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“Yearly Digest”

OF

Indian & Select English Cases

Reported in all the important Legal Journals during the year

1920

BY

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ABBREVIATIONS EXPLAINED.

Reports.

A.L.	Inian Law Reports, Allahabad Series.
A. L. J.	...	...	...	Allahabad Law Journal.
B. L. R.	...	...	...	Bengal Law Reports.
Bom.	...	...	...	Indian Law Reports Bombay Series.
Bom. L. R.	...	...	...	Bombay Law Reporter.
Bur. L. T.	...	...	...	Burma Law Times.
C. J.	...	...	...	Inian Law Reports, Calcutta Series.
C. L. J.	...	...	...	Calcutta Law Journal.
C. L. R.	...	...	...	Calcutta Law Reports.
C. W. N.	...	...	...	Calcutta Weekly Notes.
C. L. J.	...	...	...	Criminal Law Journal.
Cr. L. R.	...	...	...	Criminal Law Review.
I. A.	...	...	...	Law Reports, Indian Appeals.
I. C.	...	...	...	Indian Cases.
L. B. R.	...	...	...	Lower Burma Rulings.
L. W.	...	...	...	Law Weekly.
M. I. J.	...	...	...	Indian Law Reports, Madras Series.
M. H. C. R.	...	...	...	Madras High Court Reports.
M. I. A.	...	...	...	Moore's Indian Appeals.
M. L. J.	...	...	...	Malras Law Journal.
M. L. T.	...	...	...	Madras Law Times.
M. W. N.	...	...	...	Madras Weekly Notes.
N. L. R.	...	...	...	Nagpur Law Reports.
O. C.	...	...	...	Oudh Cases.
P. R.	...	...	...	Punjab Record.
P. L. R.	...	...	...	Punjab Law Reporter.
P. W. R.	...	...	...	Punjab Weekly Reporter.
Pat.	...	...	...	Patna.
Pat. L. J.	...	...	...	Patna Law Journal.
Pat. L. W.	...	...	...	Patna Law Weekly.
S. L. R.	...	...	...	Sind Law Reporter.
U. B. R.	...	...	...	Upper Burma Rulings.
W. R.	...	...	...	Weekly Reporter.

Other Abbreviations.

Appl.	...	...	...	Applied.
Appr.	...	...	...	Approved.
Dist.	...	...	...	Distinguished.
Disc.	...	...	...	Discussed.
Diss.	...	...	...	Dissented from.
Expl.	Explained.
Foll.	Followed.
F. B.	Full Bench.
P. C.	Privy Council.
Ref.	Referred to.

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INDIAN CASES

1920

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— 257 Foll 57 I C 252.
— 442 Relied 1 P L T 262.

24 Bom 77 Ref 47 Cal 446.
— 170 Ref 54 I C 6.

25 Bom 162 Foll 56 I. C. 966.
— 332 Foll 1920 M W N 171.
— 337 Ref 31 C L J 482. 44 Bom 742.

26 Bom 109 Ref 5 P L J 379.
— 146 Ref 1 Lah 57.
— 150 Foll 2 Lah L J 707 ; 1 P L T 73. Relied on 1 P L T 346.
— 206 Ref 42 All 109.
— 500 Foll 55 I C 450. Ref 2 Lah L J 160.
— 562 Ref 42 All 390.
— 641 Ref 44 Bom 686.
— 730 Ref 1 Lah 57.

27 Bom 157 Foll 56 I C 129.
— 292 Foll 5 P L J 151.
— 357 Ref 2 Lah L J 283.
— 500 Ref 1 Lah 66.

28 Bom 20 Ref 24 C W N 206.
— 226 Ref 42 All 305.
— 244 Ref 42 All 195.
— 314 Relied on 2 Lah L J 7.
— 644 Foll 5 P L J 107.

29 Bom 259 Ref 24 C W N 288.
— 449 Foll 5 P L J 11.

30 Bom 49 Foll 5 P L J 11.
— 109 Foll 56 I C 957.
— 119 Relied on 44 Bom 710.
— 152 Ref & Dist 11 L W 590.
— 167 Ref 11 L W 593.
— 229 Appr 39 M L J 166.
— 290 Foll 44 Bom 267.
— 603 Dss 38 M L J 201.

31 Bom 15 (F B) 24 C W N 545.
— 73 Appr 5 P L J 397.
— 165 Ref 2 Lah L J 689.
— 236 Dss 8 Bom L R 955 : 22 Bom L R 842.
— 331 Ref 42 All 48. 11 L W 285.
— 462 Foll 9 Bom L R 728 : 22 Bom L R 113.
— 604 Foll 1920 M W N 591.

32 Bom 111 (F B) Ref 24 C W N 501.
— 184 Ref 1920 Pat 205.
— 599 Appr 5 P L J 515.
— 602 Dist 44 Bom 272.

33 Bom 44 Foll 44 Bom 405.
— 311 Ref 47 Cal 446.
— 364 Ref 11 L W 593.
— 469 Ref 2 Lah L J 283.
— 483 Ref 24 C W N 184.
— 658 Diss 38 M L J 92 : 55 I C 517.
— 664 Ref 42 All 195.

34 Bom 72 Expl 11 L W 55.
— 139 Ref 1 Lah 109.
— 316 Ref 24 C W N 783.
— 321 Foll 44 Bom 185.
— 618 Ref 24 C W N 184.

35 Bom 163 Foll 1 P L T 153.
— 261 Dist 44 Bom 598.
— 302 Ref 1 Lah 357.
— 452 Dist 44 Bom 352.

36 Bom 42 Dist 55 I C 363.
— 58 Ref 5 P L J 390.
— 156 Diss 47 cal 515.
— 373 Diss 55 I C 646.
— 383 Ref 2 Lah L J 60.
— 533 Relied on 39 M L J 183.
— 550 foll 55 I C 38.

37 Bom 18 Ref 1 Lah 146.
— 340 Foll 56 I C 129.
— 675 Foll 43 mad 903 39 M L J 490.

38 Bom 32 Foll 1 P L T 416.

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- 94 Ref 44 Bom 742.
- 309 Dist 2 Lah L J 242.
- 416 Foll 42 All 79.
- 39 Bom L R 52 Réf 11 L W 248.
- 191 & 203 Ref 47 Cal 6.
- 245 Foll 5 P L J 510.
- 386 Foll 47 Cal 337.
- 530 Ref 2 Lah L J 457.
- 587 Dist 44 Bom 372.
- 604 Dist 44 Bom 283.
- 40 Bom 200 Appr 5 P L J 321.
- 270 Dist 55 I C 371.
- 301 Foll 57 I C 637.
- 557 Ref 42 All 7.
- 41 Bom 300 Ref 5 P L J 151.
- 384 Dist 44 Bom 405.
- 42 Bom 5 Diss 43 Mad 902.
- 626 Ref 44 Bom 742.
- 668 Dist 33 M L J 145.
- 43 Bom 66 Ret 2 Lah L J 60.
- 164 Dist 44 Bom 605.
- 300 Ret 1920 Pat 205.
- 400 Foll 1 P L T 331.
- 778 Dist 55 I C 371.

BOMBAY LAW REPORTER- 1 Bom L R 649 Relied on 54 I C 6.
- 2 Bom L R 864 Foll 56 I C 966.
- 3 Bom L R 144 Foll 56 I C 129.
- 713 Dist 55 I C 452.
- 4 Bom L R 11 Ref 18 A L J 905.
- 160 Ref 1920 M W N 528.
- 178 Foll 55 I C 450.
- 543 Foll 55 I C 371.
- 801 Ref 24 C W N 1057.
- 893 Ref 47 Cal 88.
- 968 Foll 56 I C 129.
- 5 Bom L R 174 Ref 24 C W N 1057.
- 225 Ret 24 C W N 1057.
- 869 Ref 1920 Pat 42.
- 6 Bom L R 392 Appr 18 A L J 455.
- 403 Rel 5 P L J 540.
- 7 Bom L R 642 Foll 56 I C 957.
- 811 Ref 1 P L T 444.
- 8 Bom L R 433 Ref 44 Bom 272.
- 433 Ref 2 Lah L J 32.
- 489 Foll 56 I C 97.
- 813 Expl 22 Bom L R 780.
- 9 Bom L R 9 Dist 55 I C 198.
- 122 Ret 1920 Pat 289.
- 356 Foll 1 P L T 241.
- 730 Foll 5 P L J 430.
- 10 Bom L R 201 Ref 11 P L T 241.
- 201 Ref 5 P L J 430.
- 657 Ref 24 C W N 184.
- 11 Bom L R 380 Doubted 1920 M W N 490.
- 1074 Diss 55 I C 517.
- 1087 Ret 24 C W N 1057.
- 12 Bom L R 402 Foll 57 I C 252.
- 402 Foll 56 I C 81.
- 508 D scus 54 I C 571.
- 948 Consi 55 I C 78.
- 13 Bom L R 909 Dist 55 I C 363.
- 14 Bom L R 5 Foll 55 I C 377.
- 115 Diss 55 I C 616.
- 733 Foll 55 I C 38.
- 840 Foll 56 I C 129.
- 1034 Relied 44 Bom 231 22 Bom L R 86.
- 1034 D st 55 I C 86.
- 15 Bom L R 307 Foll 22 Bom L R 166.
- 445 Foll 54 I C 131.
- 585 Not foll 5 P L J 164.
- 16 Bom L R 400 Expl and toll 55 I C 511. 55 I C 66.
- 668 Ref 24 C W N 545.
- Comm 22 Bom L R 780.
- 17 Bom L R 630 Dist 22 Bom L R 124.
- 1006 Foll 22 Bom L R 82.
- 1087 Foll 57 I C 637.
- 1134 Over Ruled 22 Bom L R 680 44 Bom.
- 1137 Over Ruled 44 Bom 742.
- 1137 Over Ruled 22 Bom L R 680.
- 18 Bom L R 172 Dist 55 I C 371.
- 693 Over Ruled 22 Bom L R 698.
- 19 Bom L R 498 Expl 55 I C 320.
- 498 Ref. 22 Bom L R 102.
- 751 22 Bom L R 498.
- Discu 54 I C 154.
- 20 Bom L R 524 Foll 56 I C 826.
- 708 Comm 22 Bom L R 106.
- 798 Foll 55 I C 969. 22 Bom L R 553.
- 826 Dist 22 Bom L R 790.
- 887 Foll 22 Bom L R 665.
- 947 Expl 22 Bom L R 768.
- 1022 Foll 55 I C 234.
- 21 Bom L R 238 Foll 56 I C 591.
- 238 Foll 55 I C 38.
- 496 Dist 55 I C 371.
- 547 Foll 54 I C 22.
- 605 Appr 55 I C 139.
- 640 Foll 22 Bom L R 79.

BOMBAY HIGH COURT REPORTS.- 5 Bom H C R 42 Relied on 44 Bom 496.
- 7 Bom H C R A C J 153 Relied on 2 Lal L. 570.
- 9 Bom H C R 429 Ref 1 P L T 190.
- 10 Bom H C R 391 Ref 42 All 277.
- 391 Rel 18 A L J 241.
- 471 Foll 22 Bom L R 275.
- 471 Foll 44 Bom 237.
- 11 Bom H C R 90 Ref 24 C W N 501.

CALCUTTA SERIES.- 1 Cal 104 Ref 47 Cal 88.
- 184 Foll 1 P L T 561.
- 207 Ret 24 C W N 501. 31 C L J 402
- 2 Cal 130 Ret 38 M L J 146.
- 272 Consi 55 I C 977.
- 3 Cal 198 Foll 1 P L T 511.
- 544 Not Foll 11 L W 477.
- 4 Cal 172 Foll 47 Cal 547.
- 483 Ref 24 C W N 501.
- 683 Ret 39 M L J 492.
- 744 Foll 57 I C 252.
- 831 Diss 22 Bom L R 698.
- 5 Cal 7 Ret 18 A L J 857.
- 148 Ref and Foll 18 A L J 503.
- 148 Foll 1 P L T 511.
- 707 Appr 5 P L J 550.
- 720 Dist 18 A L J 872.

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—844 Ref 1 Lah 357.
 —855 Ref 5 P L J 120.
 —

6 Cal 22 Ref 5 P L J 472
 —119 Foll and Cons 39 M L J 147.
 —513 Diss 11 L W 63
 —655 Ref 24 C W N 581
 —687 Foll 1 Lah 344.
 —762 Foll 1 Lah 361.
 —935 Foll 1 P L T 501, 588.

7 Cal 107 Ref 11 L W 232
 —107 Foll 2 Lah L J 99
 —256 Relied 1 P L T 203.
 —703 Ref 31 C L J 298.

8 Cal 51 Dist 31 C L J 382.
 —51 Applied 1 P L T 504
 —121 Ref 1920 Pat 24.
 —131 Ref 5 P L J 120
 —708 Dist 1 Lah 249
 —969 Ref 42 All 146.

9 Cal 93 Expl 1920 M W N 584.
 —255 Foll 18 Mad 845.
 —290 Foll 1 Lah 192.
 —439 Dist 54 I C 335.
 —505 Ref 11 L W 246, 47
 Cai 286.
 —526 Dist 55 I C 380
 —619 Ref 47 Cal 337.
 —744 Foll 1920 Pat 241.
 —961 Dist 39 M L J 445.
 —661 Ref 1 P L T 582.

10 Cal 265 Overruled 47
 Cal 300
 —541 Foll 2 Lah L J 104.
 —557 Const 55 I C 977
 —688 Ref 24 C W N 794
 —1035 Ref 47 Cal 446; 39
 M L J 445.
 —1035 Appl 1920 M W N 384 1 P L T 582.
 —1102 Comm 39 M L J 101.

11 Cal 6 Foll 56 I C 848
 —143 Diss 1920 Pat 229
 —160 Foll 38 M L J 189.
 —301 Dist 54 I C 335.
 —359 Foll 31 C L J 372 47
 Cal 331.
 —762 Foll 5 P L J 246.

12 Cal 1197 Foll 2 Lah L J 310
 —271 Foll 2 Lah L J 310.

13 Cal 62 Ref 5 P K J 344.
 —104 Ref 5 P L J 472,
 —170 Ref 31 C L J 298.
 —221 Ref 43 Mad 51.
 —225 Ref 24 C W N 288.

14 Cal 67 (F B) Ref 24 C W N 815.

—141 Ref. 5 P L J 6
 —348 Ref 1920 pat 229
 —365 Ref 47 Cal 337
 —631 Foll 2 Lah L J 313.
 —656 Foll 1 P L T 501.
 —757 Ref 5 P L J 417
 —768 Ref 5 P L J 550.
 —839 Ref 2 Lah L J 501.
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15 Cal 152 dist 2 Lah L J 51
 —353 Ref 24 C W N 582.
 —492 Dist 11 L W 436.
 —521 Ref 1 Lah 37.
 —608 Foll 31 C L J 183
 —667 Ref 11 L W 63
 —708 Foll 44 I C 294.

16 Cal 98 Foll 39 M L J 412.
 —682; 16 I A 107 Ref 31
 C L J 98
 —730 Foll 57 I C 150.
 —794 Relied on 39 M L J
 188.

17 Cal 260 Ref 1 Lah 57.
 —263 Ref 42 All 146.
 —301 Dist 11 L W 466
 —329 Ref 42 All 244
 —329 Ref 18 A L J 187.
 —438 Ref 5 P L J 87.
 —474 Ref 47 Cal 337
 —642 Ref 24 C W N 501
 —680 Foll 5 P L J 394
 —704 Ref 120 Pat 17.
 —849 Foll 5 P L J 460.

18 Cal 10 (P. C.) Foll 11 L W 606.
 —104 Dist 42 All 364.
 —157 Foll 1 P L T 511
 —165 dist 55 I C 969.
 —188 Ref 47 Cal 446.
 —290 Ref 24 C W N 288.
 —311 Ref 5 P L J 257.
 —368 Ref 47 Cal 300.
 —469 Appr 5 P L J 279
 —500 Ref 1 Lah 187
 —620 Foll 38 M L J 300
 —639 Ref. 38 M L J 271.

19 Cal 4 Ref 21 Cr L J 98.
 —65 Ref 24 C W N 626.
 —253 Ref 1920 Pat 297.
 —253 Foll 5 P L J 500.
 —253 Applied 1 1/2 L T 305.
 Foll; 2 Lah, L J 136.
 —311 Ref 1 P L T 209.
 —463 Appr 1 Lah 223
 —507 Foll 11 L W 246; 25
 I C 335.
 —683 Considered and applic-
 ed 43 Mad 107 not foll 1 P
 L T 154.
 —683 Appl 54 I C 209 not
 foll 5 P L J 70
 —699 Ref 47 Cal 337.
 —703 Foll 47 Cal 337.

20 Cal 86 Ref 47 Cal 337.
 —285 Ref 5 P L J 456
 —319 Ref 38 M L J 157.
 —328 Ref 5 P L J 120.
 —353 Ref 47 Cal 190
 —409 Ref 31 C L J 52
 —520 Foll 31 C L J 369.
 —533 Ref 42 All 596.
 —649 Foll 39 M L J 529.
 —654 Ref 42 All 294.
 —708 dist 1 P L T 184.
 —843 Foll 1 Lah 124.

21 Cal 279 Ref 24 C. W. N.
 860.
 —279 Ref Dist 1 Lah 173.
 —328 Foll 31 C L J 20.
 —473 D ss 1 Lah 348 Ref 2
 Lah L J 32
 —496 Ref 1 Lah 109.
 —612 Ref 1920 Pat 209.
 —979 Foll 1 P L T 583.

22 Cal 164 Appr 5 P L J
 430.
 —324 Ref 1 Lah 173.
 —445 Ref 42 All 152.
 —506 Ref 2 Lah L J 13.
 —817 Ref 1 P L T 282.
 —820 Ref 24 C W N 184.
 —909 Ref 47 Cal 446 Expl
 43 M 135
 —924 Ref 1 Lah 187.

23 Cal 1 Ref 1 Lah 173
 —117 Appr 5 P L J 553.
 —179 Ref 1 P L T 221.
 —347 Ref 47 Cal 190.
 —361 Foll 31 C L J 20.
 —427 Ref 1 P L T 221.
 —514 Appr 47 Cal 354.
 —604 Ref 1 P L T 582.
 —621 Ref 11 L W 331.
 —775 Foll 43 Mad 185.
 —829 Relied on 2 Lah L J 99
 Ref 42 All 39.
 —851 Ref 1 P L T 203.
 —980 Not foll 2 P L J 510.

24 Cal 20 Dist 56 I C 595.
 —143 Foll 5 P L J 502.
 —183 Ref 1920 Pat 235.
 —355 Ref 24 C W N 818.
 —418 Ref 1 Lah 61.
 —440 Ref 5 P L J 563.
 —494 Ref 43 Mad 344.
 —725 Foll 2 Lah L J 673.
 —751 Appr 47 Cal 354.
 —786 Ref 47 Cal 6.
 —825 Ref 24 C W N 1057.

25 Cal 9 Foll 55 I C 745.
 —109 Foll 5 P L J 472.
 —210 Foll 43 Mad 849.
 —275 Foll 1 P L T 164.
 —315 Ref 11 L W 63.
 —565 Ref 24 C W N 44.
 —616 Foll 11 L W 596.

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- 662, 691 Ref 17 Cal 88.
- 736 Ref 17 Cal 46.
- 824 Ref 1 Lah 173, 24 C W N 860.
- 833 Ref 47 Cal 387.
- 844 Foll 2 Lah L J 5:9 Rel on 2 Lah L J 107.
- 876 Ref 17 Cal 337 Foll 5 P L J 63.
- 917 Ref 24 C W N 1022.
- 26 Cal 109 Ref 24 C W N 44
- 114 Foll 56 I C 469.
- 184 Ref 1 P L T 231.
- 349 Foll 56 I C 129.
- 398 Ref 47 Cal 6.
- 598 Foll 55 I C 444 1920 M W N 228.
- 607 Foll 31 C L J 3:31 C L J 379.
- 617 Ref 1 P L T 27.
- 625 Relied on 5 P L J 104.
- 950 Ref 31 C L J 463.
- 955 Foll 31 C L J 318.
- 27 Cal 1 Ref 1920 Pat 184
- 139 Foll 47 Cal 154.
- 295 Appr 5 P L J 430.
- 308 Ref 47 Cal 387.
- 370 Cons 55 I C 345.
- 417 Rel 54 I C 396.
- 473 Ref 5 P L J 83 : 1920 Pat 40.
- 762 Ref 5 P L J 120,
- 814 Foll 31 C L J 318.
- 849 Foll 1920 Pat 120.
- 892 Comm 47 C L J 148.
- 921 Foll 5 P L J 47.
- 996 Ref 17 Cal 88.
- 1004 Ref 17 All 175.
- 1023 Dis Appr 2 Lah J 51.
- 28 Cal 164 Foll 1 P L T 555.
- 238 Ref 11 L W 63.
- 251 Foll 55 I C 98.
- 256 Ref 47 Cal 129
- 353 Foll 1 P L T 471.
- 571 Foll 2 Lah L J 403.
- 652 Foll 1 P L T 203.
- 689 Foll 47 Cal 46 Ref 5 P L J 430.
- 738 Ref 11 L W 176.
- 29 Cal 68 Foll 47 Cal 115
- 154 Ref 29 I A 9: 47 Cal 446.
- 208 Relied on 5 P L J 104.
- 355 Ref 2 Lah L J 689. Dist 55 I C 698.
- 363 Rel on 38 M L J 28.
- 433 Ref 29 I A 82: 31 C L J 52.
- 470 Ref 1 P L T 75
- 518 Foll 1 P L T 505.
- 664 Ref 29 I A 1:2 : 42 All 152.
- 726 Foll 1 P L T 2:2
- 779 Foll 1920 M W N 305
- 871 Ref 1 P L T 181.
- 903 Dist 55 I C 389
- 30 Cal 155 Foll 37 Cal 408
- 257 Ref 1920 M W N 198.
- 265 Ref 5 P L J 423
- 291 Ref 11 L W 253
- 394 Foll 2 Lah L J 600
- 532 Appr 47 Cal 300 : 24 C W N 4.
- 539 Ref 11 L W 506
- 576 Foll 13 Mad 290.
- 617 D'sss 5 P L J 270.
- 923 Foll 1 P L T 346
- 999 Ref 47 Cal 583.
- 95 Foll 42 All 353.
- 480 Not foll 5 P L J 70.
- 487 Foll 1 Lah 225
- 503 Relied on 2 Lah L J 44.
- 643 Ref (F. B.) 24 C W N 44.
- 688 Dist 47 Cal 115.
- 757 Ref 24 C W N 93.
- 863 Ref 47 Cal 446.
- 960 Relied upon 1 P L T 192.
- 970 Relied upon 1 P L T 192.
- 993 Diss 1920 Pat 53.
- 32 Cal 22 Foll 1920 M W N 149
- 62 Foll 1920 Pat 33
- 296 Dist 1 Lah 47 Ref 1920 Pat 91.
- 339 Foll 43 Mad 579 : 38 M L J 539.
- 386 Foll 5 P L J 302.
- 444 Ref 42 All 146.
- 473 Ref 2 Lah L J 13.
- 908 Relied upon 1 P L T 403
- 953 Foll 47 Cal 387.
- 1036 Comm 47 Cal 364.
- 33 Cal 30 Ref 1 P L T 138.
- 68 Foll 31 C L J 183. 482: 47 Cal 438.
- 203 Foll 31 C L J 259.
- 295 Dist 1920 Pat 127.
- 352 Ref 24 C W N 723.
- 410 Ref 51 C L J 375.
- 531 Ref 24 C W N 117.
- 613 Foll 44 Bom 238.
- 789 Foll 1 P L T 128 Ref 2 Lah L J 457
- 812 Ref 11 L W 391.
- 927 Appr 1 Lah 339.
- 1047 Ref 1 Lah 357
- 1158 Ref 42 All 39.
- 1237 Ref 42 All 525.
- 1256 Foll 1 P L T 431.
- 34 Cal 51 Ref 21 C W N 115
- 70 Foll 56 I C 57.
- 97 Ref 2 Lah L J 283.
- 101 Ref 44 B 183 ; 12 All 98. 1 Lah L J 283.
- 109 Ref 1 P L T 184.
- 184 Ref 5 P L J 120.
- 199 Foll 1 P L T 504.
- 305 Foll 43 Mad 798.
- 481 Dist 1 Lah 57.
- 551 Ref 5 P L J 23.
- 689 Ref 24 C W N 117.
- 698 Foll 56 I C 281.
- 706 Appr 5 P L J 347.
- 878 Cons 54 I C 326.
- 886 Ref 1 P L T 416.
- 954 Ref 1920 Pat 17.
- 1020 Ref 24 C W N 44.
- 35 Cal 1 Ref 31 C L J 510.
- 56 Foll 42 All 362.
- 61 Ref 47 Cal 377 Foll 31 C L J 98 ; 1920 Pat 259.
- 202 Dist 39 M L J 350.
- 202 Ref 5 P L J 394 : 540.
- 209 Ref and Disc 11 L W 487.
- 226 Ref 31 C L J 37.
- 243 Foll 1920 M W N 398.
- 294 Dist 1 Lah 317.
- 320 Ref 5 P L J 239.
- 388 Ref 42 All 396.
- 551 Ref 2 Lah L J 439.
- 568 Ref 1920 Pat 35.
- 621 Ref 24 C W N 639.
- 756 Ref 18 A L J 556 foll 5 P L J 147.
- 807 Ref 24 C W N 1064.
- 845 Foll 55 I C 213.
- 859 Dist 1920 Pat 120.
- 877 D ss 43 Mad 135.
- 896 Ref 47 Cal 88.
- 990 Foll 2 Lah L J 242.
- 1104 Dist 1920 Pat 129.
- 1108 Ref 1 P L T 127.
- 36 Cal 130 Ref 1 P L T 296.
- 130 Appr 5 P L J 415.
- 193 Ref 24 C W N 633; 723.
- 197 Ref 1 Lah 158.
- 233 Ref 42 All 98.
- 385 Dist 1 P L T 318.
- 573 Ref 24 C W N 501.
- 590 Dist 38 M L J 49.
- 745 Foll 43 Mad 503.
- 762 Foll 2 Lah L J 673.
- 768 Foll 5 P L J 460.
- 975 Ref 31 C L J 37.
- 1003 Ref 38 M L J 198.
- 37 Cal 13 Ref 5 P L J 23.
- 30 Ref 1 P L T 27.
- 46 Dist 54 I C 319.
- 57 Ref 5 P L J 314.
- 67 Ref 18 A L J 905.

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—107 Ref 17 Cal 347.
 —179 Ref 47 Cal 502.
 —197 Foll 22 Bom L R 72.
 —214 Relied on 2 Lah L J 481.
 —221 Ref 38 M L J 210.
 —236 Cons 55 I C 345.
 —461 Foll 31 C L J 7.
 —551 Ref 1920 Pat 140.
 —559 Foll 1 P L T 235.
 —578 Foll 5 P L J 240.
 —626 Ref 47 Cal 133.
 —642 Ref 1920 Pat 205.
 —723 Foll 47 Cal 95 : 1 P L T 474.
 —760 Appr 24 C W N 351.
 —796 Ref 1 Lah 187 ; 1920 Pat 104.
 —808 Appr 47 Cal 485.
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 38 Cal 1 Ref 24 C W N 1068
 —53 Applied 5 P L J 347.
 —68 Foll 5 P L J 47.
 —230 Not foll 1 Lah 135.
 —335 Ref 1920 Pat 184.
 —339 Ref 11 L W 50.
 —342 Foll 5 P L J 375.
 —387 Foll 5 P L J 240.
 —475 Foll (1920) M W N 26.
 —537 Ref 17 Cal 337.
 —639 Ref 17 Cal 410.
 —862 Ref 1 Lah 146.
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 39 Cal 141 Foll 1 P L T 501.
 —150 Ref 24 C W N 1075.
 —232 Foll 38 M L J 77.
 —241 Foll 1920 Pat 302.
 —418 Ref 5 P L J 164.
 —527 Ref 47 Cal 44.
 —663 Ref 31 C L J 298.
 —696 Foll 47 Cal 95:5 P L J 503.
 —766 Relied 1 P L T 262.
 —774 Ref 2 Lah L J 415.
 —862 Ref 1920 Pat 100.
 —953 Dist 47 Cal 597.
 —981 Ref 47 Cal 337.
 —1029 Dist 42 All 70.
 —
 40 Cal 21 Dist and comm 1 P L T 210
 —21 Ref 5 P L J 253.
 —29 Ref 24 C W N 1022.
 —89 Ref 39 I A 22:47 Cal 446.
 —173 Ref 47 Cal 446.
 —477, 500 Relied on 47 Cal 438 Foll 5 P L J 23.
 —537 Ref 42 All 195.
 —598 Ref 11 L W 115.
 —619 Ref 47 Cal 515.
 —716 Foll 1920 M W N 198.
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 41 Cal 97 Expl and toll 55 I C 511.
 —446 Foll 31 C L J 38.
 —576 Diss 43 Mad 617.
 —590 Ref 11 L W 108.
 —727 Ref 1920 Pat 204.
 —743 Foll 1 P L T 221 Ref 1 P L T 241.
 —743 Ref 5 P L J 436.
 —844 Ref 1 P L T 127.
 —926 Foll 43 Mad 78 : 39 M L J 39.
 —972 Ref 38 M L J 251.
 —972 Foll 55 I C 66.
 —972 Relied on 2 Lah L J 130.
 —972 Ref 31 C L J 272.
 —
 42 Cal 1 Appr 5 P L J 415
 —72 Dist 43 Mad 57.
 —72 Ref 24 C W N 723.
 —116 Foll 5 P L J 164.
 —172 Ref 24 C W N 818.
 —225 Foll 42 All 515.
 —305 Not toll 5 P L J 265.
 —346 Foll 5 P L J 563.
 —370 Reviewed 5 P L J 540.
 —370 Ref 5 P L J 304.
 —422 Ref 1920 Pat 24.
 —489 applied 1 P L T 193 : 220 Ref 11 L W 256.
 —550 Appr 31 C L J 495.
 —582 Foll 5 P L J 265.
 —801 Ref 18 A L J 877.
 —830 Ref 47 Cal 568.
 —876 Ref 1 P L T 335 : 540.
 —888 Dist 55 I C 520.
 —957 Foll 24 C W N 501.
 —1140 Ref 24 C W N 1032.
 —1179 Applied 30 M L J 529.
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 43 Cal 574 Ref 2 Lah L J 13.
 —660 Ref and Disc 11 L W 487.
 —707 Appr 43 Mad 253 Ref 1 P L T 130.
 —790 Ref 5 P L J 328.
 —857 Ref 47 Cal 611 app 1 Lah 348.
 —944 Dist 55 I C 371.
 —1031 Dist 18 A L J 503.
 —1128 Foll 1920 M W N 308.
 —
 44 Cal 109 Ref 31 C L J 435.
 —130 Ref 1920 Pat 52.
 —186 Ref: 5 P L J 521.
 —477 Foll 31 C L J 302 : 24 C W N 501.
 —524 Foll 42 All 58.
 —585 Foll 5 P L J 563 : 47 Cal 195.
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 45 Cal 60 Ref 47 Cal 568.
 —87 Foll 1 P L T 474.
 —87 Foll 5 P L J 563.
 —94 Ref 11 L W 140.
 —320 Ref 44 Bom 710.
 —320 Ref 11 L W 352.
 —469 Appr 24 C W N 1064.
 —793 Foll 1 Lah 284.
 —816 Ref 11 L W 33.
 —878 Foll 55 I C 234.
 —
 46 Cal 70 Ref 31 C L J 379.
 —211 Foll 55 I C 450.
 —236 Comm 47 Cal 354.
 —390 Ref 24 C W N 809.
 —398 Foll 1920 M W N 209.
 —566 Foll 55 I C 431.
 —663 Appr 55 I C 436.
 —670 Foll 11 L W 537.
 —807 Foll 1 P L T 446.
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 47 Cal 95 Foll 5 P L J 273.
 —95 Ref 1 P L T 360.
 —139 Foll 47 Cal 133.
 —280 Dist 24 C W N 874.
 —370 Dist 42 All 519.
 —377 Foll 1920 Pat 250.
 —
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 WEEKLY NOTES
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 1 C W N 449 Foll 55 I C 745.
 —458 Dist 11 L W 460.
 —493 Ref 1 P L T 75.
 2 C W N 883 Dist 56 I C 7.
 —680 Ref 24 C W N 1022.
 —750 Ref 39 M L J 243.
 —
 3 C W N 13 Dist 1 P L J 259.
 —17 Foll 1 P L T 346.
 —151 Ref 24 C W N 85.
 —190 Foll 56 I C 129.
 —207 Ref 5 P L J 521.
 —277 Ref 1 P L T 19.
 —375 Foll 1 Lah 344.
 4 C W N 107 Rel on 54 I C 396.
 —239 Dist 5 P L J 76.
 —351 Cons 55 I C 345.
 —426 Foll 1 P L T 594.

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— 469 Cons 55 I C 345.
5 C W N 56 Ref 1 P L T 203
 — 101 Foll 1920 Pat 283
 — 223 Ref 5 P L J 97
 — 330 Foll 1 P L T 241 31
 — 497 Ref 17 Cal 146.
 — 649 Dist 55 I C 452.
6 C W N 196 Ref 24 C W N 44 Foll 1 Lah 225.
 — 283 Dist 1 P L T 33.
 — 283 Ref 1920 Pat 75
 — 329 Doubt 55 I C 86
 — 333 Ref 24 C W N 582
 — 345 Foll 1920 Pat 83
 — 395 Ref 2 Lah L J 689 55
 I C 618.
 — 601 Dist 2 Lah L J 583
 toll 55 I C 571.
7 C W N 11 Ref 39 M L J 243.
 — 119 Foll 1 P L T 594
 — 176 Discuss 1 Lah 169
 — 400 Ref 1920 Pat 131.
 — 462 Dist 1 P L T 594.
 — 522 Dist 47 Cal 104.
 — 849 Ref 24 C W N 639.
8 C W N 214 Ref 24 C W N 44
 — 218 Ref 1 P L T 2 2.
 — 320 Ref 1 P L T 184.
 — 359 Dist 1 Lah 216
 — 434 Foll 55 I C 212.
9 C W N 18 Ref 2 Lah L J 79
 — 25 D st 1 Lah 69
 — 383 Ref 24 C W N 650.
 — 497 Relied on 2 Lah L J 7.
 — 619 Foll 1920 Pat 283.
10 C W N 241 Dist 1920 Pat 187.
 — 303 24 C W N 55.
 — 306 Ref 1 Lah 187.
 — 499 Ref 5 P L J 83.
 — 503 Foll 5 P L J 79.
 — 564 Not foll 1 P L T 595.
 — 564 Reviewed 5 P L J 540.
 — 775 Diss 43 Mad 700.
 — 775 Dist 11 L W 315.
 — 898 Foll 56 I C 97.
 — 981 Foll 1 Lah 225 Ref 24 C W N 44.
 — 1026 Ref 1920 Pat 140.
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 — 95 Ref 1 P L T 458.
 — 178 Foll 56 I C 97.
 — 195 Foll 5 P L J 23.
 — 271 Ref 1 P L T 72.
 — 273 Dist 55 I C 198.
 — 504 Foll 1 Lah 225 Ref 14 C W N 44.
 — 666 Foll 56 I C 211
12 C W N 68 Diss 47 Cal 28.
 — 1009 Ref 31 C L J 245.
 — 117 Foll 1 P L T 123.
 — 167 Ref 42 All 195.
 — 316 Foll 55 I C 213.
 — 446 Rei 1 P L T 980
 — 481 Ref 2 Lah L J 132.
 — 845 Foll 1 Lah 361
 — 904 Rei 1 P L T 27.
13 C W N 63 Diss 47 Cal 29.
 — 125 Ref 5 P L J 87.
 — 412 Not Foll 24 C W N 601
 — 493 Ref 1920 Pat 17.
 — 661 Ref 5 P L J 87.
 — 696 Foll 56 I C 640.
 — 994 Ref 1920 Pat 131
 — 1046 Ref 31 C L J 63.
14 C W N 71 Dist 1920 Pat 290.
 — 79 Ref 5 P L J 155
 — 114 Foll 1 P L T 201.
 — 183 Rei 1920 Pat 35.
 — 280 Cons 55 I C 245.
 — 433 Foll 1 P L T 501
 — 439 D's 2 Lah L J 419.
 — 479 Foll 1 P L T 129
 — 545 Foll 57 I C 252
 — 545 Foll 56 I C 81.
 — 552 D's 1 P L T 511.
 — 741 D st 54 I C 318
 — 817 Discuss 51 I C 371.
 — 938 Cons 55 I C 78.
 — 1053 Ref 1 P L T 414.
 — 1068 Ref 24 C W N 511.
15 C W N 54 Foll 43 Mad 703.
 — 66 Ref 17 Cal 88.
 — 191 Not foll 1920 Pat 9.
 — 205 April Foll 1 P L T 541.
 — 221 Foll 1 P L T 171.
 — 249 Ref 24 C W N 85.
 — 353 Foll 5 P L J 550.
 — 481 Foll 1 P L T 242.
 — 565 Ref 5 P L J 135.
 — 655 Ref 11 L W 397.
 — 682 Ref 5 P L J 520.
 — 703 Ref 24 C W N 639.
 — 748 D's 1 P L T 511.
16 C W N 69 Foll 47 Cal 154.
 — 74 Foll 15 I C 377
 — 124 Ref 1920 Pat 227.
 — 612 Not foll 56 I C 612.
 — 613 Foll 1920 Pat 151.
 — 643 Foll 38 M L J 224
 — 805 Foll 47 Cal 367.
 — 849 Foll 47 Cal 274.
 — 885 Ref 5 P L J 47.
 — 928 Foll 1 P L T 119
 5 P L J 70.
 — 975 Ref 24 C W N 1038.
 — 1002 Ref 1 P L T 206.
 — 1009 Dist 55 I C 86.
 — 1027 Ref 1920 Pat 212.
17 C W N 10 Dis 47 Cal 118.
 — 116 Ref 24 C W N 633.
 — 129 Pat 15.
 — 151 Ref 24 C W N 630.
 — 282 Not 47 C L C 146.
 — 389 Foll 54 I C 61.
 — 521 Cited with approval 2
 Lah L J 522.
 — 613 Relied on 5 P L J 107.
 — 782 Ref 2 Lah L J 113.
 — 817 Ref 24 C W N 382.
 — 824 Foll 1 P L T 155.
 — 1161 Dist 55 I C 560.
 — 1230 Foll 1 P L T 591.
18 C W N 320 Ref 47 Cal 115.
 — 366 Foll 1 Lah 167.
 — 447 Diss 5 P L J 250.
 — 604 Foll 5 Pat 1 P L T 103.
 — 604 Dist 24 C W N 223.
 — 817 Evsl and foll 55 I C
 66 55 I C 511.
 — 949 dist 31 C L J 12.
 — 1188 Foll 43 mad 503.
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19 C W N 84 Ref 24 C W N 728.
 — 233 Cons 55 I C 72.
 — 290 Ref 24 C W N 41.
 — 305 applied 1 P L T 428.
 — 329 Foll 24 C W N 52.
 — 347 Ref 24 C W N 177.
 — 366 Ref 24 C W N 611.
 — 375 Foll 5 P L J 563.
 — 502 Foll 1920 Pat 222.
 — 525 Ref 1 P L T 184.
 — 641 Dist 1920 Pat 33.
 — 653 Ref 5 P L J 61.
 — 860 Foll 31 C L J 17.
 — 923 Ref 5 P L J 10.
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 — 949 Ref 12 All 185.
 — 1C43 Dist 55 I C 510.
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20 C W N 14 Ref 5 P L J 87.
 — 51 Ref 24 C W N 1037.
 — 145 Ref 1 P L T 13.
 — 147 Foll 24 C W N 1021.
 — 489 Dist 55 I C 371.
 — 675 Dist 55 I C 10.
 — 702 D's 55 I C 371.
 — 773 Foll 56 I C 811.
 — 796 Relied on 5 P L J
 104.
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— 986 Relied on 2 Lah L J — 418 Ref 24 C W N 425.
 — 242. — 536 Dist 24 C W N 1032.
 — 1000 Foll 1920 Pat 232. — 633 Ref 1920 Pat 232.
 — Overruled 24 C W N 723. — 657 Foll 24 C W N 659.
 — 1011 Foll 1 P L T 291. —
 — 1099 Doubt 5 P L J 344.
 — 1258 Ref 24 C W N 1057.
 — 1284 D st 55 I C 198.
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 — 371 D st 54 I C 396.
 — 269 Ret 24 C W N 783.
 — 371 dist 14 I C 396.
 — 423 dist 24 C W N 551.
 — 573 Foll 1 P L T 201.
 — 698 Expl 55 I C 320.
 — 698 Ret 24 C W N 949.
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 — 761 Dist 1 P L T 535.
 — 920 Foll 1 P L T 416.
 — 1004 d st 24 C W N 223.
 — 1089 Discu 14 I C 154.
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 22 C W N 104 Ref 24 C W
 N 749.
 — 179 Foll 24 C W N 593.
 — 289 Foll 5 Pat L J 32.
 — 484 Foll 56 I C 820.
 — 499 Comm 47 Cal 438.
 — 535 Foll 31 C L J 125.
 — 637 15 I C 450; 125.
 — 780 Ret 47 Cal 1-5.
 — 872 Ref 24 C W N 639;
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 — 919 appr 5 P L J 417.
 — 965 Foll 24 C W N 571.
 — 967 D st 24 C W N 571.
 — 1021 Foll 5 P L J 151.
 — 1033 Foll 55 I C 302.
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 23 C W N 50 Foll 55 I C 234.
 — 251 Foll 55 I C 38,
 56 I C 391.
 — 258 Foll 2 Lah L J 283.
 — 273 Foll 54 I C 22.
 — 375 Foll 1 P L T 59.
 — 484 Foll 1 P L T 349;
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 — 521 Foll 52 I C 411;
 — 661 Dist 1 Lah 361.
 — 700 Dist 1 P L T 34 Ref
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 — 707 Ref 24 C W N 775.
 — 750 Foll 1920 Pat 288;
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 — 811 Ref 24 C W N 454;
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 — 914 Foll 5 P L J 533 1 P
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 — 937 Appl 55 I C 436.
 — 986 Foll 31 P L R 200 47
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 — 1049 Ref 24 C W N 708.
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 — 105 Ref 18 A L J 674.
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 — 214 Dist 54 I C 51.
 — 456 Ref 1 P L J 57.
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 — 202 Ref 47 Cal 445.
 — 318 Foll 31 C L J 105.
 — 343 Ref 31 C L J 175.
 — 369 Dist 55 I C 380.
 — 546 Foll 52 I C 150.
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 — 197 Not foll 1 P L T 595.
 — 316 Ret 24 C W N 659.
 — 385 Dist 55 I C 452.
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 — 198 Dist 48 M L J 491.
 — 202 Foll 5 P L J 302;
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 — 130 Dist 55 I C 198.
 — 175 Foll 26 I C 97.
 — 222 Foll 5 P L J 23.
 — 264 Foll 55 I C 641.
 — 642 Cons 54 I C 382.
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 6 C L J 7 D ss 1 P L T 174.
 — 46 Ref 42 All 296.
 — 427 Foll 5 P L J 324.
 — 462 applied 5 P L J 287.
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 7 C L J 149 Foll 55 I C 213.
 — 251 Dist 5 P L J 77.
 — 384 Ref 31 C L J 463.
 — 414 Ref 5 P L J 173.
 — 461 Ref 5 P L J 77.
 — 644 Diss 43 Mad 121.
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 9 C L J 55 Foll 5 P L J 430.
 — 56 Ref 18 A L J 142.
 — 234 Dist 11 L W 266.
 — 257 Foll 1920 M W N 278.
 — 284 Ref 1920 Pat 177.
 — 346 Ref 31 C L J 463.
 — 561 Ref 42 All 170.
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 10 C L J 91 Ref 1 P L T 416.
 — 150 D ss 11 L W 232.
 — 326 Ref 1920 Pat 184.
 — 355 Ref 37 Cal 128 31 C L
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 — 68 Foll 31 C L J 78.
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 — 233 Cons 55 I C 78.
 — 410 Not foll 1920 M W N
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 — 464 Diss 39 M L J 181.
 — 574 Over ruled 31 C L J
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 — 589 Ref 24 C W N 85.
 — 591 Ref 5 P L J 32.
 — 593 Ref 24 C W N 85.
 — 612 Ref 5 P L J 32.
 — 642 Ref 1 P L T 55.
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 13 C L J 284 D st 47 Cal
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 — 316 Dist 1 Lah 206.
 — 495 Ref 47 Cal 418.
 — 568 Ref 5 P L J 302.
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 14 C L J 61 Ref 25 C W N
 43.
 — 159 Ref 5 P L J 314.
 — 445 Ref 1920 Pat 35.
 — 476 Ref 2 Lah L J 99.
 — 515 Appr 31 C L J 495.
 — 648 Ref 1 P L T 416.
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 15 C L J 61 Ref 5 P L J 328
 56 I C 612.
 — 61 Foll 1 P L T 434.
 — 69 Foll 55 I C 377.
 — 227 Foll 1920 M W N 532.
 — 228 Discus 1 P L T
 136.
 — 387 Appr 17 Cal 176.
 — 647 Foll 1920 Pat 168;
 5 P L J 302.
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 16 C L J 7 D ss 5 P L J 563.
 — 34 Appr 31 C L J 421.
 — 77 Ref 17 C W N 116;
 31 C L J 272.
 — 156 Ref 24 C W N 1068.
 — 169 Ref 1 P L T 416.
 — 259 Ref 24 C W N 184.
 — 527 Foll 1 P L T 474.
 — 596 Dist 55 I C 86.
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 17 C L J 1 Discus 1 Pat L
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 — 34 Ref 24 C W N 184.
 — 38 at 43 Not Foll 54 I C
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 — 206 Foll 1 P L T 84.
 — 277 Foll 54 I C 131.
 — 316 Ref 31 C L J 463.
 — 384 Foll 1 P L T 392.
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- 578 Ref 24 C W N 501.
- 19 C L J 146 dist 54 I C 530.
- 263 Foll 5 P L J 371.
- 451 Ref 47 Cal 256.
- 484 Foll 55 I C 56 511.
- 20 C L J 148 Foll 55 I C 615.
- 183 dist 42 Cal 455.
- 31 C L J 37.
- 213 Re. 31 C L J 182.
- 527 Foll 5 P L J 563.
- 21 C L J 45 Ref 24 C W N 1957 foll 1 P L T 126.
- 104 Ref 47 Cal 443.
- 231 Foll 1 P L T 374.
- 441 Foll 1920 Pat 200.
- 570 Foll 5 P L J 376.
- 599 Ref 5 P L J 453.
- 621 Foll 1 P L T 311.
- 22 C L J 212 Ref 24 C W N 145.
- 212 Dist 55 I C 321.
- 404 Re. 31 C L J 174.
- 452 Ref 31 C L J 417.
- 508 Ref 24 C W N 124.
- 23 C L J 237 Foll 1 P L T 571.
- 372 Dist 55 I C 371.
- 395 Dist 55 I C 371.
- 489 Relied 31 C L J 482.
- 559 not foll 1920 Pat 250.
- 587 Foll 55 I C 30.
- 24 C L J 113 Ref 24 C W N 117.
- 190 Dist 55 I C 198.
- 343 dist 47 Cal 125.
- 440 Relied 1 P L T 474.
- 462 Foll 5 P L J 70.
- 25 C L J 193 Ref 5 P L J 563.
- 469 at 471 Dist 54 I C 396.
- 499 Ref 1 P L T 174.
- 26 C L J 29 Expl 47 Cal 547.
- 94 Ref 24 C W N 85.
- 208 Ref 1 P L T 100.
- 290 D'sca 54 I C 154.
- 590 (P C) Ref 24 C W N 809.
- 590 Ref 24 C W N 639 11 L W 256.
- 27 C L J 107 Ref 1920 Pat 177.
- 119 Ref 1920 M W N 528.
- 253 Ref 31 C L J 1.
- 289 Foll 55 I C 698.
- 363 Foll 56 I C 826.
- 528 Ref 24 C W N 582.
- 615 Ref 47 Cal 6.
- 28 C L J 123 Not foll 56 I C 612.
- 123 Ref 5 P L J 328.
- 188 Foll 55 I C 660.
- 201 Ref 24 C W N 44.
- 220 Ref 47 Cal 129.
- 409 Foll 55 I C 234.
- 437 Ref 24 C W N 1057.
- 29 C L J 43 Relied upon 1 P L T 77.
- 143 Ref 5 P L J 563.
- 153 Foll 54 1 C 22.
- 184 Foll 56 1 C 391.
- 184 Foll 55 I C 38.
- 193 Ref 1 P L T 474.
- 332 Ref 5 P L J 255.
- 340 Appd 55 I C 436.
- 438 Foll 5 P L J 147.
- 461 Ref 24 C W N 44.
- 571 Ref 5 P L J 64.
- 30 C L J 9 Foll 1 P L T 27.
- 37 Ref 24 C W N 85.
- 113 Ref 24 C W N 967.
- 224 Foll 27 M L T 131.
- 31 C L J 150 Ref 5 P L J 579.
- 272 Foll 1 P L T 300.
- 354 Foll 31 C L J 330.
- 363 Foll 57 I C 302.
- 471 Relied 1 P L T 571.
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- 1 Mad 69 Ref 43 Mad 636.
- 133 Dist 53 I C 154 toll 1920 M W N 247.
- 174 Ref 4 I A T 43 Mad 650.
- 235 Ref 1 P L T 75.
- 235 Ref 31 C L J 37.
- 2 Mad 140 Ref 18 A L J 857.
- 175 43 Mad 253.
- 179 Ref 24 C W N 249.
- 264 Ref 5 P L J 379.
- 3 Mad 66 Foll 43 Mad 902 1920 M W N 534.
- 342 Ref 1920 Pat 289.
- 4 Mad 200 Ref 44 Bom 304.
- 235 Foll 1 P L T 504.
- 391 Ref 31 C L J 37.
- 6 Mad 76 Ref 31 C L J 37.
- 130 Ref and D'sc 11 L W 409.
- 372 Ref 1920 M W N 7.
- 7 Mad 365 Cons 55 I C 78 11 L W 311.
- 9 Mad 175 at 183 Foll 54 I C 385.
- 224 Foll 5 P L J 430.
- 10 Mad 22 Ref 1920 Pat 109.
- 185 Appd 43 Mad 720.
- 38 M L J 201.
- 211 Foll 1920 M W N 162.
- 295 Appr 5 P L J 430.
- 11 Mad 26 Ref 42 All 105.
- 148 Ref 2 Lah L J 427.
- 197 Foll 1920 M W N 163.
- 234 Foll 24 C W N 1024.
- 443 Relied upon 1 P L T 319.
- 12 Mad 49 Expl 1920 M W N 518.
- 123 Appr 5 P L J 430.
- 1 P L T 241.
- 153 Foll 54 1 C 479.
- 223 Foll 5 P L J 307.
- 260 Rel and D sc 11 L W 409.
- 292 Foll 54 I C 385.
- 331 Ref 1 Lah 45.
- 459 Ref 1 P L T 282.
- 13 Mad 51 Not foll 1 P L T 49. 5 P L J 120.
- 195 Foll 1920 Pat 33.
- 406 Rel 38 M L J 149.
- 14 Mad 78 foll 43 Mad 319.
- 96 Relied upon 1 P L T 192.
- 289 diss 43 Mad 464.
- 1920 M W N 258.
- 462 not foll 2 Lah L J 366.
- 15 Mad 101 foll 1920 M W N 209.
- 155 Ref 2 Lah L J 287.
- 302 not foll 5 P L J 70.
- 303 Ref 47 Cal 446.
- 307 Ref 1 Lah 92.
- 412 Ref 47 Cal 446.
- 419 foll 42 All 549.
- 16 Mad 76 foll 55 I C 578.
- 94 foll 11 L W 215.
- 207 Ref 47 cal 446.
- 341 foll 43 Mad 822 ; 39 M L J 181.
- 353 Ref and Foll 18 A L J 503.
- 17 Mad 17 Ref 47 cal 446 : Dist 2 Lah L J 343.
- 18 Mad 257 appr 2 Lah L J 466.
- 364 foll 55 I C 213.

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--- 373 Ref 2 Lah L J 439.

 19 Mad 3 Relied on 2 Lah L J 32.
 --- 30 Rel 18 M L J 321.
 --- 230 Not over 10 I C 976.
 --- 292 Rel 11 L W 344.
 --- 482 Appr 5 P L J 429.

 20 Mad 37 Rel 5 P L J 31.
 --- 129 Rel 35 M L J 297.
 --- 155 Cons derel and disc 41 Mad 93, 38 M L J 190.
 --- 155 doubled 1920 M W N 19.
 --- 233 Relied on 10 M L J 183.
 --- 289 Renewal 5 P L J 311.
 --- 433 Rel 1 P L T 101.
 --- 461 Rel 10 15 P L J 151.
 --- 470 Rel 10 15 P L T 192.
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 21 Mad 23 Rel 5 P L J 124.
 --- 29 Rel 1 Lah 77.
 --- 153 Relied avon 1 P L T 192.
 --- 170 Rel 181 M L J 51 I C 284.
 --- 232 Rel 21 C W N 733.
 --- 356 Rel 10 15 P L J 79.

 22 Mad 113 applied 1 P L T 511.
 --- 256 Rel 1 Lah 137.
 --- 270 Rel 1920 M W N 519.
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 --- 381 Rel 363 Rel 34 I C 281.
 --- 398 Rel 31 C L J 170.
 --- 464 Rel 11 L W 256.
 --- 508 Foll 13 I A 101. 47 Cal 485.

 23 Mad 23 Cons 55 I C 977.
 --- 271 Rel 1 P L T 73.
 --- 540 Rel 1920 M W N 7.

 24 Mid 25 Rel 5 P L J 472.
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 --- 35 Rel 2 Lah L J 32.
 --- 59 Rel 42 All 102.
 --- 130 Foll 25 I C 42.
 --- 136 Rel 42 All 128.
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 --- 147 Rel 2 Lah L J 60.
 --- 238 Dist 1 Lah 35.
 --- 284 Rel 42 All 146.
 --- 358 Diss 1 Lah 348.
 --- 401 Rel 38 M L J 123.
 --- 429 Foll 21 I C 116.
 --- 555 Foll 39 M L J 484.
 --- 646 Rel 5 P L J 472.
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25 Mad 26 Rel 5 P L J 151.
 --- 61 applied 1 P L T 241.
 --- 149 Rel 155 Rel 57 I C 252.
 --- 163 Rel 2 Lah L J 409.
 --- 367 Rel 11 L W 374.
 --- 414 5 I C 471.
 --- 519 Foll 44 Bon 185.
 --- 599 Dist 18 A L J 872.
 --- 669 Rel 2 Lah L J 594.
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 26 Mai 127 Rel 1 P L T 558.
 --- 127 Rel 15 M L J 78.
 --- 157 Exp 43 Mad 702.
 --- 138 Rel 12 P L T 12.
 --- 212 Rel 42 All 195.
 --- 419 Dist 38 M L J 27.
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 --- 420 Rel 1 M L J 123.
 --- 440 Rel 11 Bon 674.
 --- 423 Rel 11 L W 122.
 --- 428 Dist 55 I C 335.
 --- 477 Dist 13 M L J 38 M L J 104 54 I C 494.
 --- 433 Foll 57 I C 269.
 --- 599 Over rule 143 Mad 94.
 --- 649 Foll 1920 M W N 646.
 --- 333 Foll 1920 M W N 477.
 --- 730 Relied 11 M L J 412.

 27 Mad 21 Rel 11 W 484.
 --- 23 Rel 18 M L J 45.
 --- 30 Foll 57 I C 38.
 --- 32 Foll 57 I C 252.
 --- 45 Cons derel 1920 M W N 267.
 --- 143 Rel and disc 11 L W 487.
 --- 192 Dist 2 Lah L J 13 Rel on 39 M L J 401.
 --- 202 Dist 55 I C 380.
 --- 259 Appr 5 P L J 270.
 --- 271 Rel 21 C W N 119.
 --- 417 Relied on 1920 M W N 15.
 --- 450 Renewal 5 P L J 540.
 1 P L T 555.

 28 Mad 37 Rel 43 Mad 443.
 --- 161 Rel 47 Cal 115.
 --- 227 Dist 11 L W 211.
 --- 303 Foll 1 Lah 51.
 --- 351 Rel 21 C W N 752.
 --- 466 Dist 11 L W 173.

 29 Mad 111 Rel 1 P L T 203.
 --- 126 Foll 1 P L T 293.
 --- 179 Rel 1920 Pat 209.
 --- 212 Rel 42 All 55.
 --- 283 Rel 31 C L J 57.
 --- 294 Foll 1 Lah 134.
 --- 309 Rel 5 P L J 379.
 --- 312 Rel 5 P L J 70.

--- 329 Rel 1920 Pat 285.
 --- 367 Foll 1 Lah 234.

 30 Mad 50 Rel 43 Mad 620.
 --- 54 Foll 55 I C 444.
 --- 274 Foll 5 P L J 17.
 --- 332 Expl 5 P L J 23.
 --- 419 Rel and Cons 11 L W 519.
 --- 469 Foll 43 Mad 744 39 M L J 62.
 --- 537 Rel 11 L W 63.

 31 Mad 28 Dist 54 I C 451.
 --- 40 Rel 1920 Pat 205.
 --- 71 Foll 11 L W 52.
 --- 82 Rel 11 L W 255.
 --- 364 Dist 55 I C 926.

 32 Mad 1 Dist 39 M L J 63.
 --- 3 Diss 1 P L T 46.
 --- 95 Comm 45 Mad 617.
 --- 255 Dist 55 I C 105.
 --- 416 Foll 42 All 79.

 33 Mad 93 Rel 5 P L J 210.
 --- 187 Rel 11 L W 140.
 --- 177 Const 55 I C 78 120 M W N 15.
 --- 423 Rel 42 All 195.
 --- 173 Rel 47 Cal 115.
 --- 429 Rel 42 All 596.
 --- 429 Rel 18 A L J 807.
 --- 448 Diss 27 M L T 94.
 --- 483 Rel on 38 M L J 108.
 --- 502 Foll 5 P L J 11.

 34 Mad 29 Rel 31 C L J 471.
 --- 72 Applied 43 Mad 849.
 --- 97 Dist 29 M L J 412.
 --- 138 Foll 11 L W 285.
 --- 133 Foll 1920 Pat 288.
 --- 175 Rel 42 All 596.
 --- 255 Rel 11 L W 331.
 --- 408 Rel 11 L W 22.
 --- 543 Rel 28 M L J 467.

 35 Mad 1 Rel 2 Lah L J 32.
 1 Lah 348.
 --- 35 Doubtful 1920 M W N 572.
 --- 35 Disapp 39 M L J 350.
 --- 35 Foll 1920 M W N 77.
 --- 177 Doubtful 1 P L T 34.
 --- 239 Foll 55 I C 38.
 --- 582 Rel 38 M L J 123.
 --- 607 Dist 55 I C 86.
 --- 636 Foll 42 All 45.
 --- 642 Rel 47 Cal 446.
 --- 642 Dist 55 I C 658.
 --- 692 Dist 38 M L J 55.
 --- 728 Rel 1 Lah 146.

 36 Mad 32 Foll 39 M L J 431.

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—32 Foll 43 Mad 885.
 —46 Overruled 43 Mad 688
 —68 Ref 2 Lah L J 107
 —116 Foll 1920 M W N 501
 —120 Foll 1920 M W N 519.
 —275 Ref 11 L W 285
 —304 Foll 54 I C 50
 —346 Ref 27 M L T 94
 —357 Ref 5 P L J 56
 —375 Ref 1920 M W N 171.
 —380 D st 55 I C 580.
 —426 D st 55 I C 555.
 —544 Not foll 5 P L J 376.
 —553 Foll 11 L W 501 + 39 M
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37 Mad 17 Expl 1920 M W
 N 215
 —38 Foll 11 L W 596
 —113 Expl and foll 1920 M
 W N 495
 —119 Foll 57 I C 653
 —199 Ref 42 All 266.
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 —462 Overruled 11 L W 63.
 —462 Foll 11 L W 232
 —529 Relied on 43 M L J
 495.
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38 Mad 6 Ref 38 M L J 222.
 —33 Foll 1920 M W N 303
 —33 D st 38 M L J 312.
 —45 Foll 43 Mad 82.
 —86 Ref 11 L W 523
 —160 Appr 43 Mad 509
 —178 Ref 38 M L J 131.
 —203 Foll 1 P L T 206.
 —205 Diss 1 P L T 434.
 —247 Foll 39 M L J 412.
 —305 Ref 1 P L T 464.
 —456 Ref 38 M L J 222.
 —548 Foll 1 P L T 34.
 —639 Foll 1 P L T 200.
 —684 Dist 11 L W 108.
 —705 Foll 54 I C 382.
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 —705 Not Foll 5 P L J 328.
 —705 Foll 56 I C 612
 —323 Ref 24 C W N 783.
 —1071 Foll 11 L W 596.
 —1076 Foll 1920 M W N 1.
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39 Mad 341 Appr 39 M L J
 277,
 —479 Ref 11 L W 145.
 —483 Dist 43 Mad 812 : 39
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 —634 Foll : 39 M L J 529.
 —750 Appr 47 Cal 438
 —903 Ref and Cons: 11 L W
 340.
 —997 Foll 27 M L T 94.

—1010 Appr 1920 M W N :
 349
 —1029 Foll 54 I C 146.
 —1045 Dist 55 I C 198
 —1045 Ref 11 L W 122.
 —1045 Foll 2 Lah L J 51
 —1049 Ref 24 C W N 1064
 —1085 Foll 47 Cal 194.
 —1085 Ref 42 All 253.
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40 Mad 77 Ref 47 Cal 446.
 —110 Ref 38 M L J 1201.
 —112 Applied 1920 M W N
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 —212 Dist 38 M L J 198.
 —212 Foll 1920 M W N 393
 —233 Dist 43 Mad 725 : 39
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 —303 Ref 38 M L J 77.
 —630 Foll 38 M L J 338
 —630 Foll 1 Lah 213.
 —672 Ref 1 Lah 173
 —709 Ref 38 M L J 198.
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 —793 Ref 24 C W N 288
 —824 Dist 2 Lah L J 352.
 —836 Discr 54 I C 194
 —1040 Foll 57 I C 470
 —1083 Ref 5 P L J 1
 1 P L T 193 1920 Pat 102
 —1122 Exp dist 1920 M W
 N 221, 43 Mad 824.
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41 Mad 115 Ref 18 A L J
 648
 —121 Foll 11 L W 3.
 —124 Foll 1920 M W N
 393.
 —233 Ref 11 L W 225.
 —256 Foll 11 L W 282.
 —296 Ref 39 M L J 685.
 —323 Foll 1 Lah 109.
 —327 Dist 55 I C 363.
 —442 app 18 A L J 503.
 —469 overruled 43 Mad
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 —473 Ref 1 P L T 239.
 —533 Foll 1 P L T 237.
 —556 Dist 11 L W 3.
 —561 Ref & dist 11 L W
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 —577 Ref 43 Mad 519.
 —612 over Ruled 39 M L J
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 —612 d'ss 55 I C 752.
 —612 overruled 43 Mad
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 —629 Ref 11 L W 513.
 —650 Foll 55 I C 450.
 —659 Ref 1 Lah 69.
 —731 overruled 13 Mad
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 —743 Ref 38 M L J 138.

—840 Foll 55 I C 770
 —985 Foll 1 P L T 559.
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 —998 Foll 55 I C 58
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 —114 not Foll 39 M L J 30
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 —561 Foll 1 Lah 261
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 —616 appr 59 M L J 11.
 —654 Ref 38 M L J 110
 —631 Ref 11 L W 223.
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 —277 d st 38 M L J 108.
 —281 Cons: 55 I C 977.
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 —210 foll 54 I C 146.
 —353 foll 57 I C 252.
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12 M L J 385 diss 43 Mad
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13 M L J 65 Diss 55 I C 198.
 —233 foll 55 I C 38.
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14 M L J 209 dist 1 Lah 69.
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16 M L J 291 foll 56 I C 97.
 —479 app 55 I C 444.
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---74 d'st 55 I C 198.
---149 over Ruled 59 M L J
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---495 d'st 54 I C 451.
---528 dist 43 Mad 824.

19 M L J 239 dist 38 M L J
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---304 Ref 18 A L J 828.

20 M L J 439 foll 56 I C 81
---439 foll 57 I C 252.
---546 Ref 38 M L J 108.
---596 Consi 55 I C 78.
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21 M L J 21 d'ss 56 I C 517
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---795 Ref 2 Lah L J 240.
---811 Dist 55 I C 658.
---1156 Foll 55 I C 377.

22 M L J 118 D'st 55 I C
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---284 Over ruled 1920 M W
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---419 Ref 2 Lah L J 239.

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---479 Ref 38 M L J 222.
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---610 Not foll 38 M L J 77.
---667 Dist 55 I C 945.

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---75 Ref 39 M L J 685.
---235 appr 1920 M W N 19.
---488 Ref 38 M L J 131.
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25 M L J 95 Foll 54 I C 131
---162 Ref 1920 M W N 198.
---258 appr 55 I C 436.
---297 Ref 38 M L J 222.
---360 Foll 56 I C 957.
---586 Not foll 43 Mad 476.

26 M L J 283 Not foll 11 L
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27 M L J 80 Foll 55 I C 66;
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---166 Foll 11 L W 289.
---291 Ref 2 Lah L J 60.
---605 Dist 38 M L J 62.
---656 Ref 39 M L J 77.
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---665 Diss 39 M L J 597.
---690 Foll 38 M L J 461.
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---611 Ref 11 L W 59.

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---575 Ref 38 M L J 77.

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---54 D'ss 43 Mad 1.
---259 Ref 39 M L J 174.
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---323 Diss 43 Mad 319.
---434 Ref 24 C W N 728.

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---144 D'scu 54 I C 154.
---320 Foll 55 I C 450.
---476 Dist 43 Mad 728.
---693 Not foll 56 I C 154.
---705 Diss 55 I C 752.
---750 Foll 11 L W 222.

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---234 Expl 1920 M W N
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---291 Foll 56 I C 826.
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---526 Over ruled 56 I C
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---528 Foll 55 I C 450.
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---382 Ref 5 P L J 129.
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---40 Foll 55 I C 38.
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---68 Foll 55 I C 431.
---124 Foll 55 I C 770.
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1 M L T 210 Foll 56 I C 97.
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3 M L T 23 Dist 54 I C 451.

4 M L T 89 d'ss 56 I C 936
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---521 D'st 55 I C 380.

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---174 D'st 55 I C 658.

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13 M L T 19 D'st 55 I C 945.
---185 Foll 54 I C 131.

14 M L T 574 Not foll 56 I
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15 M L T 338 Foll 43 Mad
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16 M L T 6 Foll 55 I C 66.
---430 Dist 54 I C 451.
---489 Foll 54 I C 146.

17 M L T 15 Foll 43 Mad 1.
---583 Foll 1920 M W N 534.

18 M L T 542 Foll 54 I C
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---549 Dist 55 I C 198.

19 M L T 193 Dist 55 I C
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---390 diss 55 I C 752.

21 M L T 24 Expl 56 I C
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— 236 Foll 55 I C 450.

23 M L T 228 Foll 56 I C
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— 92 Foll 55 I C 969.
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3 L W 259 Dist 55 I C 371.
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— 317 Foll 54 I C 146.

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— 340 Discu 54 I C 154
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7 L W 33 Ref 11 L W 394.
— 218 Foll 11 L W 55
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8 L W 28 Foll 55 I C 450.
— 109 Ref 11 L W 513.
— 461 Foll 55 I C 722.
— 530 Expl 11 L W 55.

9 L W 5 Dist 55 I C 351.

— 19 Rel 11 L W 211

— 126 Foll 54 I C 22

— 243 Foll 26 I C 91

— 289 Foll 52 I C 770.

— 311 Foll 55 I C 444

— 385 Foll 55 I C 431.

— 476 Foll 39 M L J 472.

— 518 Foll 55 I C 234.

— 550 Foll 55 I C 969.

— 598 Appr 56 I C 395

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— 105 Expl 11 L W 11.

— 143 Appl 55 I C 426.

— 204 Foll 11 L W 55.

— 339 Dist 55 I C 371

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— 410 Dist 11 L W 59

— 474 Foll 55 I C 977

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— 63 Ref 11 L W 232.

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— 432 Foll 56 I C 81 ; 57 I C
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— 466 Consi 55 I C 78.

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— 385 Ref 1920 M W N 114.

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(1912) M W N 22 Foll 55 I
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— 198 Not foll 55 I C 612.

— 353 Dist 55 I C 658.

— 935 Dist 55 I C 86

— 1188 Not Foll, 55 I C 377.

(1913) M W N 157 Foll 54
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— 529 Foll 11 L W 13.

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— 462 Expl 1920 M W N 487
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— 846 Foll 1920 M W N 261.

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(1915) M W N 45 foll 51 I
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— 150 Ref 11 L W 590.

— 290 Appr 47 Cal 524.

— 522 Foll 1920 M W N 75.

— 614 Foll 1920 M W N 15.

— 643 Diss 11 L W 42.

— 1050 Dist 55 I C 198.

(1916) 1 M W N 93 Ref
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— 258 Dist 55 I C 371.

(1916) 2 M W N 136 Appr
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(1917) M W N 44 Expl 56 I
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— 327 Foll 48 M 476 : 56 I
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— 419 Doub 55 I C 380.

— 536 Discu 54 I C 154.

— 609 Foll 55 I C 450.

— 872 Dist 55 I C 363.

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— 327 D'st 1920 M W N 276.

— 446 Foll 56 I C 826.

— 448 Foll 55 I C 450.

— 578 Foll 55 I C 969.

— 662 Foll 55 I C 770.

— 751 Foll 55 I C 722.

— 768 Over ruled 56 I C 957.

— 853 Dist 55 I C 86.

— 859 Foll 54 I C 22.

— 922 Applied 1920 M W N
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(1919) M W N 91 Foll 55 I
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— 120 Foll 55 I C 770.

— 246 Foll 55 I C 444.

— 310 Appl 55 I C 436.

— 318 Dist 55 I C 371.

— 355 Appr 56 I C 395.

— 463 Foll 54 I C 22.

— 687 Foll 55 I C 977

— 821 adopted 1920 M W N
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(1920) M W N 66 applied
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 ——393 Foll 1 P L T 136
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 ——429 dist 1 Lah 174.
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 ——467 Comm 1 P L T 197
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4 I A 1 Ref 1920 M W N 385.

5 I A 87 Foll 57 I C 252.
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6 I A 15 Ref 57 I C 252.

7 I A 63 Ref 24 C W N 01.

8 I A 123 Relied on 44 Bom
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9 I A 197 Dist 55 I C 335

10 I A 20 Ref 13 Mad 253
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11 I A 7 Consid 55 I C 977
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12 I A 23 Dist 55 I C 335

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15 I A 51 Foll 24 C W N 855.
 ——81 Ref 14 C W N 145.
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17 I A 20 Dist 55 I C 335.
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18 I A 6 Ref 1 P L T 403.
 ——121 Foll 38 M L J 360

19 I A 30 Foll 22 Bom
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 ——90 Foll 55 I C 436.
 ——166 Applied 54 I C 200.
 ——228 Ref 2 C W N 1057

22 I A 12 Ref 24 C W N
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 ——76 Ref 24 C W N 18.

23 I A 106 Relied on 44 Bom
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24 I A 196 Foll 55 I C 745.

25 I A 1 Ref 43 Mad 116

26 I A 101 Foll 24 C W
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27 I A 216 Ref 24 C W N
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28 I A 15 Ref 24 C W
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29 I A 76 Foll 55 I C 371.
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30 I A 44 Ref 24 C W N 809.
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 ——128 Foll 56 I C 97.

34 I A 26 Ref 1920 M W N 385.
 ——41 Dist 55 I C 198.
 ——107 Ref 24 C W N 57.
 ——126 Dist 54 I C 387.

37 I A 93 Foll 56 I C 81.
 ——110 Consid 55 I C 78.
 ——124 Discu 54 I C 371.

39 I A 1 Foll 55 I C 377.
 ——218 Dist 55 I C 86.

41 I A 110 Foll 55 I C 66 511.
 ——142 Foll 2 Lah L J 466.

42 I A 22 Dist 38 M L J 717.
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43 I A 56 43 Dist 55 I C 371.
 ——73 Ref 43 Mad 253; 24 C
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44 I A 126 Ref 44 Bom 341.
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 ——163 Foll 1 P L T 6.
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 ——166 Discussed 18 A L J
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 ——73 Foll 55 I C 234.
 ——118 Ref 18 A L J 877.
 ——130 Foll 42 All 364 38 M
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 ——148 Foll 31 C L J 91.
 ——209 Foll 54 I C 22.
 ——209 Foll 24 C W N 129.
 ——265 Foll 39 M L J 70.
 ——265 Foll 56 I C 391.
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46 I A 1 Foll 44 Bom 352.
 ——72 Ref 39 M L J 161.
 ——97 Dist 55 I C 371.
 ——145 Foll 1 P L T 6
 ——151 Dist 39 M L J 203.
 ——156 Ref 24 C W N 57.
 ——176 Ref 24 C W N 630.
 ——240 Foll 43 Mad 688.
 ——240 Ref 39 M L J 77.

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 —147 Ref 18 A L J 905.
 —222 Cited with approval 2 Lah L J 499.
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 —218 Foll 47 Cal 357.
 8 W R 128 Ref 47 Cal 354.
 —207 Ref 5 P L J 321.
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 —61 Ref 5 P L J 147.
 —65 Ref 24 C W N 369.
 —312 Foll 1920 Pat 245.
 —344 Ref 24 C W N 685.
 —579 Ref 24 C W N 685.
 —13 Cr Ref 1920 Pat 253.
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 11 W R Cr 53 Foll and dist 31 C L J 122.
 12 W R 1 Ref 1920 Pat 289.
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 —354 Ref 1 P L T 235.
 —413 Dist 24 C W N 874
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 —498 Relied on 2 Lah L J 1.
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 15 W R 212 Foll 1920 M W N 209.
 —461 Foll 1920 Pat 245.
 —560 Ref 47 Cal 337.
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 20 W R 150 Cons 24 C W N 599.
 —172 Ref 1920 Pat 521.

—374 Foll 1920 Pat 39.
 20 W R 37 Cr Ref 42 A L 345.
 21 W R 48 appr 5 P L J 430.
 —59 Foll 1 P L T 127.
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 21 W R Cr 49 Ref 1 P L T 241.
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 —302 Cited with approval 2 Lah L J 499.
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 —97 Foll 2 Lah L J 463.
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 3 I C 19 Relied on 2 Lah L J 107 1 Lah 357.
 —271 Ref 1 Lah 206.
 —387 Dist 55 I C 105.
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 —141 Foll 57 I C 52.
 —144 D'st 55 I C 698.
 —243 Diss 55 I C 517.
 —542 Foll 56 I C 940.
 5 I C 408 Cons 55 I C 345.
 —484 Dist 54 I C 218.
 —748 Foll 57 I C 252.
 —842 Ref 1 Lah 69.
 —909 Ref 1 Lah 77.
 —941 Foll 5 P L J 455.
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 —248 Foll 1 Lah 295.
 —272 Foll 56 I C 81.
 —988 Cons 55 I C 78.
 7 I C 196 Discu 54 I C 371.
 —715 Foll 54 I C 453.

8 I C 512 Dist 55 I C 517.
 —677 Dist 42 All 125.
 —825 Diss 1920 Pat 114.
 —1043 Foll 56 I C 918.
 —1196 Ref 1 Lah 206.
 9 I C 243 Ref 2 Lah L J 689.
 —264 Ref 42 All 195.
 —381 Dist 55 I C 406.
 —417 Foll 2 Lah L J 701.
 —607 Ref 1920 Pat 271.
 —614 Ref 2 Lah L J 60.
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 —114 Appr 5 P L J 267.
 —156 Diss 1 P L T 349 Ref 1 P L T 349.
 —346 Relied upon 1 P L T 292.
 —543 Foll 56 I C 129.
 —660 Foll 55 I C 38.
 —705 Foll 1 Lah 339.
 11 I C 132 Foll 57 I C 91.
 —198 Foll 1 Lah 234.
 —321 Foll 54 I C 436.
 —339 Ref 11 L W 484.
 —433 Appr 42 All 336: 18 A L 1 287.
 —562 Over ruled 1 Lah 187.
 —712 Foll 2 Lah L J 555.
 —865 Dist 55 I C 658.
 —907 Foll 57 I C 252.
 —1007 Cons 55 I C 345.
 12 I C 37 Dist 1 Lah 357.
 —130 Overruled 55 I C 666.
 —378 Ref 2 Lah L J 107.
 —549 Dist 55 I C 363.
 —858 Ref 5 P L J 521.
 —1007 Dist 55 I C 880.
 13 I C 33 Foll 55 I C 377.
 —182 Foll 57 I C 259.
 —185 Foll 55 I C 517.
 —318 Foll 57 I C 15.
 —414 D'st 1 Lah 27.
 —495 Ref 2 Lah L J 698: 55 I C 698.
 —653 Not foll 56 I C 612.
 —906 Not foll 56 I C 612.
 14 I C 175 Foll 2 Lah L J 242.
 —270 Foll 1 Lah 352.
 —321 Foll 54 I C 436.
 —447 Diss 55 I C 646.
 —1006 Ref 1920 Pat 75.
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 —206 Dist 55 I C 658.
 —537 Foll 47 Cal 337.
 —554 Foll 55 I C 444.
 —611 Ref 1 Lah 27.
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 —938 Foll 56 I C 129.

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18 I C 33 Rel 42 All 103.
 — 201 Foll 1920 M W N 599.
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 — 887 Relied on 2 Lah L J 136.
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 — 497 Not foll 55 I C 37.
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18 I C 17 Foll 54 I C 131.
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 — 625 Not Foll 54 I C 146.
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 — 295 Dist 55 I C 520.
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 — 351 Ref 1 Lah 109.
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 — 451 Foll 56 I C 913.
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 — 901 Foll 45 M 739; 39 M L J 345.

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 — 319 Foll 56 I C 557.
 — 639 Fot Foll 56 I C 289.
 — 848 Ref & dist 11 L W 596.
 — 951 Foll 56 I C 927.

22 I C 132 Ref 1 Lah 105.
 — 604 Ref 1 P L T 27.
 — 709 diss 1 P L T 119.
 — 742 Foll 56 I C 850.
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 — 850 Rel 1920 Pat 271.
 — 899 Ref 1 La'l 187.
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 — 943 Ref 1 P L T 27.

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 — 429 Dist 54 I C 318.
 — 530 Foll 56 I C 289.
 — 637 Foll 55 I C 66; 511.
 — 743 Diss 5 P L J 267.
 — 785 Ref 2 Lah L J 701.

24 I C 707 Ref 1920 Pat 235.
 — 850 Dist 55 I C 19.

25 I C 84 Foll 1 Lah 295.
 — 185 Foll 2 Lah L J 463.
 — 502 Dist 55 I C 720.
 — 549 Foll 57 I C 250.

— 680 Dist 2 Lah L J 583.
 — 884 Foll 5 P L J 70.
 — 977 Ref 1 P L T 349.

26 I C 63 Dist 54 I C 451.
 — 158 Ref 1 P L T 79.
 — 384 Foll 56 I C 957.
 — 393 Foll 54 I C 146.
 — 571 Foll 57 I C 578.
 — 980 Foll 55 I C 615.

27 I C 56 Relied on 2 Lah L J 287.
 — 143 Foll 1 P L T 446.
 — 276 Foll 2 Lah L J 639; 1 Lah 173.
 — 323 Foll 56 I C 612.
 — 336 Not Foll 38 M L J 467; 56 I C 530.
 — 537 Dist 54 I C 335.
 — 554 Foll 1 P L T 161.

28 I C 245 Dist 55 I C 520.
 — 446 Consi 54 I C 382.
 — 507 Ref 1 Lah 146.
 — 623 Dist 56 I C 313.

29 I C 468 Ref 1 P L T 203.
 — 469 Foll 1 Lah 220.
 — 747 Ref 11 L W 537.

30 I C 1000 Foll 56 I C 861.

31 I C 196 Foll 57 I C 195.
 — 286 Ref 2 Lah L J 457.
 — 3d5 Foll 5 P L J 430.
 — 381 Foll 5 Pat L J 267; 1920 Pat 224.
 — 444 Dist 1 Lah 57.
 — 803 Foll 54 I C 146.

32 I C 35 Dist 57 I C 269.
 — 326 Dist 55 I C 198.
 — 380 Dist 56 I C 313.
 — 403 Dist 55 I C 371.
 — 497 Ref 1 Lah L J 107.
 — 497 Dist 1 Lah 357.
 — 731 Ref 1 Lah 77.
 — 833 Foll 5 P L J 430.

33 I C 205 Foll 57 I C 637.
 — 443 Ref 1 Lah 187.
 — 823 Dist 55 I C 685.

34 I C 10 Dist 55 I C 371.
 — 126 D st 54 I C 387.
 — 171 Foll 2 Lah L J 583.
 — 209 Foll 55 I C 739.
 — 244 Foll 55 I C 450.
 — 542 Foll 56 I C 593.
 — 665 Ref 5 P L J 47.
 — 686 Ref 1 Lah 173.
 — 707 Foll 1 P L T 277.
 — 778 Diss 55 I C 752.
 — 932 Dist 56 I C 489.

35 I C 292 Foll 55 I C 55.
 — 294 Dist 55 I C 30.

— 577 Foll 5 P L J 371.
 — 718 Dist 1 Lah 317.
 — 875 Relied on 2 Lah L J 68.

36 I C 57 Foll 56 I C 291.
 — 125 Ref 2 Lah L J 597.
 — 890 Foll 56 I C 811.

37 I C 644 Ref 1 Lah 22.
 — 836 Expl 55 I C 976.
 — 847 Dist 54 I C 396.

38 I C 33 Dist 55 I C 363.
 — 53 Not Foll 55 I C 414.
 — 244 Foll 43 Mad 398.
 — 387 Foll 55 I C 210.
 — 823 Foll 1920 Pat 52.
 — 980 D'st 55 I C 198.

39 I C 280 Expl 55 I C 320.
 — 707 Ref 1 P L T 277.
 — 753 Foll 55 I C 19.
 — 861 Foll 1920 Pat 13.

40 I C 345 Relied on 2 Lah L J 242.
 — 393 diss 1920 Pat 235.
 — 655 Foll 1920 M W N 599.
 — 698 Foll 1 P L T 115.
 — 769 Doub 55 I C 380.
 — 820 Foll 56 I C 289.
 — 891 Diss 1920 Pat 302.

41 I C 98 Discu 54 I C 154.
 — 730 Foll 57 I C 259.
 — 905 Foll 39 M L J 412.
 — 1007 Ref 1 P L T 331.

42 I C 37 Ref 1 Lah 109.
 — 176 Foll 5 P L J 430.
 — 943 Foll 1 P L T 441.
 — 670 Foll 1 P L T 535.
 — 675 Ref 1 Lah 234.
 — 845 Relied on 2 Lah L J 68.
 — 493 Not foll 55 I C 154.

43 I C 31 Foll 55 I C 450.
 — 187 Dist 55 I C 363.
 — 210 Appr 1 Lah 241.
 — 404 Foll 1 P L T 318.
 — 651 Diss 55 I C 752.
 — 740 Foll 2 Lah L J 689.
 — 740 Foll 55 I C 698.

44 I C 5 Ref 1 Lah 92.
 ... 28 Foll 55 I C 990.
 — 41 Not Appro 54 I C 473.
 — 216 Foll 11 L W 174.
 — 216 Foll 43 Mad 396 38 M L J 92.
 — 216 Foll 55 I C 517.
 — 290 Foll 56 I C 826.
 — 398 Ref 1 Lah 234.
 — 605 Ref 1 P L T 535.
 — 837 Dist 56 I C 595.
 — 844 Foll 56 I C 454.

45 I C 189 Ref 5 P L J 17.	— 105 Ref 1920 Pat 235.	— 162 Ref 1920 Pat 205.
— 290 Ref 42 All 174.	— 200 Dist 55 I C 511.	— 1 P L T 331.
— 333 Ref 2 Lah L J 139.	— 418 Foll 55 I C 454.	— 216 Appl 55 I C 436.
— 783 Foll 55 I C 450.	— 682 Ref 1 P L T 349.	— 327 Foll 55 I C 444.
— 798 Foll 55 I C 969.	— 689 Foll 54 I C 22.	— 457 Dist 55 I C 371.
— 867 Foll 55 I C 450.	— 706 Foll 55 I C 38 : 56 I C 391.	— 959 Diss 11 L W 106.
— 848 Foll 2 Lah L J 310.	— 706 Foll 56 I C 391.	—
46 I C 815 Ref and Dist 11 L W 506.	— 765 Foll 5 P L J 70.	51 I C 111 Appr 56 I C 395.
— 849 Over ruled 56 I C 957.	— 918 Foll 2 Lah L J 419.	— 381 Foll 55 I C 739.
—	—	— 465 Foll 1 P L T 73.
47 I C 16 Foll 2 Lah L J 366	49 I C 1 Foll 55 I C 481.	— 465 Dist 1 P L T 349.
— 277 Foll 1920 M W N 398	— 80 Dist 54 I C 359	— 585 Foll 2 Lah L J 255.
— 277 Foll 43 Mad 450.	— 138 Dist 55 I C 520.	— 622 Foll 2 Lah L J 310.
— 513 Foll 55 I C 234	— 231 Not foll 56 I C 162.	— 985 Foll 2 Lah L J 549.
— 563 Dist 56 I C 595.	— 278 Dist 55 I C 86.	—
— 608 Foll 55 I C 770.	— 283 Ref 18 A L J 449.	52 I C 75 Foll 56 I C 291.
— 626 Relied upon 1 P L T 192	— 673 Foll 55 I C 770.	— 152 Ref 2 Lah L J 421.
— 963 Dist 1 Lah 173.	— 919 Relied upon 1 P L T 349 Dis 1 P L T 346	— 387 Foll 2 Lah L J 261.
48 I C 78 Not foll 56 I C 612.	50 I C 31 Dist 1 P L T 318.	— 512 Ref 1 P L T 544.
	— 134 Diss 1920 Pat 250.	— 621 Foll 55 I C 529.
		—
		53 I C 926 Foll 55 I C 977.
		55 I C 425 Foll 57 I C 302.

Addenda Et. Corrigenda.

Col. 531. Read. Baldeo v. Kanhaiya Lal. 12 L. W. 408.

" 720. Read. 43 Mad. 715 : 38 M. L. J. 461 ; 11 L. W. 582 : (1920) M. W. N. 335 :

57 I. C. 424.

" 857. Read. 43 Mad. 405 : 38 M. L. J. 251 : (1920) M. W. N. 205 : 55 I. C. 86.

THE
“YEARLY DIGEST”

I—Indian Decisions.

ABADI.

ABADI—Co-sharers See also LANDLORD AND TENANT

—Co-sharers—Appropriation of site—Injunction—Delay—Special damage

No individual proprietor can appropriate to himself a portion of the common land and use it in such a way as to affect the rights of all the co-sharers at the time of partition. To restrain a co-sharer from appropriating a portion of the common land, it is no necessary to give proof of special damage, but the suit must be brought without delay and before the defendant has erected substantial buildings on the land. *Abdul Raouf, J. v. MANJI v. GULAM MAMMED.* 1 Lah. 249 : 57 I. C. 207.

Village common land whether liable to partition—Custom See (1917) D. G. Col 1 MAHOMED KAN v. FAWAL DAD

55 I. C. 14.

ABATEMENT—Cause of action—Suit for damages for breach of contract of marriage—Abatement of suit on death of wife See DAMAGES

22 Bom. L. R. 143.

ACCOMPlice—Who is—Knowledge of exact crime of necessary. See (1919) D. G. Col. 3. SURYA KANTA BHATTACHARYA v. EMPEROR

31 C. L. J. 30 :

58 I. C. 674.

ACCOUNTS—Mode of taking—Redemption—Deewan Agriculturists’ Relief Act, S. 3 mortgage See DEEWAAN AGRICULTURISTS RELIEF ACT, S. 23 22 Bom. L. R. 1299.

—Non-production of—Suit for accounts—Effect of non-production. See ACCOUNTS, SUIT

24 C. W. N. 922.

—Settled—Re-opening of—Error, when a ground

A settled account cannot be re-opened without specifically charging at least one definite and important error and supporting that error with evidence confirming it.

15 C. P. L. R. 61, *Parkinson v. Hanbury* (1878) 9 Ch. D. 529; *relied upon. (Drake-Brockman and Findlay, A. J. C.) PADAMRAJ v. GOPIKISAN.* 56 I. C. 129.

ACCOUNTS.

—Settled—Re-opening of—Fraud—Serious error

Accounts settled between parties may be re-opened on the ground of substantial error or fraud. *Williamson v. Barbour, L. R. 9 Ch. D. 589; 5 M. I. A. 379, foll. (Mears, C. J. and Banerji, J.) BANGWAN BAKSH SINGH v. JOSHI DAMODARJI* 42 All. 230 : 18 A. L. J. 100.

—Settled—Re-opening of

A settled account cannot be reopened except on specific allegations of fraud or mistake (*Le Rossignol, J. v. RAJAKISHEN v. TIRATH RAM*) 1 Lah. L. J. 220.

—Suit for—Commissioner—Court—Powers of

The questions as to whether settled accounts are not to be disturbed and whether accounts included in another suit by plaintiff are not to be included in a suit for accounts are legal questions which must be decided by the Court and not by the Commissioner

(*Le Rossignol, J. v. RADIA KISHEN v. TIRATH RAM*) 1 Lah. L. J. 220.

—Suit for—Dismissal of debt and seizure of papers—Effect of

In a suit for accounts the defendant’s plea that he was preparing the account when he was dismissed and a superior officer took possession of all the papers without giving him any receipt for the same was proved *Held*—that it was impossible for the defendant to render an account without the plaintiffs’ producing the papers that were with them. (*Richardson and Shamisul Huda, JJ. v. JATINDRA NATH DUTTA v. S. C. S. : CHANDRA ROY CHOWDHURY.* 24 C. W. N. 922.

—Suit for—Withholding of accounts by plff—Loss of account books not proved.

A plaintiff who has the accounts with him cannot ask a Court to take accounts whilst he withholds the evidence in his power 13 C. W. N. 696 foll. The loss of the account books not having been proved secondary evidence of their contents is not admissible. (*Shadi Lal and Dundas, JJ. v. THAKUR DAS v. JANARDHAN.* 1 Lah. L. J. 242 : 56 I. C. 940.

ADMINISTRATION.

ADMINISTRATION—Suit by heir of deceased a Mahomedan—Maintenance though no suit for partition is brought—Mahomedan Law—Practice

There is no need under Mahomedan Law to take letters of administration or to the estate of a deceased Mahomedan.

A person who has interest in the estate, by a deceased Mahomedan is entitled to ask the Court to pass a preliminary decree for the administration of the estate if he knows exactly who is his heir. He is then bound to file a suit for partition. *Heaton, C. J. and Heaton, J. v. ESCUELLA ALIBIYAH AND LIL GULAM HUSSAIN*

22 Bom. L. R. 1117.

ADMINISTRATOR GENERAL'S ACT (III of 1913) S. 11—Applicability of—Succession; meaning of

The admission by the court that there is a valid will does not prevent him from taking recourse to S. 11 of the Administrator General's Act.

The word "succession" as so it should not be read as meaning intestate's succession only. *Rukkin, J. v. THE GOVERNMENT OF PASUPATI MURKEEF*

24 C. W. N. 326 56 I.C. 431.

ADVANCEMENT—Presumption—Europeans dom cited in British India—English rule applicable. See TRUSTS ACT, Ss 8 AND 53

39 M. L. J. 296.

ADVERSE POSSESSION—S. 121 LIMITATION Ver. ACT. 14 and 15.

—Acquisition of title—Ignorance of true owner—Time, if any

If the true owner A buys, the opportunity to acquaint himself with all the facts and law and not being led into error by the fraud of the opposite party, B sees B enjoying A's land openly claiming it as owner, litigation against A cannot cease to run till the grantee on the part of A will let him into知道 that the land really belonged to B is removed. *(Sadasiva Iyer, J.)* See *TRAVANCORE STATE v. INDIA & VENKATANA ASWAMI NAMBI*

27 M. L. T. 147 (1920) M. W. N. 209. 11 L. W. 256 58 I.C. 689.

—Case—Fluctuating body, it can acquire property by prescription. See C. P. CODE, O. 1, R. 2 24 C. W. N. 206.

—Co-mortgagor—Possession of, after redemption if adverse to others

Even assuming that the possession of the entire property after redemption by a co-mortgagor is not *ipso facto* adverse there can be no doubt that that possession becomes adverse when the co-mortgagor holds the property with an open assertion of his exclusive title

ADVERSE POSSESSION.

11 A. 415; 18 A. 540; 26 B. 500 Ref (Shadi Lal v. Broadway, J.J.) SHAHAB-UD-DIN v. KASIM ALI KHAN 2 Lah. L. J. 160

—Co-owners—Onus of proving ousted person setting up. See LIM ACT, ARTS 142 AND 143 55 I. C. 247.

—Co-owners—Ouster See (1917) DIG Col. C VITADI PHILLAI v. JEEVARATHNAMMAL 33 M. L. J. 313 : 43 Mad. 244 : 24 C. W. N. 343 : 27 M. L. T. 6 : 18 A. L. J. 274. 22 Bom. L. R. 444 (P. C.)

—Co-sharers—Sole possession — Non-payment of rent—Effect of

In order to establish adverse possession as between co-sharers there must be evidence of an open use on or a hostile act on the part of the co-sharers setting up adverse possession with notice to the others and mere non-participation in the profits by one party and exclusive occupation by the other party is not sufficient. *(Chevris, O. C. J.)* BALAK RAM v. KAURA 2 Lah. L. J. 619 56 I. C. 169.

—Co-tenants—Alienee from co-tenant—Possession of, if adverse—Knowledge if essential

The possession of an alienee from one of several co-tenants is adverse as against the other co-tenants from the moment of the entry into possession by the alienee (Seshagiri Aiyar and Moore, J.J.) POWDAGAR SHEIK ABDUL GAFUR & ASHRAFATHI BIRI 11 L. W. 31 : 54 I. C. 385.

—Entry of—Entry in Revenue papers—Under proprietors in possession.

The title of a person holding land as an under-proprietor cannot be disturbed or destroyed by any adverse entry in the revenue papers or any order passed by the Revenue Court releasing to enter his name in the revenue papers (*Kanpuria Lal, J. C.*) CHANDIKA v. SHOBRAJ 55 I. C. 490.

—Exit of—Trespass on Coal mine.

A trespasser wrongfully working a vein of coal from an adjoining mine acquired possession only of the coal worked but cannot be said to be in possession of the mine itself. If a person having title to all the seams of coal under a defined surface enters on a seam, he will be taken to be in possession of all the seams over which he has title (*Das and Foster, J.J. v. THE LOLNA COLLERY CO., LTD v. BIPIN DEBARI BOSE*)

1 Pat. L. T. 84 : 55 I. C. 113.

—Heredity Office—Lands attached to—Adverse possess on of stranger—Loss of title See LIM ACT, ART 144

38 M. L. J. 320.

ADVERSE POSSESSION.

Lands annexed to office—Denial of right.

Where a person holds adversely land granted in perpetuity to an *ala lambadar*, the possession is adverse to the *ala ianbaradar* in esse and in posse and bars the title of the latter after the lapse of 12 years. (*Scott Smith and Wilberforce, JJ v. GHULAM MUHAMMAD & AHMAD KHAN.* 55 I. C. 835.

Landlord and tenant—Incumbrance

The possession of a person as a tenant, however long, cannot be adverse to the landlord and cannot be held to be an incumbrance such a title upon him. (*Stuart, J. C. RAMBESHWAR BAIKUNTH DWARI* 54 I. C. 261.

25 C. W. N. 106.

Landlord and tenant—Non-transferable occupancy holding—Transfer of

To establish a case of adverse possession against the landlord by the transferee or a non-transferable occupancy holding it must be shown that the possession was adequate in continuity, publicity and extent. The element of publicity would be wanting if the landlord was not aware of the transfer and where the element of publicity is wanting the element of extent would also be wanting. 20 C. W. N. 773, foll. (*Beachcroft, J. J. MANULLA KOLU v. PRASANNA KUMAR SARKAR.* 56 I. C. 811.

Lessor and Lessee—Trespass—Right to sue.

A suit for ejection by a lessor against a trespasser, who has wrongfully dispossessed his lessee while the latter was holding over, is governed by Art 144 of the Lim Act. The plff. is entitled to succeed unless the trespasser has acquired a title by adverse possession for the statutory period as against him.

If the tenancy was in operation at the date of the suit, the title of the lessor could not be extinguished by adverse possession of the trespasser as against the lessee. There's no distinction in the application of this doctrine between a case where a tenant is dispossessed during term of his tenancy and where the tenant is dispossessed while holding over after the expiry of the term. (*Mukherji, A. C. J. and Fletcher, J. J. BAIKUNTHA NATI SOUMA & CHAITANYACHARAN CHAUDHURY.* 57 I. C. 994.

Licensor and licensee—Erection of buildings on land and enjoyment of same—Effect of.

A raiyat of a village obtained possession of land as a licensee, the terms of the license being that so long as he was cultivator and resided in the village he had a right to occupy the land for his own use, to construct buildings upon it, to dwell therein, and to enjoy the same but with no right in the soil. Held that the raiyat could not claim to be in ad-

ADVERSE POSSESSION.

verse possession against the licensee. The fact that he has improved the buildings on the land or has related executors will not confer such a title upon him. (*Stuart, J. C. RAMBESHWAR BAIKUNTH DWARI* 54 I. C. 261.

Owner—Grantee of surface soil—Adverse possession of minerals and minerals—Constructive possession—Doctrine of, not available to trespasser

A grantee of a certain land does not acquire a Zemindar's rights in the sub-soil rights in the lands even if

The mere fact that a grantee has given leases which purport to give a right to the soil and the sub-soil as tenant, and that minerals have been worked by the lessees, will not convey a title by adverse possession to the grantee as against the zamindar from whom he acquired his grant.

Although possession of a part of a certain property is constructive possession of the whole if the whole is otherwise vacant, this constructive possession is an incident of ownership and results from title. The doctrine of constructive possession is not applicable to a case where the occupant deems himself on the ground of his possession only without proving any title.

A wrong-doer's rights by adverse possession must be confined to land of which he is in actual possession and this principle is applicable equally to mines.

7 C. L. J. 414 ref.

Where an owner of land sells it reserving to himself the minerals he retains possession of the minerals in the same way as if he had not sold the surface. Mere non-user is not an abandonment of possession, and consequently, no matter how long mines remain unworked by the owner his right is not barred so long as they are not worked by some one else.

There are cases in which a title by adverse possession can be made out in respect to minerals but it does not follow that by working a part of the minerals by opening up particular quarries possession over a contiguous field of minerals or quarries of which the portion worked forms a part can be acquired. (*Miller, C. J. and Coutts, J. J. KUMAR PRAMATHA NATH MALIA & MEIK* 5 Pat L. J. 273. (1920) Pat. 146: 1 Pat L. J. 360: 56 I. C. 184

Mortgagor and mortgagee—Equity of redemption—Mere mutation of names—Effect of.

In a suit for redemption of a mortgage the plaintiff claimed to have acquired ownership of the equity of redemption by adverse possession on the ground that his name was mutated in the revenue register. But beyond the fact that the name of the plaintiff was entered in the revenue register no manner of possession whether actual or constructive was established by him.

ADVERSE POSSESSION.

Held, that the plaintiff could not and did not acquire ownership of the equity or redemption by merely having his name entered in the revenue register. *34 I.C. 171* (coll. 6 C.W.N. 601 and 22 I.C. 610 d.s.) (*Scott Smith v. Abdul Raouf, J.J.*) *SHAH NAWAZ v. SHEIKH AHMAD*. 1 Lah. 549 : 2 Lah. L.J. 583.

—Municipality—Drains—Testing of a Municipality—Adverse possession of, by private owners. See MADRAS DT. MUN ACT, S. 24

11 L.W. 202.

—Plea of—landlord and tenant—Specific notice to the landlord essential. See LANDLORD AND TENANT, EJECTMENT.

22 Bom. L.R. 1413.

—Proof of—Continuous possession—Jungle land—Presumption

To succeed on the plea of adverse possession evidence ought to be forthcoming of continuous possession for a period of 14 years. Revenue records of seven years do not amount to proof of continuous possession for the statutory period. In the case of uncultivated lands covered by jungle trees, the presumption is that possession is with the owner. (*Lindsay, J.C.*) *DAN BAHADUR SINGH v. PIRTHIPAL SINGH*

57 I.C. 538.

—Tacking—Independent trespassers—No right to tack on possession of prior trespasser. See LIM. ACT, ARTS 142 AND 144

22 Bom. L.R. 1452.

—Tacking possession before and after decree not permissible.

The plaintiffs were in possession of certain property from 1882. In a suit brought against them in 1893, it was held in 1896 that they were not entitled to possession. Notwithstanding this decree, the plaintiff remained in possession till 1908, when they were dispossessed under an order passed by the Collector. The plaintiffs having sued to recover possession on the ground of their adverse possession.—

Held, dismissing the suit, that the plaintiff could not be allowed to tack on the period of adverse possession before the decree in the suit of 1893 to the period after the decree

The period of adverse possession is calculated for the benefit of the party setting up adverse possession, and if he loses, then there is an end of that period; and he must, if he wishes to acquire a good title by adverse possession, start afresh after the decree (*MacLeod, C.J. and Heaton, J.J.*) *MIR, ARBALILLI v. ABDUL AJIZ*.

22 Bom. L.R. 916 : 58 I.C. 96.

—Trusteeship—General and particular trusts—Idol—Kattalai—Suit by general trustee for possession of endowment—Bar of limitation—Management by Kattalai trustee adverse to

AGRA TEN. ACT, S. 10.

general trustee. See REL ENDOWMENT, TRUSTEE
18 A.L.J. 594 (P.C.)

—Trusteeship—Religious Office—Right to nominate successor.

A trusteeship with power to appoint a successor is well known to and recognized by law and may be prescribed for. When title is acquired by statutory operation the title of the true owner is not revived by re-entry; in other words, even if the lawful owner should acquire possession he is not thereby remitted to his original title; cases on the subject referred to (*Modherjee, A.C.J. and Fletcher, J.J.*) *KASSIM HASSAN v. HAZRA BEGAN*

32 C.L.J. 151.

—Under proprietary right—Acquisition of by prescription. See OUDH RENT ACT, S. 61

58 I.C. 558.

—Under-proprietary right—Acquisition by prescription.

A person who had lost all his rights in certain land retained possession thereof, to the knowledge of the superior proprietor, without any title whatever, and was continuously recorded for more than 12 years as under-proprietor. *Held*, he acquired a title to the under-proprietary right by adverse possession. (*Lindsay, J.C.*) *NADIR SINGH v. MUSSAMMAT ANUPKUNWAR*.

56 I.C. 759.

—Waste land—Continuous possession.

In order to constitute adverse possession by which the right of the real owner may be extinguished, the possession must be continuous for a period of twelve years.

Acts of possession exercised at intervals over different portions of waste land in different years cannot amount to adverse possession inasmuch as the possession is not continuous. (*N. R. Chatterjee and Panton, J.J.*) *PYARI DEEVE DEMI v. SAKIR MANDAL*

57 I.C. 716.

AGRA TEN ACT. (II of 1901) SS. 4 (5) and 11—Occupancy rights—Accrual of—Ejection of tenant—Lease to stranger—Ejected tenant continuing in possession—Effect of

A landholder ejected a tenant in due course of law and leased the land to a casteman of the latter for one year only; the ejected tenant, however, continued in occupation, paid the rent due and was re-admitted on expiry of the lease;

Held *Per Hopkins, J.M.*—(Ferard, S.M. dissenting) that there was a continuous occupation by the original tenant (*Ferard, S.M. and Hopkins, J.M.*) *MUHAMMAD NABI v. UMIDE*.

54 I.C. 309.

—S. 10. Exproprietary rights—Proprietor cannot contract himself out of.

AGRA TEN. ACT, S. 10.

A proprietor cannot contract himself out of his right to become an ex-proprietary tenant of his sir with all the rights of such a tenant, including the right to hold at the rent rate mentioned in S. 10 of the Agra Tenancy Act (*Ferard S. M. and Harrison, J. M. J. DULLO KUER v. CHITALA*) **58 I. C. 619.**

S. 10—Exproprietary Tenant—Rent Enhanced by compromise if recoverable.

Deft sold his rights in a village to the plaintiff and became an exproprietary tenant in respect of certain lands which he was cultivating. The patwari recorded him as a non-occupancy tenant. In a suit for ejection brought by the plaintiff a compromise was entered into by which the defendant agreed to pay an enhanced rent. In a subsequent suit to recover the enhanced rent, Held that the provisions of S. 10 were mandatory and the compromise was not binding (*Tudball and Rafiq, JJ. J. MANSA RAM v. GANGA RAM*)

42 All. 334 : 18 A. L. J. 282 : 55 I. C. 889

Mortgage—Proprietor holding as tenant—Redemption—Proprietary rights.

A proprietor mortgaged his proprietary rights in land without obtaining ex-proprietary rights therein and was recorded as an ordinary tenant. After redemption of the mortgage his proprietary rights were sold in execution of a money decree. Held, that the fact that he held the land throughout or at least with no material interval, as tenant land cannot in any circumstances be deemed to have conferred ex-proprietary rights upon him, (*Hopkins and Harrison, J. J. UDEY RAM v. TOTA*) **57 I. C. 47.**

S. 10 (1)—Sir Land—Lease of—Transfer of proprietary right.

Proprietors, when selling or about to sell their property, cannot deprive themselves by any trickery or subterfuge of the rights given by section 10 (1) of the Agra Tenancy Act.

A collusive lease of Sir Land intended to defeat the law is entirely void (*Ferard S. M. and Harrison, J. J. HEM KUAR v. SEWA RAM*) **56 I. C. 645.**

S. 11—Tenant becoming usufructuary mortgagee—Accrual of occupancy rights—Computation of the period.

Where a tenant takes a usufructuary mortgage of the share of his landlord and on that share being redeemed again becomes a tenant, he cannot count the period of the mortgage towards the accrual of occupancy rights (*Ferard, S. M. and Harrison, J. J. MANI RAM v. JOPHA SINGH*) **55 I. C. 882.**

S. 11—Proviso (a)—Occupancy right—Lease for seven years—Commencement of tenancy

Where a tenant is admitted to a holding at the beginning of the agricultural year on the understanding that he will be given a year's

AGRA TEN. ACT, S. 18.

lease and the lease is executed later, the lease must be held to cover the period from 1st July. But if the tenant is not actually admitted to the land until some date subsequent to 1st July, the mere recital in the deed of the 1st July, as the date of the commencement of the tenancy would not give the lease a retrospective effect, (*Hopkins S. M. and Porter, J. M. J. TAWAKUL HUSNIN v. JEET AHIR*) **58 I. C. 500.**

S. 13 (6)—“Years” meaning of—Tenant readmitted within one year—Continuous holding.

The “years” referred to in S. 13 (b) of the Agra Tenancy Act is a calendar year. Where therefore a tenant was ejected on the 21st August 1914 and was re-admitted on the 1st July 1914, he must be held to have been re-admitted within one year from the date of his ejection, within S. 13 (b) of the Agra Tenancy Act. (*Ferard, S. M. J. BISMILLAH BEGUM v. CHUTTAN*) **54 I. C. 299.**

S. 14—Joint Hindu family—Holding let to different members—Ejectment—Tenancy if continuous.

A member of a Hindu joint family taking land on lease from a landholder in his individual capacity is the sole tenant of that landholder to the exclusion of the other members of the joint family. When he is ejected from the holding and his brothers are admitted as tenants the latter are not entitled to count the period of cultivation when their brother was recorded as tenant towards the period necessary for acquiring occupancy rights (*Hopkins and Harrison, J. M. J. WIDHIYA RAM v. SOBHA RAM*) **56 I. C. 764.**

S. 14—Zemindar—Permanent lessee from—Decree against—Attachment and sale of trees on land.

The holder of a decree against the permanent lessee of a zemindari is not precluded by S. 20 of the Agra Tenancy Act, from attaching and selling the trees standing on the land which belong to his judgment-debtor. Such attachment and sale do not involve a transfer of the interest of the lessee in the zemindari (*Tudball and Sultanian, J. J. KIRTARATH GIR v. RAGHU-NANDAN RAM*) **57 I. C. 198.**

S. 18—Mortgage of occupancy rights lapse of, on death of tenant—Position of mortgagee.

A right of occupancy is a personal heritable right and lapses when there is no one to inherit it. Where such rights are mortgaged and the tenant dies without issue, the mortgagee is determined and the mortgagee is liable to ejection at the instance of the zemindar (*Ferard S. M. and Harrison, J. M. J. RAJA RAM TEWARI v. BINDESHRI PRASAD*) **55 I. C. 868.**

Ss. 18 (c), 22 and (b)—Occupancy holding—Surrender by widow—Effect of.

AGRA TEN. ACT, S. 18.

The surrender by a widow of an occupancy holding inherited from her husband under S. 22 (b) of the Agra Tenancy Act extinguishes the occupancy right. No rights present or future, remain to persons who might otherwise have had a contingent right if she had retained the holding till her death or re-marriage. (*Ferard, S. M. and Harrison, J. M. v. RAM GOVIND PANDEY v. RAMKAL SINGH*. 54 I. C. 567.)

Ss. 18 (c) and 22 (b) and (e)—Occupancy holding—Surrender by widow—Effect of—Reversioner, if can receive holding

Under S. 22 (b) of the Agra Ten. Act a widow is entitled to surrender her occupancy holding and this surrender absolutely extinguishes the occupancy right. Possible reversioners under S. 22 (e) of the Act cannot revive it later when the lady who has surrendered it dies or re-marries. (*Ferard, S. M. and Harrison, J. M. v. GOVIND PANDEY v. DIPY KOERI*. 54 I. C. 572.)

S. 19—Non-occupancy tenant—Grove holder in a—Jurisdiction of Revenue Court—Ejectment. See (1919) DIG. COL. 12 RAMESH SINGH v. MIDHU LAL

42 ALL. 36.

S. 20 (b)—Execution of decree—Trees on ex-proprietary holding if liable to attachment and sale

Trees existing on an ex-proprietary holding are appurtenant to the holding and are not liable to attachment and sale in execution of a decree in view of S. 20 (b) of the Agra Ten. Act. (*Banerjee, J. J. PHAKI LAL v. BNJ MOHAN SINGH*. 54 I. C. 805.)

S. 22—Joint Hindu family owning tenure—Death of a member—Widow not entitled to succeed.

If one member of a joint Hindu family which has acquired an occupancy tenancy dies the "tenant" does not die and therefore S. 22 of the Agra Tenancy Act does not operate and the widow of the deceased member is not entitled to succeed. (*Tubail and Sulaiman, J. J. MENDYA v. JHUNYA*. 18 A. L. J. 769. 57 I. C. 272)

S. 22—"Sharing in cultivation"—meaning of—Boy of 8 or 9 doing petty work

A boy aged between 8 to 10 or 11 years, who lives with an agricultural relative and does such petty work as is usually done by boys of that age, cannot be said to be "sharing in cultivation" with the relative within S. 22 of the Agra Tenancy Act. (*Ferard, S. M. and Hopkins, J. M. v. BANSI RAM v. KUNJ BEHARI*. 54 I. C. 285.)

S. 22 (e)—Cultivation—Co-sharer—Co-sharer in part holding—Effect of.

To succeed to an occupancy holding under S. 22 (e) of the Agra Tenancy Act a collateral

AGRA TEN. ACT, S. 47.

must have co-shared in cultivation of the holding with the principal tenant and not with his widow.

A holding must be taken as a whole. Co-sharing in cultivation of a portion of it is co-sharing in cultivation of the holding. (*Ferard, S. M. and Harrison, J. M. v. RAM NARAIN GORAI v. RAMKAL SINGH*. 57 I. C. 51.)

S. 34—Ejectment—Mortgagor in possession—Dispossession—Resumption of cultivation

If a mortgagee in possession of land is dispossessed in due course of law, and after dis-possession re-enters on the land, he is a trespasser and liable to ejectment under S. 35 of the Agra Tenancy Act. (*Hopkins, S. M. and Porter, J. M. v. SHEO SHANKER LAL v. CHANDAN*. 57 I. C. 8.)

S. 34.—Grove—Cultivation—Status of grove holder—Ejectment by landlord

When grove land is brought under cultivation the holder thereof loses his rights and is liable to be treated by the landholder as a tenant under S. 34, Agra Tenancy Act, and to be ejected. (*Hopkins and Porter, J. M. v. LALA KISHORE SARIN v. RAMESHWAR*. 56 I. C. 980.)

Ss. 34 and 58—Grove—Sowing of fodder crop—Grove if altered to agricultural holding—Ejectment

The character of a recorded grove is not altered to that of an agricultural holding by the mere fact of a fodder crop being sown among the trees so as to render the occupier liable to ejectment under S. 58 read with S. 34 of the Agra Tenancy Act. (*Ferard, S. M. and Harrison, J. M. v. NIAZ HUSAIN v. TIKARAM*. 54 I. C. 626.)

S. 43—Landlord and tenant—Occupancy holding—Enhancement of rent—Rise in prices

In matters of enhancement of rent the only possible way of estimating the rise in prices is to compare prices obtaining at the time the rents were fixed with those obtaining at the time the suit is brought. A Court has to base its calculation on a stable and permanent rise in prices and not on exceptional prices obtaining under temporary conditions. (*Hopkins, S. M. v. RAM SAHEB CHAUDHURI DIARAM SINGH v. RISAL*. 57 I. C. 816.)

S. 47—Enhancement of rent—Effect on term of the tenancy.

A lease for a term of years providing for a rise in the rent in the last year of the lease confers no right on the tenant to continue in possession after the expiry of the period of the lease. To such a case S. 47 of the Agra Tenancy Act does not apply. (*Hopkins, S. M. and Harrison, J. M. v. MUSSAMAT HANIF UNNISSA v. RAM DAYAL*. 56 I. C. 46.)

AGRA TEN. ACT, S. 58.

—**S. 58—Ejectment suit—Question of proprietary title—Forum of appeal**

Where in an ejectment suit defendant pleads that he is not the tenant of the plaintiff but holds the land as his own *khudkasht* without the ability to pay rent to anybody, a question of proprietary title arises and an appeal lies to the District Judge and not to the Commissioner (*Hopkins, S. M and Harrison, J.*) CHANDAN SINGH v. BIJORA LAL 56 I. C. 549.

—**S. 63—Suit for ejectment—Limitation**

The Agra Tenancy Act lays down no period of limitation for bringing a suit for ejectment. The particular months specified in the Act for bringing such suits are prescribed for administrative convenience (*Ferard S. M and Harrison, J. M.*) MR SURSATI BIBI v. BHARAT RAI 55 I. C. 926.

—**S. 79—Civil or Revenue Court—Rent free grantee—Dispossession—Suit in ejectment.**

A suit by a rent-free grantee for recovery of possession as such grantee against his zamindar who has wrongfully ejected him is not provided for by the Agra Tenancy Act, and lies in the Civil Court (*Piggot and Walsh, JJ.*) GOBIND RAI v. BANWARI LAL 42 ALL 412.

18 A. L. J. 388 : 58 I. C. 594

—**S. 79—Fixed rate tenancy—Mortgage of—Dispossession of mortgagee, effect of—Right of mortgagor—Cause of action when arises.**

When the mortgagee of a fixed rate tenancy is dispossessed otherwise than in accordance with the provisions of the Agra Tenancy Act, the mortgagor's cause of action against the landlord under S. 79 of that Act arises, not from the date on which he may redeem the mortgage, but from the date of the dispossession of the mortgagee (*Hopkins, J. M.*) RAM NARAIN v. MUHAMMAD HASHIM ALI KHAN.

54 I. C. 293.

—**S. 79—Suit for possession of holding—Civil and Revenue Courts—Jurisdiction—Revision**

Where a person seeks to recover possession of his holding the suit should be brought under S. 79 of the Agra Tenancy Act and over such a suit the Revenue Court alone has jurisdiction (*Knox J. J. TAJAMMAL HUSSAIN v. ALI BABA DUR KHAN* 23 O C 281 : 56 I. C. 946).

—**S. 79 (b)—Jurisdiction—Civil or Revenue Court—Suit for value of crops wrongfully cut and taken by landlord—Forum.**

A suit by a tenant for recovery of the value of certain crops grown by him but forcibly cut and removed by the landlord, plaintiff not alleging dispossession by the landlord does not lie under S. 79 of the Tenancy Act and

AGRA TEN. ACT, S. 164.

is cognizable by the Civil Court (*Banerji, J.*) RAM SARAN DAS v. HARI KISHEN KOERI

18 A. L. J. 434 : 58 I. C. 511

—**S. 95—Suit by tenant for declaration of rate of rent—Subsequent claim for rent at higher rate—Res judicata**

Where in a suit brought by a tenant under S. 92 of the Agra Tenancy Act, the Court declares the rate of rent payable by him, a subsequent suit by the landlord for rent at a higher rate is not maintainable (*Talibzil and Sulaimani, JJ.*) TAKU ISHAI SINGH v. KALUA 57 I. C. 683.

Ss. 154 and 177 (f)—Place of Jurisdiction—Coterrible—Appeal—Civil Court.

A suit under S. 154 of the Agra Tenancy Act for the resumption of land held rent free is cognizable only by a revenue Court and no question of jurisdiction arises; it however, such a plea is urged that would not confer jurisdiction on a Civil Court to entertain an appeal in the suit (*Banerji, J.*) GULABI v. MITHAN LAL

58 I. C. 661.

—**S. 159—*C. P. Land Revenue Act (III of 1911) S. 144—Suit by lambardar—Liability of co-sharer for revenue.***

The word co-sharer, in S. 159 of the Agra Tenancy Act means a person holding proprietary rights in the mahal who is jointly and severally liable for land revenue with other proprietors in the mahal and whose revenue is payable through the lambardar under the provisions of S. 144 Land Revenue Act

Some lands in a village, were once held revenue-free by the deots but were assessed to Government revenue. The patti lambardar of the village had to pay the revenue to the Government and sued the defendants for its recovery on the ground that they were liable to pay it. The defence to the suit was that the revenue was payable by the general body of co-sharers and not the defendants and the suit was not maintainable.

Hold, assuming that the liability for the land revenue of these plots of land lies on the defendants, the defendants would be jointly and severally responsible for the revenue of the mahal and the payment of the revenue assessed upon these plots would be rightly made on behalf of the defendants by the lambardar (*Piggot and Walsh, JJ.*) MUKLI DHAR v. BABA RAM 42 ALL 311 : 18 A. L. J. 121 : 55 I. C. 74.

—**S. 164—Actual collections—Sums collected as arrears of previous years—Profits—Calculation of Gross rental or on actual collection is inclusive of arrears—Misconduct.**

In a suit under S. 65 of the Tenancy Act the decree should be passed either on the basis of the gross rental, or on the basis of actual

AGRA TEN. ACT, S. 164.

collections made in the years in suit whether in payment of the demand or those years or as arrears due from previous years but collected in the years in suit. The plaintiff is not entitled to get a decree on both the basis together.

The question of negligence or misconduct on the part of the Lambardar under S. 164 (2) is a mixed question of law and fact, and the finding of facts is binding on the High Court in second appeal (*Ryves, and Golul Prasad JJ. v. CHHAB RAJI KUAR v. GANGA SINGH*)

18 A. L. J. 863

S. 164—Khudkhasht of lambadar or—Usufructuary mortgage—Agreement with mortgagee to pay low rent for resulting ex-proprietary tenancy—Other sharers not affected

A lambardar owned certain khudkhasht lands the rent of which was deemed to be Rs 241 in calculating the profits of the village. He executed a usufructuary mortgage of the khudkhasht and agreed with the mortgagee that the rent to be paid by himself as ex-proprietory tenant would be Rs 100 only. The other co-sharers were no parties to this agreement or to the mutation proceedings, under Ss. 32 and 36 of the Land Revenue Act in which this rent was entered in a suit for profits against the lambardar, held that the rent of khudkhasht lands should be calculated at the statutory rate payable by ex-proprietary tenants (i.e.) 5/8ths of Rs 241 and not at Rs 100 (*Sulaiman and Kanhaiya Lal, JJ. v. BALDEO SINGH v. CHHIL BEHANI LAL*)

18 A. L. J. 944.

Ss. 164 and 194—Lambardar—Liability for profits—period anterior to appointment

In a lambardari mohal the lambardar is, from the date of his appointment, the agent appointed to act on behalf of the co-sharers, and he is the only person who under S. 194 (1) of the Agra Tenancy Act has a right to institute suits against defaulting tenants for the recovery of arrears of rent which accrued due prior to the date of his appointment and which are not time barred.

A distinction may require to be drawn in many cases between the degree of responsibility attaching to lambardar in respect of arrears of rent which had accumulated during an interregnum prior to his appointment, and his responsibility for the realisation of current demand as it falls due after the date of his appointment. (*Piggot and Walsh, JJ. v. MOJL FATIMA v. ALI AKBAR*) 18 A. L. J. 435.

42 All. 414: 56 I. C. 112.

Ss. 164, 201—Suit for profits—Plaintiff a recorded co-sharer at date of suit—Subsequent amendment of record by Revenue Court—Amendment—Not retrospective in operation.

AGRA TEN. ACT, S. 177.

At the date of instituting a suit for profits under S. 164 of the Tenancy Act the plaintiff was a recorded co-sharer, and he was a recorded co-sharer in the years to which the suit related. The debts denied the plaintiff's title, but the Court gave the plaintiff a decree in accordance with his recorded share. While an appeal therefrom was pending in the Court of the District Judge, plaintiff's name was on application by defendant removed from the khewat by the Revenue Court. On the basis of this removal the District Judge decided the appeal against him and dismissed the suit. Held, that under S. 201 of the Tenancy Act the District Judge was not entitled to go behind the record of the plaintiff's name as a co-sharer on the years in suit and at the date of suit, or to take into consideration the subsequent amendment of the record by the Revenue Court and treat it as if it were the decision of a civil Court; and the amendment did not operate in regard to the years in suit but operated only from the date on which the order making it was passed (*Tudball and Sulaiman, JJ. v. LACHMAN PRASAD v. SHITARO KUNWAR*)

18 A. L. J. 1008.

S. 177—Objection to jurisdiction overruled—Appeal to District Judge. See (1919) DIG. Con. 14 Go KARAN SINGH v. GANGA

42 All. 91.

S. 177—Proprietary title—Meaning of Appeal—District Judge.

Under S. 177 of the Agra Tenancy Act an appeal lies to the District Judge from the decision of a Revenue Court in a suit in which the question of proprietary title has been in issue in the court of first instance and is a matter in issue in the appeal. The words "proprietary title" refer not to a disputed title to a tenure or tenants right but only to the Zemindari. Therefore an order of ejectment in a suit by a usufructuary mortgagee of a fixed rate tenure in which defendant pleads that he is not plaintiff's sub-tenant, is not appealable to the District Judge as there is no question of proprietary title involved in the suit (*Tudball, J. v. GUR CHHARAN KUAR v. DEOKINANDAN KUAR*)

58 I. C. 760.

S. 177 (c) —Appeal—Civil or Revenue Court—Proprietary title—Question as to

The question whether a defendant is holding as a sub-tenant or is cultivating the land as khudkhasht with no obligations to pay rent to anyone is a question of proprietary title within S. 17 (c) of the Agra Tenancy Act. In such a case an appeal lies to the District Judge and not to the Commissioner. (*Hopkins S. M. and Harris v. M. MUSSAMMAT BADAMI v. K. W.*)

56 I. C. 801.

S. 177 (c) Appeal—Proprietary title—Question as to—Co-sharer claiming to holding proprietary possession.

AGRA TEN. ACT, S 177.

Where in an ejectment suit the defendant a co-sharer in the village claims to hold in proprietary possession the land from which it is sought to eject him, a question of proprietary title is raised under S. 177 (e) of the Agra Tenancy Act. An appeal in the suit therefore lies to the District Judge. (*Ferard, S. M. and Harrison, J. M. v. TILAKDHARI SINGH and RAMPAL AHUJA*, 57 I. C. 321.

—S. 177 (e)—Co-tenancy—Defence of—No question of proprietary title—Jurisdiction—Question not raised in Lower Court

In a suit for ejectment brought in a Revenue Court the defendant pleaded that he was a co-tenant of the plaintiff and not his sub-tenant. Held that the dispute did not relate to a question of proprietary title and no appeal lay to the District Judge.

Held, further that the plea of jurisdiction could be taken in the High Court although not raised in the lower appellate court, as the question was one purely of law and in no way involved a question of fact (*Tudball and Sulatma, JJ. v. DAULATIA and HARGOBIND*.

18 A. L. J. 928 57 I. C. 206.

—S. 177 (e)—Suit for ejectment—Plea of proprietary title—Decision—Appeal—Forum.

If in an action of ejectment the defendant sets up a claim of proprietary title by adverse possession and an issue is drawn in respect of it, a question of proprietary title is in issue, and a decision of that question is appealable to the District Judge. (*Hopkins, S. M. and Harrison, J. M. v. MUHAMMAD MOHSIN KHAN and SIEJO PRASAD*, 55 I.C. 930.

—S. 202—Jurisdiction—Civil and Revenue Courts—Suit for ejectment of trespasser, if cognizable by Civil Court—Plea of tenancy

A suit to eject an alleged trespasser is cognizable by a Civil Court and not by a Revenue Court. If in such a suit the defendant pleads that he is a tenant of the plaintiff the procedure laid down in S 202 of the Agra Tenancy Act should be followed (*Tudball and Ryves, JJ. v. RAGHUNATH and GUNESH*, 42 All. 222 54 I.C. 381.

ALIYASANTHANA LAW—Ejman—Suit for removal of—Declaration of unfitness of anandraman—Grounds for exclusion—Management entrusted to junior member—Power of Courts. See (1919) DIG COL. 17. *NEMANNA KUDRE v. ACIMCHENGSC*, 43 Mad. 319 : 11 L.W. 49 : 27 M.L.T. 88 ; (1920) M.W.N. 117.

ALLAHABAD HIGH COURT RULES, CHAPTER I, RULE 3.—Power of vacation Judge to stay execution of decree on appeal. See C. P. CODE O 41, R 3. 18 A.L.J. 1121.

ALLUVION AND DILUVION—Acretion—Non-tidal and non-navigable

ALLUVION AND DILUVION.

rivers—Accretions—Right to—Common law of India—Subversion—Effect of.

The accretions in non-tidal and non-navigable rivers in India belong to the riparian landlords. It is part of the common law of India that the ownership of river beds *usque ad medium filum aquae* is presumed to vest in the riparian owners. But this presumption is capable of being rebutted, 41 M. 340, 42 M. 239 ref

A person does not lose his title to land by its mere submersion under water so long as the land is identifiable. Non-resistance to *vis major* such as flood, which causes the change of a river course, cannot be treated as evidence of acquiescence or of abandonment of rights by a riparian owner (*Spencer and Krishnan, JJ. v. OLAPPAMANANNA NANAKAL and SECRETARY OF STATE FOR INDIA*, 12 L.W. 371 : 55 I.C. 770.

—*Bengal Alluvion and Diluvion Regulation (XI of 1825) S 4 (1)* gradual accession, what is—Gained meaning of—Common law of England, applicability of to India—Possession and dispossess—Presumption as to continuity of possession until contrary is shown

S. 4 clause (1) Regulation XI of 1825 applies to cases of gradual accession from public domain or territory e. g. river or sea belonging to the state and does not refer to land confiscated from another private proprietor, as has been authoritatively laid down by the Judicial Committee.

(1870) 13 M. I. A. 467 followed. (1862) 1 Marshall Report 136 ; 1858 2 W. R. 312 ; (1871) 15 W. R. 461 ; (1875) 24 W. R. 317 referred to (1916) 1 P. L. J. 536 dissented from.

S. 4 (1) also has no application where the accreted land in dispute is shown to have reformed on its old identifiable site. (1919) 5 P. L. J. 11, P. L. T. 193 relied upon.

The English Common Law has no application to the mohussi towns in India except as rules of justice equity and good conscience.

(1914) 42 Cal. 488 applied.

Where the plaintiff brings a suit for recovery of possession he has to prove his possession and dispossession within 12 years from the date of the suit but possession is not always the same thing as actual user.

When land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes, at such a time and under such circumstance that state naturally would and probably did, continue till within 12 years before suit it may properly be presumed that it did so continue and that the previous possession continued also until the contrary was proved.

(185) 9 Cal. 744 relied upon.

Per Das, J. (obiter):—The word 'gained' in S. 4 (1) does not mean land washed away and afterwards identified as having reformed on its old site. (*Das and Adami, JJ.*)

APPEAL.

BARU BRAHM-NAND SINGH v. DUND BAHADUR SINGH. I. P. L. T. 229 (1920) Pat 245 56 I. C. 344

APPEAL—Complaint of, from decree set aside on review. See 1919 Dig. Col. 19 MALAWA RAM v. MADAN GOPAL 55 I. C. 763.

—Connected suits—Appeal filed in one—Conflicting findings.

Plff. instituted a suit for rent as also a title suit. An appeal was preferred against the decision in the rent suit only and the Judge came to certain findings different from those arrived at by the Munsif in the title suit.

Held, though no appeal was preferred from the decision in the title suit the Judge was competent to deal with the appeal before him and also such matters as were necessary for the decision of the appeal. *Shamsul Huda, J.J.* NARINDEO DAS v. DILIP KUMAR MONDAL 56 I. C. 282.

—Costs—No appeal unless question of principle involved.

An appeal raising a question of costs only, where no question of principle is involved, is incompetent. *Fletcher and Cuning, JJ.* CHETIA CHAITANA DUTT v. BISWESHWARI BISWESHWAR CHOWDHURY. 47 Cal. 67 56 I. C. 384.

—Forum Erroneous valuation for court fees—District Court—High Court.

An appeal from a decree which on the face of it was granted in a suit of the jurisdictional value of Rs. 5,500 was filed in the High Court. The figure Rs. 5,700 found its way into the decree apparently for the reason that the plff. assessed the market value of the land in suit at that sum, although the real value of the suit for purposes of jurisdiction calculated at 50 times the *jama* was only Rs. 615.

Held, that the appeal lay to the District Judge (*Chevis, C.J., and Le Rossignol, JJ.*) DAIM, SHAH v. MUSA DAS.

2. Lah. L. J. 300

—Maintainability of—Arbitration—Order superseding—Decree in accordance with award—Appeal against.

A reference to arbitration was superseded and case decided on the merits. The order of supersession was confirmed on appeal. In the meantime there was an appeal against the decision. On the merits the lower appellate court held that an award having been made in the arbitration proceedings the arbitration could not be superseded and that a decree must be passed in accordance with the award.

Held, that a second appeal was competent against the decision of the lower appellate court and that the order superseding the arbitration having been confirmed on appeal, the lower appellate court was precluded from reopening the question. (*Adami and Sultan Ahmed, JJ.*) SHONE THAKUR v. CHANDESHEWAR JHA. 55 I. C. 1.

APPEAL.

—Maintainability of—Decree of lower court imposing conditions—Conditions not performed.

Where a decree imposes certain conditions on the plaintiff and provides for the dismissal of the suit in default of his complying therewith the mere fact of his failure to comply would not deprive him of his right to appeal against the decree. (*Beacheroff, J.*) EPASAN ALI v. RAM KUMAR DAS.

55 I. C. 375.

—Maintainability—Decree set aside on review during pendency of the appeal. See 1919 Dig. Col. 21 BASHESWAR NATH v. RAM KISHEN DAS.

1 Lah. L. J. 191 54 I. C. 966

—Maintainability of—Judgment by Consent—claims in a general account—Limitation—waiver of the plea.

In a suit on an account stated the account turned out to be a deliberate fabrication and reliance was then placed upon the items of claims contained in the general account, each one of them being barred by limitation. The defendants waived the plea based on limitation and proceeding on this footing the Court gave a judgment for plaintiffs for a particular sum.

Held, that the judgment was a judgment by consent and as such there could be no appeal; but if it were not regarded as a consent judgment the Appellate Court in adjudicating upon the claims must necessarily examine into the conditions associated with the bar of limitation affecting the items in the general account. (*Lord Buckmaster*) SRI RAMACHANDRA DEO GARU v. CHAITANA SAHU.

39 M. L. J. 68 : 18 A. L. J. 625 : 28 M. L. T. 97 : 1920 M. W. N. 366 : 12 L. W. 260 : 22 Bom. L. R. 1313 : 24 C. W. N. 1055 : 56 I. C. 539 : 47 I. A. 200.

—New case—Not to be allowed to be made without giving opponent opportunity to meet it.

In a suit for pre-emption deft resisted plff. claim on the strength of a deed of gift. The validity of the gift was not questioned in the trial and plaintiff's suit was dismissed. On appeal plff. challenged the validity of the gift deed on the ground that it was not properly attested and that attestation had not been proved.

Held, that the plff. having virtually admitted the validity of gift at the trial ought not to have been allowed to challenge it in appeal. At any rate the appellate court ought not to have entertained the objection without affording deft opportunity of proving the due attestation of the deed. (*Tudball and Rafique, JJ.*) LALITA PRASAD v. NASIR KHAN.

56 I. C. 179.

—Order granting leave to sue a receiver for damage caused by his negligence whether lies—See C. P. Code, S. 104 and O. 43, R. 1.

22 Bom. L. R. 1126.

APPEAL.

—Presentation of, without copy of decree—Invalid *See C. P. CODE O. 41, R. 1*
54 I.C. 36.

—Right of—Decree-holder—Suit to establish right to property attached and sold in execution of decree.

In a second appeal arising out of a suit for a declaration to the effect that a certain vacant site was not liable to attachment and sale in execution of a decree, it was contended that the decree-holder having parted with her interest in the property by the sale in favour of the auction-purchaser had *no locus standi* to prefer the appeal to the District Judge.

Held, that the decree holder was aggrieved by the decision which rendered the sale effected at her instance and in execution of her decree liable to be set aside as soon as the plaintiff's father died. The decree-holder was then liable to make good the purchase money to the auction-purchaser, and in order to avoid this possibility she was fully entitled to appeal from the decree of the first Court. (*Rattigan, C. J. RUPA v. UTTAM SINGH*.
2 Lah. L.J. 158)

—Right of—Person not *ex facie a party* but claiming to be beneficially interested.

Where a decree is passed against a person and another person seeks to appeal from the decree on the ground that the party on record is his benamidar but his character as bene-ficiary is denied by the alleged benamidar *held* that the beneficiary could not appeal.

R. 5 of Chapter VI of the Patna High Court rules had no application as the decree was not against a trustee as such. (*Miller, C. J. and Coutts, J. GOBIND RAM v. BADRI NARAIN*.
5 Pat. L.J. 256 : 1 P.L.T. 159 : 55 I.C. 881)

APPELLATE COURT—Costs—Decision of trial Judge—Interference on matters of principle *See C. P. CODE S. 35.*

24 C. W. N. 352.

—Damages—Quantum of—Interference with award of trial judge—When justified *See DAMAGES*.
24 C. W. N. 352.

—Findings of fact—Appreciation of evidence.

Per Richardson, J.—A Court of Appeal should in general be slow to differ from the trial Court on a question of fact depending on the credibility and veracity of witnesses. But there are cases where the trial Judge has approached the evidence from a wrong stand-point or has applied to that evidence wrong standards of probability or improbability. If a trial Judge says that a servant speaking for his master ought never to be believed, the appeal Court is not obliged to accept his estimate of the servant's evidence. In such a case the question is not merely a question of the credibility of the particular witness, the witness has not been given a fair chance. These are verdicts or findings which are contrary to the

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weight of evidence (*Richardson and Gretes, J.J. HFM CHANDRA ROY CHOWDHURY v. BEPIN BHUAN SA. A*).
24 C. W. N. 800 : 58 I.C. 879

—Judgment of—Disagreement with finding of first Court—Duty of Appellate Court

If an Appellate Court disagrees with the finding of the trial Court, it should come to an independent finding of its own upon the evidence on the record (*Chatterjee and Panting, J.J. MAJAHAR DIN KARIM v. MUSAIR-BAHAMAN BISWAS*.
51 I.C. 248.)

—New point—Interpretation of statute

A point not urged in the Court below but which depends on the construction of a statute can be raised on appeal. (*Muller, C. J. and Adamji J. ALLAN MATTHEWSON v. DR. BOARD OF MANBUHM*.
1 Pat. L.T. 269 (1920) Pat. 193 58 I.C. 749)

—New point, when allowed—Question of law.

A pure question of law not depending on the determination of a question of fact, though not raised in the primary Court nor mentioned in the memorandum of appeal, and is not one of jurisdiction in the sense of competency of the Court to entertain the suit can be raised at the hearing of appeal, if it goes to the root of the matter and raises the question whether the Court was competent to grant the relief claimed by the plaintiff (*Moorjoe and Fletcher, J.J. RAM KISSEN JOYDOYAL v. FOORAN MULL*.
47 Cal 733 : 31 C. L. J. 259. 56 I.C. 571)

—Power of—conviction of accused under S. 457, Penal Code—Right of appellate court to convict under S. 456 Penal Code *See PENAL CODE Ss. 456 and 457.*

1 Pat. L.T. 221.

—Power of, inadmissible evidence admitted by lower court—Procedure *See BEENG, TEN. ACT, S. 103.*
1 Pat. L.T. 224.

—Powers of to examine parties—C.P. Code S. 107: *See (1919) Dig. Col. 21 JANG BAHDUR RAI v. PARWATI KUNWAR.*

42 All 48.

—Question of fact—Decision of trial Judge, not to be lightly set aside *See (1919) Dig. Col. 25. BEJOY KRISHNA MUKERJEE v. NRITYA GOPAL SINGH.*
47 Cal 337 : 24 C. W. N. 972 : 54 I.C. 736.

ARBITRATION—*See also C. P. Code Sch. d. II*

—Arbitrators—withdrawing of one—Procedure.

Where of two arbitrators appointed to decide a case one withdraws pending the arbitration the remaining arbitrator cannot proceed with the case and file an award. The Court should in such a case appoint another arbitrator in place of the arbitrator who has withdrawn or supersede the arbitration and

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decide the case on the merits. *Willerj. & J. v. THAKAR DAS & NARAIN* 2 Loh 55 637 56 I.C. 344.

Award—Ex parte proceedings—arbitrators when justified in hearing ex parte.

It is the duty of the arbitrators hence they proceed ex parte to see that the parties had sufficient notice to enable them to appear and put their case before the arbitrators. If a person is guilty of a final, irreconcileable or collusive refusal to have anything to do with an arbitration the arbitrators need not give a notice but might proceed ex parte. (*Ranik. & J. v. Louis DREYFUS AND CO. & PURUSHOTMA DAS NARAIN DAS.* 47 Cal. 29 56 I.C. 325.

Award—Legality of injunction—Discretion.

It is a matter of procedure and not of substance that the party complaining of the invalidity of an award would have to apply to the Court to have the document taken off the file. An interlocutory injunction should not be granted upon novel considerations interfering with arbitrators by reason of difference in practice between the Arbitration Act and the provisions of the rules 23 C.W.N. 611-614 (1), (*Sanderson, C.J., Mookerjee and Fletcher, JJ. v. Joilal & Co. v. Gorakhpur Bharatika*.

47 C. 611-31 C.L.J. 167
24 C.W.N. 612-55 I.C. 755.

Award—Minor parties—Negligence of guardian—Award if binding on minors—Reversionary interest.

Where certain minor parties to a reference are not properly represented in the arbitration proceedings and their guardian is grossly and fraudulently in his duty to protect the interests, the award passed by the arbitrators is not binding on the minors. (*Outfield and Eakewell, J.J. v. KANTALA VENKAT ARUNESH MACHARLU & PERUNDEVAMMA* 56 I.C. 593.

Award—Objections to—Dismissal for default—Decree in accordance with award—Restoration—Application for.

A suit was referred to arbitration and the arbitrators made an award against which the plaintiff filed certain objections. The objections were subsequently dismissed for default and the court passed a decree in accordance with the award. That plaintiff applied for restoration of his petition of objections. Held that the passing of the decree did not operate as a ground for refusing to entertain the application for restoration on its merits (*Ryres and Gokul Prasad, JJ. v. Makund Ram & Naubat Singh*.

18 A.L.J. 756: 57 I.C. 220.

Award—Order superseding—Decision on merits—Appeal—Lower appellate court passing decree on award—Second appeal—Maintainability of. See APPEAL, MAINTAINABILITY OF.

55 I.C. 1.

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Award—Setting aside of—Error of law on the face of the award—Illegality.
Bijayi Cotton Textile Association's Kr. 23 and 25—Vendor and Purchaser—Person Comitting fraud on Contract—Right to claim damages. See—(1919 Dig Col 40) *JIVRAJ BAIJAN SPINNING AND WEAVING CO. v. BAWB.*

44 Bom. 780.

Award—Setting aside—Forgery—Disputes arising from Contract—Power of arbitrator to determine existence of contract itself.

A and B entered into several contracts for the sale and purchase of Hessian which were contained in Advice Notes. The Advice Note No. 31 contained a writing which stated that it was a settlement of Advice Note No. 29. The contracts provided that all disputes whatsoever arising on or out of the contract should be referred to arbitration. Disputes having arisen they were referred to arbitration and an award was given in favour of B. A applied to set aside the award on the ground that the said writing on the Advice No. 31 was forged and so the arbitrators had no jurisdiction to decide the question of forgery which went to the very root of the contract.—

Held, that it was competent for the arbitrators under the terms of the submission to decide whether or not this interpolation was in the contract as originally made (*Graves, J. v. ALIHOY MAHOMED & BAIJAN HALO RAM.* 24 C.W.N. 567.

Award—Successive awards—Several and separate contracts.

There may be successive awards even in the same matter: 21 C.W.N. 767 (1). Where there are several and separate contracts the right conferred by the arbitration clause is not exhausted as soon as a complete award is made upon the first reference (*Mookerjee, and Fletcher, JJ. v. PALMURUND RINA & GOHAM BHOTIA* 31 C.L.J. 391.
24 C.W.N. 775-56 I.C. 828.

Award—Validity of—Absence of one of the arbitrators.

The absence of one of the arbitrators at one of the sittings when nothing material which in any way affected the subsequent award was done does not in any way vitiate the award. 12 Mad 113 and 7 All 523 ref. (*Krishnan, J. v. VAGANASI RAMANNA & KILLAMSETTI APPANNA.* 12 L.W. 505.

Award—Validity of—All partners not consenting to reference—Award invalid. See C.P. CODE Sec II, PARA 1

31 C.L.J. 150.

Award—Validity of—Award against a firm.

An award against a firm is not bad. The provisions relating to the execution of a decree against a firm apply to an award which

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has been filed. (*Rankin, J. L. LOUIS DREYFUS AND CO v PURUSHOTTAM DAS NARAIN DAS*
47 Cal. 29 : 56 I.C. 325.)

—Award—Validity of—Award embodying agreement between parties

The fact that an award embodies an agreement arrived at between the parties does not prevent its being a valid and binding award. 22 A 224 fol. An award when delivered is binding on the parties. (*Shadi Lal and Broadway, II*) *DARBARI LAL v WASU MALIK*

56 I.C. 115.

—Award—Validity of—Award not signed at same time in the same day by all the arbitrators—Misconduct.

An award is not invalid simply because it was not signed on the same day and at the same place by all the arbitrators.

The Court is bound to pass a decree in accordance with the award.

12 M 113 ; 7 A 523; A. W. N (1885) 139 dist. (*Scott-Smith and Abdul Raoof, JJ. ABDUL RAHMAN v SHAHAB UD-DIN*.)

1 Lah. 481 : 55 I.C. 883.

—Award—Validity of—Compulsion on arbitrator—Use of threatening language by Court—Revision.

A Court has no authority to compel a private arbitrator to arbitrate against his own will. If an arbitrator, after having recorded some evidence and submitted his decision upon some of the issues, refuses to arbitrate any further, the Court has no authority to force him to do so by threatening him with a notice to show cause why he should not be charged with contempt of Court. An order conveying such threat and an award forced thereby from the arbitrator after his refusal would be set aside in revision. 7 All. 20 rei (*Sulaiman and Kanhaiya Lal, JJ. BASDEO MAL GOBIND PRASAD v. KANHAIYA LAL LACHMI NARAIN*)

18 A. L. J. 952.

—Award—Validity of—Concurrence of all the arbitrators essential.

An award to be enforceable in law, must be the award of all the arbitrators without difference. (*Bakewell and Odgers, JJ. AYYASAMI MUDALIAR v. APPANDAI NYNAR*)

38 M. L. J. 145 : 54 I. C. 912.

—Award—Validity of—Consent of parties—Decision on.

The rule that an award is not open to objection on the sole ground that it merely reproduces an agreement come to between the parties, applies only were the consent of the parties is regarded by the arbitrators as evidence that the settlement proposed is fair to all.

A guardian is in competent to bind his ward's reversionary interest by a reference to arbitration. (*Oldfield and Bakewell, JJ.*) *KANTALA VENKATA KRISHNAMACHARLU v. KANTALA PERUNDEVAMMA.*

56 I. C. 593.

—Award—Validity of—Misconduct of arbitrator—Decision on private knowledge.

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When in an agreement referring a dispute to arbitration the arbitrator is not given a power to decide the case on his own knowledge and without taking evidence but he does so, he is guilty of misconduct which makes the arbitration null and void. (*Lindsay, J. LACHMI NARAIN v SHEO NATH PANDEY*.)

42 All. 185 : 18 A. L. J. 7 : 54 I. C. 443.

—Award—Validity of—not made in time fixed

An award which is not delivered within the time fixed by the court is a nullity. (*Le-Rossignol, J. ZAFIR v GHARIB ULLAH*.)

55 I. C. 221.

—Award—What constitutes.

The mere approval of a compromise arrived at between the parties before an arbitrator is not an award. (*Mittra, A. J. C. SHANAKR C. GOVINDA*.)

54 I. C. 311.

—Award—What is—Parties compromising suit after reference—Arbitrators reporting compromise to court and asking court to pass a decree accordingly—Report not an award. See C. P. CODE O. 32, R. 7.

55 I. C. 218.

—Contract to refer—Cross Contracts containing similar provisions—Effect of.

Where there is a contract for the sale of goods and a subsequent cross contract containing the same clauses, for the same quantity of goods of the same kind and for the same delivery, the obligations under the earlier contract are extinguished, being cancelled by the later cross contract, which has the effect of fixing the difference to be paid by one party to the other. It is not open to either of the parties to the earlier contract to claim arbitration, there being no difference which is referable to arbitration, mere non-payment not amounting to such a difference. 30 B 205 ref. (*Crump, A. J. C. and Kemp, A. J. C. FIRM OF POKERDAS KISHINDAS v. FIRM OF VISHNUJI GORDHANDAS*.)

56 I. C. 514

—Dispute, what amounts to—Claim admitted—Payment withheld under a claim of right, whether a dispute—Reference made under original contract after a settlement—contract if valid—Interest—If arbitrator may allow though not provided for in the contract. See (1919) Dig. Col. 37. *UTTAM CHAND v. MAHOMED JEWIA.*

54 I. C. 285.

—Reference to—Agreement for—Cancellation of—Long inaction of parties—Effect of. See C. P. CODE SCH. II, PARA. 17 (4)

54 I. C. 126.

—Reference—Award during pendency of suit—No application for stay of suit—Effect of—Award if valid.

Where an action has been commenced upon a contract which contains a provision for reference to arbitration even if a reference to arbitration has been made before the com-

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mencement of the suit, the award is of no effect unless the suit has been stayed pending the arbitration. If the Court has refused to stay an action, or if the defendant has abstained from asking it to do so, the court has seen of the dispute and it is by its decision, and by its decision alone, that the rights of the parties are settled. (1912) 3 K. B. 257 : 46 Cal. 1041; 41 Mad. 115, ref. (*Mookerjee and Fletcher, JJ.*)

RAM PROSAD SURAJMULL v. MOHAN LAL LACHMINARAIN. 47 Cal. 752.

—Reference to—Parties not consenting to—Award invalid See C. P. CODE, SCH. II PARA. 1. 31 C. L. J. 150.

—Settlement—Re-opening of—Grounds for—Fraud.

A settlement made by arbitrators or mediators is not liable to be re-opened except on the ground of fraud. (*Abdur Rahim and Aylng, JJ.*) RAMANATHAN CHETTIAR v. MUTHIAH CHETTY. 43 Mad. 428:

38 M. L. J. 247 : 11 L. W. 405 : 27 M. L. T. 242 : 56 I. C. 358.

—Stay of—Contract impeached for fraud and misrepresentation.

An arbitration proceeding is to be stayed when a plaintiff impeaches a contract on equitable grounds 23 C. W. N. 534 foll. (*Sanderson, C. J. and Fletcher, J.*) G. M. BIRLA AND CO., v. JOHURMULL PREMSUKH

31 C. L. J. 158 : 55 I. C. 817.

ARBITRATION ACT (IX of 1899)
Ss. 2, 4 (b), 5 and 19—Reference before suit—Award after—If a bar to suit.

A suit is not barred by a reference to arbitration made before the award in which is delivered after the suit.

Held, that the suit was not barred by the reference before and the award after the suit (1912) 3, K. B. 257 ref to 41 Mad 115 foll

Per Kemp, A. J. C. The case would be different if by a reference and award before the suit the rights and liabilities of the parties had been determined at the date of the suit. (*Kemp and Raymond, A. J. C.*) RAMCHAND GURUDASMAIL v. GOBINDRAM.

13 S. L. R. 193 : 56 I. C. 150.

—Ss. 2, 15 and 19—Arbitration—Submission to three arbitrators—Stay of suit—Jurisdiction of Court.

The Court has jurisdiction under S. 19 of the Arbitration Act, to stay a suit where there is an agreement between the parties to refer any matter in dispute to three arbitrators. A submission providing for a reference to three arbitrators is not outside the scope of the Indian Arbitration Act.

The words "a submission to which this Act applies" in S. 19 of the Arbitration Act are intended to provide for the case where a suit is filed in an up-country Court in an area to which the Act has not been applied though part of the cause of action has arisen in a

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Presidency town That Court would have power to stay the suit if the submission was one to which the Act applies or in other words if the suit could with leave or otherwise have been filed in a Presidency town. 31 Bom 236 dissented from. (*Pratt, J.*) IN RE BABALDAS KHEMCHAND 22 Bom. L. R. 842 : 57 I. C. 997.

—S. 4 (6)—"Submission"—Meaning of—Inference from documents—Clause fixing time for appointment of arbitrator—Waiver.

"Submission" means a written agreement signed by both parties, to submit differences to arbitration and this agreement may be collected from a series of documents even though connected by parol evidence and the signature to bind the party signing. Where it was printed on the indent form that disputes arising between the vendor and the vendee would be referred to arbitrators one appointed by each party, and the indent form was filled up and signed by the purchaser held that the submission was binding on him.

Under one of the clauses of the agreement disputes arising between parties were to be referred to the arbitrators appointed in Delhi, one by the vendor and another by the vendee and if either party failed to appoint one within 20 days of the receipt of letter from the other party, the decision of only one arbitrator was to be final.

The purchaser refused to make the appointment denying that there was a submission whereupon the sole arbitrator appointed by the seller passed an award before the period of twenty days had elapsed.

Held, that the failure to give the requisite number of days for the appointment was fatal to the award of the sole arbitrator who had no jurisdiction to pass it.

The refusal and failure to appoint an arbitrator did not amount to the waiver of his right by the purchaser, as the period of 20 clear days had not elapsed, and the award made by the sole arbitrator was bad in law.

When a Court is asked to file an award it has to see whether it is enforceable in the same way as a decree would be enforceable if it was a decree (*Piggot and Walsh, JJ.*) SUKHAMAL BANSIDHAR v. BABU LAL KEDIA & CO. 42 All. 525 : 18 A. L. J. 652.

—Ss. 12 and 13—Arbitration, award—Time for making award not specified—Application to set aside—Extension of time for making award—Jurisdiction of Court—C. P. Code, O. 41, R. 33—Appeal against order refusing to extend time, See (1919) Dig. Col. 35. TEJPAL JAMUNDAS v. NATHMULL & CO. 54 I. C. 668.

—S. 14—Award—Ground of attack—Suit to impeach award when maintainable.

When an award under the Indian Arbitration Act, has been made and fled, a party

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affected thereby can maintain a suit to impeach it on grounds not included with in S. 14 of the Indian Arbitration Act.

Where a ground of attack goes to the root of the matter and arises as it were before the constitution of the domestic forum, a suit is maintainable for the investigation and determination of the controversy according to the procedure prescribed by law.

Where the grounds of attack are completely covered by S. 14 of the Indian Arbitration Act, an application is the exclusive and not merely an alternative remedy, the adjudication by a court other than a Chartered High Court, will be final and not liable to be challenged by way of appeal : 5 Bur. L. T. 155. (*Mookerjee and Fletcher, J.J.*) RADHA KISSEN KHETRY v LUKSHMI CHAND JHAWAR

24 C. W. N. 454 : 31 C. L. J. 283 : 56 I. C. 541.

S. 19—Arbitration clause—Party repudiating contract—Right of.

Where a party to a contract, enabling the parties to refer to arbitration repudiates the contract, he cannot be permitted to rely upon a subsidiary term in the contract and demand a reference to arbitration. (*Kemp, and Raymond, A. J. C.*) MESSRS. JIVRAJ LAKHANSI v. MESSRS. TAKANDAS MOHAN-DAS. 58 I. C. 790.

S. 19—Arbitration proceedings—Filing of suit subsequently—Stay of suit—Effect of.

The filing of a suit by a party to an arbitration proceeding renders subsequent proceedings before the arbitrators null and void but it has no retrospective effect.

Disputes having arisen among the sellers (Appellants) and purchasers under a contract containing an arbitration clause, the sellers on 24th April 1919 referred the dispute to the arbitration of the Bengal Chamber of Commerce and both filed their respective statements before the arbitrators. On the 14th August the buyers filed this suit and the sellers were served on the 26th September. On the 16th October the arbitrators made their award in favour of the sellers and this award was set aside on the 28th November at the instance of the buyers on the ground that the arbitrators were functus officio after the filing of the suit. On the 1st December the seller applied for stay of the suit under S. 19 of the Indian Arbitration Act:

Held—That the cancellation of the award of the 28th November did not affect the portion of the arbitration proceedings which had taken place before the institution of the suit.

Held further—That under the Rules of the Tribunal of Arbitration the remedy to proceed by arbitration was still available.

Held also—That as there was nothing shown why the court should not exercise its discretion under S. 19 of the arbitration Act the suit

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should be stayed. (*Mookerjee and Fletcher, J.J.*) JOEHIRAM KAYA v. GANESHAMDAS KEDAR NATH 25 C. W. N. 82.

S. 19.—Breach of contract—Arbitration—Reference—Stay of suit—Custom alleged inconsistent with contract—Power to decide.

The parties to a contract referred the matters in dispute between them to arbitration, and the Court stayed the suit under S. 19 of the Arbitration Act. Plaintiff objected to the stay of the suit, on the ground that the main defence to the suit was based on an alleged custom which was inconsistent with the written terms of the contract, and could not be gone into before the arbitrators

Held, that there was no legal objection to the arbitrators going into the question of the existence of the alleged custom, whereby the method of performance of the contract would be legitimately widened.

A mere widening of the method of performance by custom is, though a variance, not a contradiction of the terms of a contract, so as to make the custom inadmissible. (*Fawcett, J. C. and Kincaid, A. J. C.*) THE FIRM OF GOBINDRAM SHIVALDAS v. MESSRS. EWART RYRIE & CO. 58 I. C. 508.

S. 19—Cross-Contracts—Arbitration clause—Reference.

The arbitration clauses of a contract are only applicable where delivery of goods purports to be the object of the contract on the face of it. They do not apply where the intention of the parties, by making cross contracts, is to determine the amount payable by one to the other. In a suit, upon a cross contract the defendant is not entitled to a stay order pending a reference to arbitration. (*Kemp, and Raymond, A. J. C.*) JETHALAL KALLIANJI v. PARARAM KHEMANDAS. 58 I. C. 799.

S. 19—Stay of suit—Onus on party objecting—Questions of law—Competency of arbitrators to decide.

In an application for stay it is the *prima facie* duty of the Court to stay the suit and the onus is on the plaintiff to show why he should not be bound by his agreement to refer.

Arbitrators are competent to decide questions of law and the mere fact that a difficult or complicated question of law is raised is not sufficient to take the matter out of the arbitrator's hands. 12 S. L. R. 34 foll. (*Fawcett, J. C. and Kincaid, A. J. C.*) HAJI ABDULLAH HAROON v. MESSRS. E. D. SASOON & CO. 13 S. L. R. 201 : 56 I. C. 76.

ASSAM FOREST REGULATION (VII OF 1891) S. 17—Declaration of reserved forest—Disposal of claim as condition precedent to validity of final order.

Where after the issue of preliminary notification under S. 5 of the Assam Forest Regulation the petitioner filed a claim before the Forest Settlement Officer who held that he

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was not competent to decide a claim of the nature made in the case and disallowed it, and the petitioner did not appeal against this order and the final notification declaring the forest to be a reserved forest was made *Held* :—That the petitioner's claim was not undisposed of within S. 17 of the Regulation and the final notification was not invalid. (*Sawceron, C J and Walmsley, J*) KHANDKAR HEDAYATULLA v. THE KING-EMPEROR.

**24 C W. N. 645 : 53 I C 383 .
21 Cr L J 754**

ASSAM LAND AND REVENUE REGULATION SS 3 (b), 98 AND 97—Partition—Lands included in the estate joint lands or Several estates See (1919) DIG COL. 37. YASIN ALI MIRDHA KADHUGOMINDA CHAUDHURI.

47 Cal 354

AWARD *See ARBITRATION-AWARD AND C. P. CODE SCH. II.*

BEHAR AND ORISSA EXCISE ACT (II OF 1915) SS 3 (12) and 47—Import—Meaning of Intention

Where the accused were simply carrying excisable articles with the purpose of importing them into their destination in U.P. for which they had the license and they did not intend to possess or import them into another province through which they carried it they could not be convicted under S. 47 of the Behar and Orissa Excise Act. (*Jwala Prasad, J.*) MULCHAND RAM KALWAR v EMPEROR

**1 Pat. L. T. 82 : (1920) Pat. 135 :
57 I. C. 99 : 21 Cr. L J 579.**

S. 47 (a)—Cocaine—Illegal possession of—Accessibility of place to several—Effect of

In order to convict a person of being in illegal possession of contraband goods, it is necessary to fix him with knowledge of their existence in the place where they are found If the place is one in which several persons have an equal right of access the goods cannot be said to be in the possession of any one of them. (*Das, J. J*) RAM CHANDRA MARWARI v. EMPEROR. **54 I C. 780 : 21 Cr. L. J. 172.**

BENAMI—Indian Law—Europeans domiciled in India—Advancement—Presumption—English rule applicable. *See TRUSTS ACT, SS. 82 AND 83.* **39 M. L. J. 296 (P. C.)**

—Presumption—Hindu Joint family—Purchase in the name of one member—Decision against benamidar—Binding on owner

A purchase in the name of one member of a joint Hindu family is a *benami* transaction especially when that member is not the managing member or a representative of the family.

A *benamidar* is allowed to represent the real owner in suits both as plaintiff and as defendant and a decree obtained by a *benamidar* or against a *benamidar* is binding upon the real owner. (*Mitra, A. J. C.*) NARHAR v. NARAIN.

56 I. C. 386.

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—Test of—Sham or nominal transaction—Proof of—Onus—Recitals—Value of—of time.

In determining whether a deed of sale is a nominal transaction if it is shown that the bulk of the mortgage-bond which formed the consideration for the sale contained false recitals, it is open to the Court to enquire whether such fictitious documents were not introduced to lend colour to a transaction which was never intended to be acted upon. If on the other hand, there was substantial consideration for the sale, the fact that all the items recited as constituting the consideration are not satisfactorily proved would in no way lead to the inference that the deed was nominal.

The burden of proof is on the party who alleges that the document was not intended to be acted upon.

When a conveyance has been duly executed and registered by a competent person, it requires strong and clear evidence to justify the Court in holding that the parties did not intend that any legal effect should be given to it. It needs to be proved that both parties had it in their minds that the deed should be a mere sham and in order to establish this proof it needs to be shewn for what purpose other than the ostensible one the deed was executed.

Recitals in deeds should be challenged at or about the time of their execution. As time passes, a recital consistent with the probability and circumstances of the case assumes greater importance and cannot lightly be disregarded.

The word “benami” does not ordinarily signify that the transaction to which the term is applied is a sham transaction and of no effect, but rather than the actual executant is one who has lent his name to the person who is the *real party to the contract*. (*Abdur Bahim and Spencer, J.J.*) VYRICHERRLA VEERABHADRRAJU BAHADUR v. DASIRAJ VENKATACHELLAPATI. **57 I C 689.**

BENAMIDAR—Decision against—Binding on real owner

A *benamidar* is allowed to represent the real owner in suits both as plaintiff and as defendant and a decree obtained by or against a *benamidar* is binding on the real owner. (*Mitra, A. J. C.*) NARHAR v. NARAIN. **58 I. C. 386.**

—Decree against if binding on real owner.

A proceeding against a *benamidar* and its ultimate result is fully binding on the beneficial owner. In a suit on a *benami* mortgage it is not necessary to add the real owner of the mortgaged property as a party. (*Chatterjee and Duval, J.J.*) ABDUL RAHAMAN v. MOHENDRA CHANDRA GHOSH **54. I. C. 633.**

—Mortgagee—Suit for possession of property purchased—Mortgagee decree holder—Leave to bid not obtained—Effect—Whether decree holder mortgagee necessary party—Suit to recover one portion of property purchased—Suit to recover another portion of

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the property from different debts—Maintainability—Procedure C. P. Code O 2, R 2, S. 47, C. P. Code (1882) S. 294

In execution of a decree on a mortgage the plaintiff purchased as a *benamidar* of the mortgagee (decree holder) the judgment-debtors' two annas share in a *khoti takshem* and also the *khasgi* lands appertaining to the share. Leave to bid at the Court sale was not obtained under S. 294 of the Civil Procedure Code, 1882. The plaintiff obtained a certificate of sale for the lands so purchased by him. The plaintiff recovered possession of the *khoti takshem* under S. 319 of the Code. In 1910 he sued to recover possession of two Survey Nos of the *khasgi* land and obtained a decree. To this suit defendants Nos 2 and 3 were made parties though needlessly. He again sued in 1914 to recover possession of other Survey Nos which were covered by the certificate of sale and which were in the possession of defendant No. 1 as tenant of defendants Nos. 2 and 3;—*Held*, (1) that the mortgagee for whom the plaintiff was *benamidar* was not a necessary party to the suit and that the plaintiff though a *benamidar* could sue in his own name to recover the property vested in him as a *benamidar*. (1918) L.R. 46 I.A. 1 followed;

(2) that the omission on the part of the mortgagee to obtain leave to bid under S. 294 of the Civil Procedure Code of 1882 did not render the purchase by the *benamidar* invalid or unlawful, though such a purchase was liable to be set aside under the provisions of the Code;

(3) that the suit was not barred under O II, R 2 of the Civil Procedure Code 1908 since in the present case the cause of action was not the same as that in the suit of 1910 in which different properties were involved and different defendants were in possession;

(4) that the suit was not barred by S. 47 of the Civil Procedure Code of 1908 for the plaintiff was an auction purchaser who was not the decree-holder for the purpose of procedure and who was therefore entitled to sue to recover possession of the property which he had purchased. 35 Bom. 492, 16 Bom. L.R. 661; *Shah and Hayward, JJ v. RAMCHANDRA VITHAL BHAT t. GAJANAN NARAYAN DESHMUKH*. 44 Bom. 352: 22 Bom. L.R. 296: 56 I.C. 349.

—*Rights of real owner*—Husband's purchase in the name of his wife—Death of husband—Transfer by wife, effect of—Mortgage by transferee—Right of mortgagee to proceed against wife's share of the inheritance. See (1919) Dig. Col. 42 *BASAR KHAN v. MOULVI SYED LEAKAT HOSSEIN*.

11 L.W. 241.

—*Right to sue—Benamidar not to be guilty of fraud etc. or accessory thereto.*

A *benamidar* can sue in his own name in certain cases but he must come into Court with a clean case.

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The parties cannot be allowed to keep changing their positions and must be bound down to the case set up originally in the plaint. *Chees. O.C.J. v. BENAMIDAR KUTUB KHANA MAL* 55 I.C. 836.

—*Right to sue—Relationship*

A *benamidar* can sue in his own name for redemp. on in his own right and the beneficial owner is bound by the decision of the suit, though not a party. *Jagla Prasad J.J. v. BHUDRANAND v. ISHU SINHA* 56 I.C. 599.

—*Right of suit—Particulars given in application as co-deft.—Lack of facts*

A suit by a *benamidar* or his agent to recover should not be dismissed where the beneficial owner of the property is not a party as a defendant. The Court may, after hearing the beneficial owner, enjoin him from decreeing the suit. In the absence of evidence that the money does not belong to the *benamidar*, the Court is bound to give effect to the legal presumption which arises. *Fletchurajit Chuning, J.J. v. KANAI LAL KHAN t. TOOSI MANJURI DASI*. 54 I.C. 21.

—*Suit by—Real owner not a party*

A *benamidar* represents the real owner and an action can be maintained in his name in respect of the property that stands in his name although the beneficial owner is no party to it. 37 M.L.J. 68, 46 C. 560 (P.C.) followed.

A *benamidar* mortgagee can sue for possession of the mortgaged property. *Broadway, J.J. v. RURA t. ABDUL MAJID* 55 I.C. 431.

BEWARES HINDU UNIVERSITATE ACT, S. 20—University appointed as executor—Probate, Power to obtain S. 20 Probate.

23 O.C. 28.

BENGAL AGRA AND ASSAM CIVIL COURTS ACT, Ss 13 and 21—Suis Valuation Act (VII of 1887) S. 11 Suit valued at less than Rs. 500—Dismissal of—Appeal to Dt. Judge—Decree for more than Rs. 5000, if valid Sec. (1919) Dig. Col. 43. *SATYA KINKAR SAHANA v. SHIBA PRASAD SINGH*. (1920) Pat. 17.

BENGAL ALLUVION AND DILUVION REGULATION (XI of 1825) S. 4 (1)—Gained, meaning of. See ALLUVION AND DILUVION. 1 Pat. L.T. 229: 55 I.C. 344.

BENGAL ALLUVION AND DILUVION ACT IX of 1847—Applicability of—Sunderban lands not paying revenue directly to Govt—Beng Regu. XI of 1825—Applicability of—Lease by Govt—Rent Diara proceedings for assessment with revenue under S. 6 of Act IX of 1847—Suit for declaration in civil court—Maintainability of.

Under Act IX of 1847 (B.C.) it must be shown that land has been added to any estate paying revenue directly to Government.

Where the Government as "owner" of the Sunderbans granted a lease of certain lands for

BENG ALLU & DILUVION ACT : BENG EST PART ACT, S 77

a certain term with a option for renewal on a progressive rental, and in the lease there was no distinction between "rent" and "revenue" and the relationship of lessor and lessee was that of a lessor and licensee and the lessee was not allowed to claim in diminution of rent on the ground of diluvion and in any case in his leasehold interest his other properties in movable and immovable were liable to be sold in the event of the occurrence of the events of the same reserved by the lessor.

Held—That having regard to the position of the Government as owner of the Southdowns and to the terms and the conditions of the lease, the lessee in the present case was not a holder of an "estate having revenue given to the Government" and as such Act IX of 1847 was not applicable, and that the relation between the parties was regulated by the contract between them subject to the provisions of Reg. XI of 1815.

The entire proceedings confirmed by the Board of Revenue assessing the lands with revenue in the present case under S 6 of Act IX of 1847 were declared a nullity.

In the present case the onus is on the grantor i.e. the Secretary of State for India to shew addition to original lands.

The present suit being one for a declaration that the proceedings under Act IX of 1847 were a nullity, it could not be dealt with as if it were a regular appeal from the decision of the Board of Revenue under S 10, cl (3) or Reg III of 1825.

Having regard to the boundaries of the land demised in this case and in the absence of evidence to show that the rivers at the date of the grant were public navigable rivers.

Held, that the boundaries on the south and west extended to the middle of the two rivers (Fletcher and Ghose, JJ). THE SECRETARY OF STATE FOR INDIA v. JATINDRA NATH CHOWDHURY. 24 C. W. N. 737.

53 I C 776

BEIGAL CIVIL COURTS ACT, (XII OF 1887) S 21—Appeal—Forum—Valuation of suit—Plaint amended and claim reduced—Statement of valuation.

In a suit by one of the heirs of a deceased Muhammadian lady for recovery of the latter's dower the plaintiff claimed Rs. 2,500 for her share and Rs. 5,000 on behalf of a minor daughter of the deceased lady. Before the suit came on for hearing this daughter died and her share passed over to her father, the defendant. Thereupon the plaintiff amended her plaint stating that only Rs. 2,500 now remained due and claiming relief for that sum instead of Rs. 7,500. She however added a prayer for costs as originally incurred on the full Rs. 7,500; and the valuation of the suit for purposes of jurisdiction and payment of Court fee laid at Rs. 7,500 in the plaint was not altered. The suit resulted in a decree and the defendant appealed.

That the subject matter of the suit at issue, and a District Court was less than its capacity, all the appeal lay to the District Collector or the High Court (Mars, C. J. and Barua, J.). Appeal Ruled C. O. No. 142-N-1887, B.C. 18 A. E. 741. 57 I C 184

BEIGAL COURT OF WARDS ACT, S 53—Instruction of sale by manager—Time limit for subservient filing of sanction of Court of Wards, after hearing before valuation—Sale for balance of "some price" of property—Set off rent—; T. Act S 13, Reg. V. 1887, D. C. 145 of CHINNAVADU v. SHAJJAHALA DEBI.

53 I C 231.

BENG. EST. PARTITION ACT, Ss 35 and 119—Partition—Powers of Deputy Collector—Jurisdiction of Civil Court.
The Deputy Collector can only pass an order under S. 35 of the Beng. Es. Partition Act, during the making of a partition and before he has submitted the same for the sanction of the Collector.

Where a partition has been effected, the Civil Courts have no jurisdiction to disturb the same (Das and Tuduall, JJ.) KESARI SINGH v. HITNARAYAN SINGH.

1 Pat L T. 507 56 I C 149.

S. 77—Applicability of—Zerait or B. baksht lands held by different proprietors—Power of Collector to allot—Questions of title between co-proprietors—Private purchaser of proprietor—if bound by partition.

The plif. and defts. 1 and 2 were co-sharers. The Lower Appellate Court found that there had been a joint partition of the zerafit or baksht lands only among them, the rayati lands being left joint, and that in 1875 defts 1 and 2 had executed a zarpeshy of the disputed baksht lands in their possession to defts. 3-10 and in 1882 sold the proprietary interest to deft No. 11 who redeemed defts 3-10 but subsequently the whole estate was partitioned by the Collector under Estates Partition Act V. of 1897, to which deft. No. 11 was not a party. The disputed lands were all allotted to the takhta of the plif. and delivery of possession given to her, and the Lower Appellate Court dismissed the plif's suit for declaration of title and recovery of possession holding that under S. 77 of the Bengal Estates Partition Act the Collector had no right to allot the lands held by defts 3-10 in zarpeshy from defts 1 and 2, who got them on a previous private partition, and the plif preferred a second appeal to the High Court.

Held, that the Collector had jurisdiction to partition the estate as there was no formal partition of all the lands as contemplated by S 7 of the Estates Partition Act.

S. 77 applies to tenanted lands held in severalty and its explanation implies that it does not apply to Zerait or baksht lands in direct possession of the proprietors, and consequently

BENG GHEE ADUL ACT, S. 2.

the Collector has jurisdiction to allot the disputed lands to the talukha of the pif and the Lower Appellate Court erred in law in dismissing her suit.

20 Cal. 225 dissented from

21 C. L. J. 299; and 1 I. A. 106. Ref.

Deft. No 11 may enforce his purchase by an application of the principle of S. 90 against the lands allotted to his vendors, deets 1 and 2.

The Civil Court has jurisdiction to decide the question of title or extent of interest not only between a proprietor and a stranger, but also between the proprietors themselves even after a partition has been completed (*Mullick and Sultan Ahmed JJ.*) JANKDULAM KOER v. BINDESHWARI GU.
5 Pat. L. J. 456 :
1 Pat. L. T. 374

BENGAL GHEE ADULTERATION ACT, (I OF 1917) S. 2 (2)—Sale of adulterated ghee—Standard raising presumption as to adulterated nature of ghee

The Ghee Adulteration Act does not lay down a standard raising a presumption that ghee not satisfying the standard is not genuine and in the absence of such statutory presumption every case must depend upon its own evidence. Where it was found that the ghee sold by the accused contained a percentage of foreign fat:

Held, that it was adulterated within the meaning of sub-cl 2 of Sec 2. (*Chaudhuri and Newbold, JJ.*) GRANDE VENKATA RATNAM v. CORPORATION OF CALCUTTA

47 Cal. 633 : 24 C. W. N. 388;
56 I. C. 586 : 21 Cr. L. J. 490

BENG. LANDLORD & TENANT PROCEDURE ACT, (VIII OF 1869) S. 6—B. T. Act, Ss. 4 and 2.—Under-raiyat if can acquire occupancy right by prescription.

An under-raiyat who has remained in occupation of a certain plot of land and has cultivated it for more than twelve years may be held to have acquired a right of occupancy under S. 6 of Bengal Act VIII of 1869.

The distinction made by the B. T. Act between a raiyat and an under-raiyat was not recognised by Bengal Act VIII c. 1869. Under the latter Act the term "raiyat" included all classes of tenants who were actual cultivators of the soil and it was immaterial whether such a cultivator held his tenancy under a middleman or under a person, who, though an occupancy raiyat originally had placed another tenant in possession of the land or his tenancy for purposes of cultivation, unless such sublease, was "for a term or year by year."

Even under the present Bengal Tenancy Act an under-raiyat may by custom acquire a right of occupancy. (*Huda, J.*) PRASANKA KUMAR SIL v. KAMINI SUNDARI DASL.

55 I. C. 251.

BENG. LAND REVENUE SALES ACT, (XI OF 1859). See BENGAL REVENUE SALES ACT.**BENG MUN ACT, S. 14**

BENGAL LOCAL SELF-GOVERNMENT ACT, (III of 1885) S. 146—Suit against Dist. Board and Municipality—Limitation—Omission to remove gravel from public road—Accident—Damages—Beng. Mun. Act, S. 363.

Pif instituted a suit on 9-1-16 for damages against the District Board and the Commissioners of the Municipality for the negligence of one or both of them in not removing the obstruction caused by the heap of gravel stack let on the public road, against which the wheel of the pif's trap came in contact resulting in the accident complained of on 3-8-15. The cause of action was dated 7-10-15 when pif's leg was amputated and the Lower Court dismissed the suit as barred under S. 146 of the Bengal Local Self-Government Act and S. 363 of the Bengal Municipal Act.

Held, that the act complained of viz., the negligence or failure of the defendants to remove the obstructions which had been negligently placed there was covered by the phrase "negligence under the Act" in Section 146, the Bengal Local Govt. Act and S. 363 of the Bengal Municipal Act of 1916.

The cause of action arose on the date of accident, i.e., 5-8-15 and not when the damages suffered became aggravated, i.e., on 7-10-15 for it is well settled that in such a case the plaintiff is entitled to compensation not only for damage actually visible at the time when the suit is instituted or at the time of trial but even such consequential damage as may reasonably be expected to arise in the future from the wrongful act complained of. A future suit for subsequent loss of the injured limb was not maintainable as it did not give rise to a fresh cause of action without any further wrong on debt's part.

S. 24 of the Limitation Act was not at all applicable to the case.

S. 363 of the Bengal Municipal Act was a bar to a suit against the Municipality as a body corporate but S. 146 of the Bengal Municipal Local Self-Government Act referred to suits against individual "members of the Board" and not against the "District Board" itself, according to the plain and natural meaning of the words "members of the Board."

Consequently the suit brought after 3 months from the date of the accident was barred against the Municipality but maintainable against the District Board. (*Darson-Miller C. J. and Azam, J.*) ALLAN MATTHEWSON v. DT. BOARD, MANIPUR.

1. P. L. T. 269 (1920) Pat. 193 :
58 I. C. 749.

BENGAL MUN. ACT, Ss. 14 and 15 (III of 1884)—Election rules—Qualified voter who has failed to have his name placed in register under R. 7 if may apply under Rule 7—Right of Suit—Jurisdiction of Civil Court.

BENG MUN ACT, S 15

Rr 7 and 11 of the Bengal Municipal Election Rules are not *ultra vires*.

In the case of persons possessing the qualification required by the proviso to S. 15 or by the rules framed under such section entry in the register is to be regarded not so much as in itself a qualification but as the evidence upon which the polling officer must proceed! For this purpose the register is conclusive and the result is that a duly qualified person fails himself debarred from voting the conclusion to be drawn is not that the Government, by rule has improperly debarred him of his rights but that he himself has failed to turn in the necessary evidence of his title.

The 15 days' interval allowed by R. 9 between the re-publication and the election is obviously intended to give electors who have failed to secure amendment of the register under R. 6 a further opportunity for registration and a further opportunity for the registration of accidental omissions and such correction may be made under the proviso to R. 11 which is not confined to rectification of the register for the purpose of bye-elections only.

The chairman having a real interest in the revision of the rules is not responsible on his own behalf in the register under the proviso to R. 11 if Plaintiff had his remedy by suit, under Sec. 9 C P. C., Sec. 42 of the Specific Relief Act and sec. s(1) of Sec. 15 of the Bengal Municipal Act. But the Plaintiff was deprived of costs as he might have secured the remedy by application to the Magistrate (*Tunnon and Newbould, JJ v. MOLLA AFZAL HUSSAIN & CHAIRMAN OF MANIKTALA MUNICIPALITY*).

24 C W N 969
57 I C 960

Ss. 15 and 69—Rules framed under—Infringement of Rule 17, if invalidates election—Burden of proof—Directory and mandatory provisions—Special—*Cess*. See (1919) *Dig. Col. 52* *Syam Chaitra Part I* *THE CHAIRMAN OF DACC MUNICIPALITY*

47 Cal 524: 24 C W N 100

Ss. 85 and 87—Assessments—*For on persons—residents and property within Municipality—Income earned by residents from outside sources*

The word "circumstances" as used in cl. (a) of S. 85 of the Bengal Municipal Act is not restricted to income earned or accruing from sources within the Municipality but includes income earned by resident tax-payers from outside the local limits of the municipality and such income brought from outside to be spent and enjoyed within the Municipality becomes a part of the "circumstances" of the resident tax-payers within that Municipality and is liable to assessment there under S. 85. 27 Cal 819 dist.

The words "within the Municipality" as used in cl. (a) of S. 85 of the Bengal Municipal Act govern both "circumstances" and "property", and the word "circumstances" must

BENG MUN. ACT, S 290.

be interpreted to be in substance the equivalent of "means" 39 Cal. 141; 41 Cal 168; 55 Cal 859; Ref. (*Tunnon and Newbould, JJ v. CHAINMANJANAGAR, MUNICIPALITY & SAILBALA DATTA*)

25 C. W. N. 47.

S 85—Circumstances and property within Municipality—Significance of—Income from Zamindari situate beyond the Municipality

Under S. 85 of the Beng. Mun. Act, the word "within" controls both the words "circumstances" and "property". Hence income from Zamindari situate outside the Municipality cannot be assessed, as it does not come under the express on "circumstances and property within the Municipality". (*Sultan Ahmad, J. v. SYED MAHOMED ALI NAWAB & CHAIRMAN OF THE PEchor MUNICIPALITY*).

1 Pat. L T 591 56 I C 221

S 85 (A)—"Circumstances and property"—Means and property within Municipality

For the purpose of assessment of tax under clause (a) of S. 85 of the Bengal Municipal Act, the municipality cannot take into account the "circumstances and property" of the assessee outside the Municipality but must restrict itself to the "circumstances and property" that is the "means and property" within the Municipality and to measure the "means and property" within the Municipality the test is not what is *earned* but what is *earned within the Municipality*. (*Baroyre, C. J., and Fletcher, J. v. DEBENDRA NATH RAI CHAUDHURI & PRANAB CHANDRA GHOSE*).

25 C. W. N. 45: 32 C. L. J. 210.

S 86—Circumstances and property within Municipality—whether income derived from Zamindari outside Municipality is liable to tax See (1919) *Dig. Col. 54*. *CHAIRMAN OF BEHAR MUNICIPALITY v. MAHANT RAM DEO DAS*

(1920) *Pat. 120: 54 I. C. 227.*

S 101 Proviso (3)—"Machine"—meaning of—Overhead tank to provide suburbs with filtered water if machinery—Existence of machinery, if enhances assessable value See (1919) *Dig. Col. 55* *CHAIRMAN OF THE COSSOPORE AND CHITPORE MUNICIPALITY v. THE CORPORATION OF CALCUTTA*

54 I. C. 337

Ss. 290, 291, 292, 293, 295 and 297—Rules framed by local Govt. under S. 290 if ultra vires—Water Connection, if Municipality can cut off for non-payment of costs of meter.

Rules, 4, 9 and 24 (e) framed by the Local Government for the Chittagong Municipality under S. 290 of the Bengal Municipal Act 1884 are *intra vires*, and do not conflict with Ss. 295 and 297 of the same Act. The Municipality is, therefore, entitled to compel the occupier or owner of a house to pay for costs of watermeter to measure the amount of water consumed in the house or to cut off

BENG. MUN. ACT, S 362.

water-supply for non-payment of the same (*Chaudhuri and Cumming JJ v NAGENDRA LAL DAS v THE CHAIRMAN, CHITTAGONG MUNICIPALITY.* 47 Cal 426.

S. 362—Scope of—Acts “done under” the statute—Notice.

The defendant as Vice-Chairman of the Municipality served the plaintiff with a notice of demand for dues claimed as fees payable for removal of filth from a receptacle in his house and subsequently a bailiff under the orders of the Vice-Chairman entered the house of the Plaintiff and attempted to execute a distress warrant as no payment had been made in response to the notice of demand. The plaintiff sued the defendant for damages alleging that the proceedings taken by him were malicious;

Held, that S. 366 requires the service of notices upon the Commissioners in every instance and also upon the person concerned if the suit is intended to be brought against an officer of the Commissioners or any person acting under their direction.

An act is to be regarded as “done under” a statute, if the doer had a reasonable and *bona-fide* belief that he was so acting (*Mookherjee, C. J and Fletcher, J J SASANK. SEKAR BANERJEE v SUDHANSU MOHAN GANGULY.* 24 C. W. N. 891

BENGAL N. W. P. AND ASSAM CIVIL COURTS ACT, S 13—Scope of—Boundary Shahabad and Ballia—Deep stream—Government Notification transferring villages from one Dt to another—Effect of.

Under S. 4 of 28 and 29 Vic. Ch 17, the Governor-General-in-Council has authority to distribute territories among the several Presidencies and Lieutenant-Governorships, and the Government of India Notification No 2598 dated 27-2-1888 has fixed the deep stream of the Ganges as the boundary between the Ballia and Shahabad districts. Consequently the Shahabad Civil Courts have no jurisdiction to try suits in respect of villages lying north of the present deep stream, which under the said notifications is now in the Ballia district and the notifications of the Local Government transferring village from Ballia to Shahabad and vice versa do not affect the matter.

The power of the Local Government under S. 13 of Act XII of 1887 refers to alteration of local limits of the jurisdiction of Civil Courts, but the Local Government can obviously act only within its own jurisdiction and it cannot give jurisdiction to Civil Courts in respect of anything out side its own jurisdiction which has been determined by the Notification of the Imperial Government. (*Cuttts and Sultan Ahmad, JJ v MAHARAJA KESO PRASAD SINGH v. NIRMAL KUMAR*

5 Pat. L. J. 451. : 1 Pat. L. T. 268. 57 I. C. 201.

BENG. REGN. II of 1819.

BENGAL PATNI REGULATION VII OF 1819—Second part—suit for rents set to set aside first suit—Suo motu sale if subsists

Scrible—When regular proceeding is to set aside patni sale the proper suit should still under the Regulation, if the first sale is set aside, the second sale which rests on the first sells with it. (*Richardson and Stamford Hindu, JJ v BEJOY CHAND MUKHERJI v MAHARAJA MOHAN GOOSH* 24 C. W. N. 785

—**Ss. 8, 10 and 14—Patna—**Suit to set aside—Plaintiff's claim and what right—Date of payment—Recovering payment to stop patni sale, decree vs. *Patna*—Purchase by stranger S. 1 of 1791 16 Dig. 16 of 17 BEJOY CHAND MUKHERJI v MAHARAJA MOHAN GOOSH 47 Cal 387 24 C. W. N. 872 54 I. C. 783

BENGAL REGULATION VII OF 1793, Art. 8 (3) Bengal Reg. 57 IX of 1793 Cl 2 (1)—Revenue Free State—Grant of—Patta mentioning rent reserved

The mere fact that no rent is reserved in a patta does not necessarily imply that it is revenue-free estate was granted.

Direct payment of cess on account of revenue-free lands is not conclusive that those revenue lands constitute a separate estate (*Dawson Miller, C. J. and Coutts, J. v KUMAR IRANLAL NATH MALIA v THUK* 5 Pat L. J. 273 (1820) Pat 146: 1 Pat L. T. 360: 56 I. C. 184.

—(II of 1819) Ss. 22, 23 and 24—*Beng. Reg. III of 1828, S. 10—River bed—Silting—Cultivable land—Non-navigable riverbed if public domain—Assessment—Suit to contest*

As soon as it is shown or admitted that a river within the ambit of the zamindari was never a public navigable river, the owner who lies on the river bed to show that his bed was included within the limits of his permanently settled estate is so satisfied or silenced.

The test for determining whether a river is a public navigable river or not is whether or not the river is navigable for boats at all seasons of the year. The question at issue may not be without importance but speaking generally the presumption in the one case is that the bed belongs to the public or is public domain and in the other that the bed belongs to a private proprietor. In the absence of any other evidence than that afforded by a plan or survey map these natural presumptions may be sufficient to displace the contrary evidence of the map. 30 Cal. 201; 29 C. I. J. 596; 46 Cal. 300; 17 Cal. 590 Re.

The bed of a river included in a permanently settled estate is in no respect different from other waste lands included in the estate, and whatever changes may have occurred from natural or artificial causes and however the land may have improved in value Government is not entitled to add tional revenue for such

BENG. REGN. (VIII of 1819) S. 14.

lands 13 M. I. A. 467 at p. 577; 40 Mad. 886, Ref:

When the bed of such a river silted up and becomes fit for cultivation neither Reg. II of 1819 nor Act IX of 1847 authorises the revenue authorities to assess the lands wth revenue.

Where nevertheless the revenue authorities have assessed such land wth revenue under Act IX of 1847:

Quare:—Whether upon the enactment of Act IX of 1847 the limitation provided by S. 24 of Reg. 11 of 1817 ceased to be applicable to a suit by the owner to contest the validity of the assessment and to recover possession on the land (*Richardson and Graves, JJ.*) SECRETARY OF STATE FOR INDIA IN COUNCIL v. PRABULLA RAHAT TAGORE

24 C. W. N. 809 : 53 I. C. 896

— VIII of 1819 S. 14—*Suit for refund of rent paid to Zamindar by auction purchaser of a patni at a sale since set aside—statute of limitation—Limitation Act, Art. 62, S. 37*

A suit by the auction purchaser at a panti sale which has been set aside for recovery of money paid to the zamindars as rent during his period of possession will not lie against the zamindar.

Such a suit brought more than three years after the date of the decree of the first Court setting aside the panti sale and the last of the payment made on account of rents barred by limitation whether Art. 62 or Art. 97 of the Limitation Act applied.

Quare:—Whether the remedy provided by S. 14 of Reg. VIII of 1819 is not exclusive (*Richardson and Shamshur Huq, JJ.*) BEJOY CHAND MARYAB v. TINKAPI BANERJEE

24 C. W. N. 617 : 58 I. C. 741

—(XI of 1825) S. 4—*Accretion—Reformation in Situ—Identification—English and Indian law—Possession—Evidence of.*

When the land in dispute is shown to have reformed from its old identifiable site, it is not a case under cl. 1 of S. 4 o: Regulation XI of 1825.

* S. 4 of Reg. XI of 1825 refers similarly to cases of gain of acquisition by means of gradual accession. There are no words which imply the confiscation or destruction of any private person's property whatever. If a regulation is to be construed as taking away somebody's property, that intention to take away ought to be expressed in very plain words, or be made out by very plain and necessary implication. According to the Regulation accretion is land gained from the recess of a river or of the sea. The rule of English Common Law, based on conditions which are entirely different should not be extended to the mafusil towns of India.

5 P. L. J. 1; (1920) Pat. 102; 13 M. I. A. 467; 1 Marshall Rep. 126; L. R. Sup Vol. 45, 1 Hay 284; 9 W. R. 512 (1868), 25 W. R. 317, 42 Cal. 489 foll. 1 P. L. J. 556 dissenting.

BENGAL REGULATION S. 10.

It lies on the plaintiff's to prove possession and dispossess on within twelve years of suit. But possession is not the same thing as actual user. The true rule is that, where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes at such a time and under such circumstance that that state naturally would and probably did continue till within twelve years be ore suit, it may properly be presumed that it did so continue and that the plaintiff's possession continued also, until the contrary is shown. 9 Cal. 744 (F. B.) foll. (*Das and Adamji, JJ.*) BABU BRAHMANNAND SINGH v. DAUD BA IADUN SINGH (1920) Pat. 245: 1 Pat. L. T. 229. 56 I. C. 344.

— S. 4—*Accretion, what is—Riparian right—Custom—Boundary between estates—Deep stratum—See (1919) Dig. Col. 63. LALA LACHMI NARAYAN LAL v. KESHO PRASAD SINGH (1920) Pat. 102: 5 Pat. L. J. I.: 1 Pat. L. T. 193.*

— S. 4—*Submersion and reformation—Possession—Presumption of—Onus—Limitation.*

Section 4 of the Bengal Alluvion and Diluvion Regulation does not apply to land which has been washed away and which reforms on its old site and is identifiable and recognizable as land belonging to the owner of the site.

When land is incapable of being used in any of the recognised modes by the proprietor, it cannot be said that in law he is out of possession. During the period, therefore, in which land is submerged possession remains with the proprietor. As a general rule, where a suit is for recovery of possession and the cause of action is dispossession, the onus is on the plaintiff to prove possession and dispossess on within 12 years and he cannot shift the onus on to the defendant by showing his own possession at any period prior to 12 years before the suit. But if the plaintiff shews that his possession continued up to the time when the land was submerged his possession is presumed to continue throughout the period of submersion and, when the land has reformed, to within 12 years of the suit, unless the defendant proves the contrary. 8 C. 744, approved, 19 C. 660, referred to.

The word "possession" being a legal term much reliance cannot be placed on the evidence of witnesses who depose that the land was in the possession of any particular person. Evidence of possession should be evidence of acts giving rise to the inference that a particular party has been in possession. (*Das and Adamji, JJ.*) GAJADHAR PRASAD v. DULHIN GULAB KUER 5 Pat. L. J. 632.

—(III of 1828) S. 10—*Silting of riverbed—Board of revenue confirming assessment Suit to contest—Limitation—Beng. Act, IX of 1847.*

BENG REG (III of 1872) S 10.

The rules contained in S 10 of Reg III of 1868 and S. 24 of Reg II of 1819, govern a suit to contest an order of the Board of Revenue under S 6 of Act IX of or 1828 confirming an assessment under the Act and to obtain incidental relief such as recovery of possession of lands of which possession has been taken under S 10 of Reg III of 1828. 14 Cal 17 Ref.

An order under S 6 of Act IX of 1828 confirming an assessment of revenue corresponds to a decision of the Board under Reg II of 1819 and unless the suit of the nature indicated by cl (3) or S. 10 o. Reg III of 1828 is brought within time limited by S. 24 of Reg 11 of 1819 the decision of the Board declaring the land liable to assessment becomes final and conclusive for all purposes.

Where the board of Revenue found that a river the channels whereof had not materially changed between 1793 and 1854 was a public navigable river, but the thak and survey maps of 1859—1861 showed the whole width of the river as included in the permanently settled estate of the plaintiff, the plaintiff offering no other evidence

Held, that the thak and survey maps were not in themselves sufficient to justify the Court in saying that the Board's order was wrong and should be reversed. 30 Cal. 291; Ref.

The question whether a river or water course is navigable or not does not depend on its name. (*Richardson and Greaves, JJ*) PRAFULLA NATH TAGORE v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL

24 C W N. 818 . 58 I C 902.

—(III of 1872) Ss. 25 and 11—
Record of rights—Entry in—Fraud.

A suit lies to set aside an entry in the record of rights under the Sonhai Pergannas Settlement on the ground of fraud. Ss 11 and 25 of Reg. III of 1872 are no bar to such a suit. Proof of fraud is sufficient to nullify a decree or order whether under the Civil Procedure Code or otherwise. (*Das and Adami, JJ*) SURESH SARAN SHAH v. RAMESWAR DE.

(1920) Pat. 363.

BENGAL RENT RECOVERY ACT, (VIII of 1865) S. 11—Sale certificate—Order directing issue of—Not appealable. See CHOTA NAGPUR TEN. ACT, ss 208 AND 209.

5 Pat L. J. 101.

BENGAL REVENUE SALES ACT, (XI of 1859) Revenue sale procured by fraud—Effect of.

Where a sale under Act XI of 1859 was brought about by deliberate default on the part of the agent of one of the co-owners of the Estate" and the purchase at the sale was effected under a pre-arranged plan to which the said agent was a party in the name of a person who under that arrangement was to hold the property for the benefit of himself and the other parties to it.

BENG REV SALES ACT, S. 2.

Held, that the sale had no higher effect than a private alienation and the purchaser who had taken with notice of or was implicated in the fraud should be made to reconvey the property to the rightful owners (*Mookerjee and Pantin, JJ*) KUMAR SATISH KANTA ROI v. SARISH CHANDRA CHOTTOPADAYA.

24 Cal W N. 362 55 I C 629.

Ss 2, 3, 25 and 26—Revenue sale—Setting aside by Commissioner—Arrears of kist when due—Several separate accounts in arrear—Excess in others—Whole estate in arrear—Payment of arrear accepted by Collector, of one separate account clearing arrear of whole estate—Other separate account if may be sold—Power of Commissioner to set aside sale

In a revenue-paying estate there were three separate accounts Nos. 33, 26 and 31 and also a residuary share, and when the March kist of 1915 became due, account No. 33 was in arrears to the extent of Rs 3-10-0 and the residuary share was in arrear to the extent of Rs. 6-8-6, but there was an excess in respect of the separate accounts Nos. 26 and 31 of Rs. 1-15-0 and Rs. 5-2-0 respectively, and when in April 1915 the arrear of Rs. 3-10-0 in respect of separate account No. 33 was paid with the permission of the Collector and this separate account was exempted from sale on 1st May 1915, there was no arrear in respect of the whole estate taking into account the excess which was in deposit in respect of separate accounts Nos 26 and 31, but despite this, the residuary share was sold and on the application of the proprietors for annulment of sale, the Commissioner set aside the sale on the ground that the general account was not in arrears at the time of the sale, and thereupon the auction purchaser brought a suit for a declaration that he was entitled to obtain a certificate of title from the Collector as the ijmal share was sold for its own arrears of Government revenue:

Held—that as soon as the Collector expressly exempted the separate account No. 33 from sale on payment of Rs. 3-10-0, this payment had the effect of clearing off the arrears in respect of the whole estate and consequently of the ijmal share and there was, therefore, in fact no arrear due on the whole estate and the ijmal share was not liable to be sold.

Although on the kist day there was a default it did not, under S. 2 of Act XI of 1859, become an arrear of revenue until the first of the following month and under S. 3 of the Act the estate did not become liable to sale until the date fixed by the Board of Revenue; and the dates fixed by the Board of Revenue under S. 3 of the Act being 28th June, 28th September, 12th January and 28th March and the case being one of default at the time of the March kist, there was no arrear of revenue until the 1st of April, under S. 2 of the Act, so that the property did not become liable to sale until the next date fixed by the Board of Revenue under S. 3 of the Act, that is, the 28th June.

BENG REV. SALES ACT, S. 12.

Consequently the estate did not become liable to sale until that date and the sale by the Collector before that date was illegal. 23 Cal 876 foll.

The contention that the Commissioner can only act under S. 25 when there has been a mistake in procedure and that in all other cases he must act under S. 26 of Act XI of 1859 is not sound. The power given to the Commissioner under S. 25 goes beyond proper procedure. (*Scotts and Das, JJ.*) CHAKKOWRI v. SECRETARY OF STATE.

5 Pat L.J. 66 (1920) Pat I.

—(VII OF 1868) S. 12 (3) & (4)—*Improvements—Tenant when protected from ejection.*

S. 12 (4) of the Bengal Land Revenue Sales Act affords protection to a tenant from ejection in the case of those improvements only which are made by the tenant himself or by some previous holder of the land. Cl (5) of that section protects a tenant from ejection whose interest has been recognised in the settlement proceedings at the last temporary settlement and the rent has been fixed under the rent law for the period of that settlement. (*Narabould, J.*) RASHIK CHANDRA DHUPI v. PEARY MOHAN CHOWDHURY.

58 I.C. 287.

—S. 12 (4)—*Operation of—Building of permanent tanks on tenure*

For a tenure of land on which permanent tanks have been made to be protected under S. 12 (4) of the Bengal Land Revenue Sales Act from being annulled by a purchaser at a suit held under that Act, it is not necessary to establish that the tanks were made either by the tenure holders or by their predecessors-in-interest. (*Ghoshjee, A.C.J. and Fletcher, J.*) PEARY MOHAN CHOWDHURY v. RASHIK CHANDRA DHUPI.

58 I.C. 543.

—S. 31.—*Assignee of recorded proprietor—Right to surplus sale proceeds—Collector refusing to recognise assignee—Effect of—Right of assignee to sue for declaration of title—Lim. Act, Art. 120 if applicable.*

A holding was sold for arrears of revenue. After the satisfaction of the dues of the Govt. a certain amount was in deposit in the Collectorate. Plffs. applied to the collector to withdraw the balance of the sale proceeds but the application was refused. Plffs. accordingly instituted a suit for declaration of their title to the surplus sale proceeds alleging that the recorded proprietors had no subsisting right to the holding at the time of the sale and that the Plffs. had right to an eight-ninths share in the property. The suit was tried on the merits but was dismissed as barred under Art. 120 of the Lim. Act.

BENG REV SALES ACT, S. 37.

Held:—That the Collector properly refused to pay the surplus sale proceeds to the plaintiff under S. 31 of Act XI of 1859.

An assignee of the recorded proprietors is not their representative and the Collector is justified in refusing to pay to such assignee claiming on his own behalf the money held in deposit on account of the recorded proprietors 12 C. 359 Ref.

The legislature did not contemplate that the title of the unrecorded proprietors should be lost by the sale to the extent that they would not be entitled to receive the surplus sale proceeds even if they could establish in the Civil Court as against the recorded proprietors that they were entitled to the estate at the time of the sale.

No question of limitation arose in the case. If Art. 120 of the Lim. Act was held applicable, time should run against plffs. from the date when the right to sue accrued. The right to sue did not accrue till the right to obtain relief by way of declaration had been denied. (*Panton and Mookerjee, JJ.*) BEJOY LAL SEAL v. NOYUNMANJARI DASI 47 Cal. 331: 31 C. L. J. 372: 24 C. W. N. 294: 55 I.C. 639.

—S. 37—*Exception—Permanant settlement—Meaning of—Permanant tenure holders if entitled to protection—Under tenure created by Government if liable to annulment—Regulation VII of 1882. See (1919) Dig. Col. 50. LALJIT UPADHYAY v. MR. WAJHUNESSA BEGAM.* 5 Pat L.J. 79: 54 I.C. 658.

—S. 37—*Suit for annulment—Incumbrances in part—Survey Khatian—Entry in—Value of—Road cess return if evidence against tenants.*

S. 37 of the Beng Land Rev. Sales Act must be strictly construed. Certain lands purchased free from all incumbrances at a sale for arrears of revenue were settled with plff. in *sadar patni taluka* right by a *patta* under which plff. had the rights of the auction purchaser to avoid or annul all incumbrances. The debt held a tenure which comprised lands included in the plaintiff's *patta* as well as other lands. In a suit by the plaintiff to set aside the defendant's tenure,

Held: that as all the lands of the defendant's tenure were not included in the plaintiff's *sadar patni*, the plaintiff was not entitled to annul the tenure in part.

5 C. L. J. 264 foll.

A cadastral survey *Khatian* must be taken to be correct unless there is evidence to the contrary.

Road-cess returns filed by a landlord are no evidence against the tenants. (*Chaudhuri and Cumming, JJ.*) MUHAMMAD GURAN CHOUDHAR v. BASARAT ALI.

55 I.C. 645.

BENGAL TENANCY ACT.

BENGAL TENANCY ACT (VIII of 1885) -- Scope of -- Not exhaustive -- Occupancy raiyat -- Rights of.

Whatever might have been the earlier law, the occupancy raiyat enjoys under the Bengal Tenancy Act substantial rights in the land and his interest cannot be appropriately described as a merely "personal right or personal privilege".

The Bengal Tenancy Act is not a complete Code : 35 Cal 34, 6 C. L. J. 273 Re. It nowhere purports to give an exhaustive enumeration of all the incidents of occupancy right. (*Mookerjee, O. C. J., Fletcher, Chatterjee, Tandon, Richardson, Chaudhuri and Huda, JJ. v. CHANDRA BENODE KUNDU v. SHAIKH ALA BUX*)

31 C. L. J. 510 (F.B.)

Ss. 3 (9) and 80 -- Holding -- Meaning of -- Suit to enhance rent of undivided share of land comprised in a tenancy.

Where the land held by a raiyat consisted of entire parcels of an agricultural land and an undivided share of a parcel of homestead land :

Held, that it was not a holding within the definition of "holding" in S. 3, cl. (9) of the B. T. Act and a suit for enhancement of rent under S. 30 of the said Act did not lie in respect of such undivided share.

The law is the same whether the undivided interest is created by a co-sharer landlord or a sole landlord or where as in the present case, the original tenancy has not been proved and is based on the result of settlement proceedings under the Bengal Tenancy Act 2 P. L. J. 553 ; referred to. (*Newbould and Panton, JJ. v. BINAYAK DAS ACHARJI CHOWDHURY v. SOMINUDDI*)

24 C. W. N. 1022

Ss. 3 (10) & 20 -- Settled raiyat -- Holding land in village, meaning of

In order that a person may become a settled raiyat within S. 20 of the B. T. Act by holding land as a raiyat continuously for a period of 12 years it is necessary under the section that he must hold land in a "village" continuously during the whole of that period. I: the area within which such land is situated was at some time declared to be a "village" the declaration cannot have retrospective effect. (*Chatterjee and Panton, JJ. v. SREEMANTO BHARASA v. PORT CANNING AND LAND IMPROVEMENT CO., LTD.*)

55 I. C. 380

S. 4 -- Raiyat and under raiyat -- Distinction between recognised before the B T Act -- Ejectment.

The distinction between a raiyat and an under raiyat was recognised from before the passing of the B. T. Act (VIII of 1885) : Acts X of 1859 and VIII of 1869 contemplate the existence of an under raiyat.

In a case governed by Act VIII of 1869, an under-tenant who holds under a raiyat cannot be a raiyat and cannot acquire a right of occupancy. (*Mookerjee, O. C. J. and Fletcher, J. J. v. KAMINI SUNDARI DASI v. PROSONNO KUMAR SIL*)

24 C. W. N. 685 : 58 T. C. 625

BENGAL TENANCY ACT, S 15

S 5 -- Raiyati Holding -- Tenure -- Extent over 100 bighas -- Presumption -- Rebuttable.

The presumption arising under S. 5 of the B. T. Act is a rebuttable presumption and evidence is admissible to show that a holding although exceeding 100 bighas in area is in fact a raiyati holding and not a tenure (*Fletcher, J. J. v. ABDUL GANI v. RADHIKA MOHIN*)

55 I. C. 249.

Ss. 7, 30, 191 and 192 -- Etman in temporarily settled area if a tenure -- Enhancement of rent -- Single suit for enhancement of rent of two etmans held by same tenant -- C. P. Code S. 99, Sec (1919) Dig. Col. 65 JOGESH CHANDRA ROY v. MAKDUL ALI CHOWDHURY.

54 I. C. 850.

Ss. 11, 18 and 85 -- Raiyat fixed rates -- Power of to grant underlease -- Extent of.

S. 85 of the B. T. Act which restricts the power of raiyats to grant under-leases must be read along with Ss. 11 and 18 of the same Act and therefore it does not apply to the case of a raiyat holding at a fixed rate of rent. (*Fletcher and Duval, J. J. v. HOCHEN SARDAR v. PORESH NATH PAL*)

54 I. C. 647.

Ss. 11, 18, 85 and 167 -- Under Raiyati interest -- Raiyat at fixed rates -- Sublease -- Sale of raiyat's interest

A sub-lease by a raiyat holding at fixed rates is not governed by S. 85 of the B. T. Act. If the sub-lease be perpetual, it operates to protect the under raiyat against the landlord or his landlord. Inasmuch as the sub-lease is not invalidated by S. 85 of the B. T. Act and the right under it subsists, the interest of the person holding under the sub-lease is an encumbrance which must be avoided before a purchaser at a sale held in execution of a decree for arrears of rent, even if he be the superior landlord can take *khas possession*. The interest of the lessee is a voidable and not a void interest. An interest created by a sub-lease granted by a raiyat does not necessarily terminate on the death of the lessee. If, under the terms of the lease, the interest is continued after the raiyat's death and if the lease is a valid lease under the law, that interest can be inherited. (*Newbould, J. J. v. PRASANNA DASVA v. AMAR CHAND ROY*)

57 I. C. 580.

S. 15 -- Landlord and tenant -- Heirs of tenure holder not causing their names to be registered in the shurista -- Suit against registered tenant

The mere failure of the heirs of recorded tenure holder to cause their names to be registered in the landlord's shurista does not entitle the landlord to affect their interest by sale in execution issued in a suit against a person who to the knowledge of the landlord had no interest in the property to which he did not cause his name to be registered under S. 15 of the Bengal Tenancy Act but simply registered his

BENGAL TENANCY ACT, S. 16.

The section has to be written in justice and equity so as to cover cases like the tenancy 10 Cal 95 (*Wadhayya and Bishnudan JJ v. PROVOST CHINDRAY CHARITI LTD v. JAGAT MUDIN MONDAL*) 82 C. L. J. 77

—S. 18—*Kuvalashti and baulashti tenants—Protection of Khulasheti raiyats*

The word "kuvalashti" in the Regulation is relating to the permanent Settlement applied to raiyats. The permanent tenants settled in the villages were called khulasheti raiyats, that is, raiyats occupying the land of their own village or the village in which they resided. They were distinguished from the pausht tenants, that is, the temporary tenants residing in another or neighbouring villages. Khulasheti tenants were protected with the permanent rights which others did not have.

In sales under Act VIII of 1858 the purchaser succeeds to the property free from encumbrance but he is not entitled to eject khulasheti raiyats or resceut and hered, any cultivators.

Where the final title of the Court below is that the defendant's are resident and located among cultivators and by dwelling houses on portions of the land and where the lands in suit are described as khulasheti in the survey record or rights, the plaintiff who is a purchaser, in a sale in execution of a rent decree under Act VIII B. C. of 1858 is not entitled to recover khulasheti possession of such lands under S. 16 of the Act, 4 C. L. J. 405, 15 W. N. 207, 3 C. W. C. 18 1854 (*Jivali Prasad, J. v. Brijendra Singh, D. A. v. Jagat Narayan Das*)

1920. Pat 181 I P. L. T. 258
56 I. C. 678

—Ss. 18 and 20—*Raiyat holding at fixed rent—Occupancy right—Acquisition of Sub-lease of tenancy*

The grant of successive *baulashti* holding at fixed rent, is a transfer of an interest in the holding within the meaning of S. 18 of the Bengal Tenancy Act.

A person holding under a *raiyat* at fixed rent is not disbarred from acquiring a right of occupancy (*Hukum Singh v. Kali Das Chakraborty*).

54 I. C. 750

—Ss. 18 and 20—*Transfer—Meaning of—Law—Law of Statutes—Raiyat at fixed rent—Power of lease*

The term "transferee" is used in clause (a) of S. 18 of the B. T. Act includes a leasee.

S. 20 is contradicted by S. 18 and therefore a *raiyat* at fixed rent can create a permanent lease. 49 I. C. 510; 15 C. W. N. 1110 cases.

Where two or more sections are apparently inconsistent, no effort must be made to reconcile them. If this is impossible, the latter will generally override the earlier, but a particular enactment where it stands must be construed strictly as against a general provision.

BENGAL TENANCY ACT, S. 22.

S. 22 should be read as if it contained the introductory words "subject to the provisions hereinbefore contained". In any case, S. 18 refers to a particular class of tenancies, whereas S. 22 lays down the general rule; consequently the particular provisions must be taken to qualify the general provision 19 C. W. N. 1127 re (*Mookerjee, A. C. J. and Fletcher, J. v. Amar Chand Roy v. Prasanna Das*)

25 C. W. N. 9.

—S. 20—*Kainai raiyat—Status of*

In the province of Behar and Orissa the word *kainai* denotes a settled *raiyat* and not a *raiyat* at a fixed rent (*Dawson Miller, C. J. and Mullie, J. J. v. Puni Munshi and Shambhu Deo Ali*) 5 P. L. J. 387. 1 P. L. T. 690.

—S. 22 (2)—*Purchase of occupancy holding by co-proprietor—Effect of—Partition of estate*

A co-proprietor acquiring an occupancy holding by purchase is entitled to retain possession of it on payment of rent to his co-sharer. The mere fact that the estate in which the holding is situated is partitioned among the co-proprietors and the holding is allotted to some other co-proprietor, would not entitle the latter to eject the co-proprietor who had purchased the holding (*Jivali Prasad, J. v. Babu Ram Prasad v. Munshi Gopal Chand*)

58 I. C. 955.

—S. 22 (3)—(1) Amending Act (I of 1907)—*Thiccadar—Purchase of occupancy holding—liability to eviction on expiry of lease—Non occupancy rights acquired by ijaradar—Lam Act—Sch III, art. 1—Mesne profits—Power to relieve against*

Where a thiccadar contracted in the lease of 1905 to give up possession of the occupancy holdings purchased by him, during the term of the lease, at an auction sale held in execution of a rent decree, on receiving the purchase money from the malik, and upon the expiry of the lease the zemadar brought the suit for ejectment of the thiccadar from the occupancy holdings, purchased before, during and after the lease.

Held, that prior to the Amending Act of 1907 the acquisition by a thiccadar of an occupancy right by purchase was not barred by S. 22 (3), and therefore the thiccadar acquired occupancy rights in the lands purchased before the date of 1905. 13 C. L. J. 561 ref.

The Amending Act of 1907 could not take away rights of occupancy already vested in the defendant and that the survey entry, Bakasheti thiccadar's imply meant that the lands were lease-lands, which the thiccadar was cultivating himself.

Any agreement in the lease of 1905 to give up the occupancy rights already acquired would be void under S. 171, B. T. Act, the covenant being restricted to acquisitions during the term of the lease. Under S. 22 (3) the thiccadar could not acquire occupancy

BENGAL TENANCY ACT, S. 22.

right during the term of his lease, irrespective of the contract in the lease S. 22 sub-S. (3) does not mean that the occupancy right merges; it simply means that no occupancy right passes, and the thiccadar acquired non-occupancy rights in the lands purchased during the term of the lease, and the suit was barred under Sch. III Art 1 (1).

24. Cal 143; 32. Cal 386 15 C.L.J. 647, foll; 13 C. L. J. 568; 20 C. W. N. 800 Ref.

The plaintiff, not having offered to pay the purchase money to the defendants, the claim for ejection was bad.

The defendants, were occupancy rāya's in respect of lands purchased after the expiry of the lease in execution of the decrees for rent, which accrued due during the term of the lease.

The contract to pay mesne profits is a secondary one intended to secure the fulfilment of the primary contract to relinquish the land on the expiry of the lease and it is open to the court to award reasonable compensation in lieu of an excessive rate embodied in the lease. (*Das and Adami, JJ.*) MORGAN v RAMJI RAM 5 P. L. J. 302 : (1920) Pat 168 : 1 P. L. T. 310 : 56 I. C. 366.

S. 22 (3)—Purchase by thiccadar of occupancy lands prior to 1907, if valid—Consent of landlords to purchase of occupancy holdings—Position of ijaradar—Question of transferability—Consent.

An ijaradar could purchase an occupancy right from a raiyat during the subsistence of the ijara prior to the amendment of S. 22, sub-S. (3) by the Amending Act I of 1907 (B.C.) 4 C. L. J. 209 foll.

Where under the terms of his lease the ijaradar had obtained from the whole body of the co-shares landlords their entire rights as maliks for the period of the ijara, he stood in the place of the maliks and during the term he had the power to grant consent in the same way as they would have been able, to had they been direct landlords.

The question of transferability does not arise where the ijaradar's in their position of landlords over the tenants gave consent to the sale, being themselves the purchasers. (*Atkinson and Adami, JJ.*) HARRINGTON v. DWARAKA PROSAD (1920) Pat 11 1 P. L. T. 533 : 55 I. C. 59

S. 23—Landlord and tenant—Trees—Custom.

Under the common law the property in trees belongs to the landlord S. 23 of the B.T. Act only declares the right of tenants to cut the trees but that does not entitle them to the timber of the trees when cut, unless a custom to the contrary is established the onus whereon is upon the tenants. Where there is no evidence of any custom establishing the right of the tenants to the same, the landlord is entitled to get the full compensation awarded for the trees

BENGAL TENANCY ACT, S. 27.

Jwala Prasad et al Dos, JJ. RAMJIT SAWH v. MAIMED CHANDRAI (1920) Pat 129 : 1 P. L. T. 143 : 56 I. C. 126.

S. 23—Landlord and Tenant—Trees—Right to—Custom—Onus

Where the Kural of Right contained the entry that "2 annas of the value of the trees, when cut and sold would belong to the landlord, and the remaining 7 annas to the tenant," and the tenant cut the branches of some trees and removed them, whereupon the landlord filed a complaint under S. 42 of I.P.C. in which the tenant pleaded that the landlord's right to 9 annas share had reference only to trees cut and sold and not to trees cut for domestic purposes.

Hold that the onus of proving the custom as set up by the tenant accused rested upon him, both in a Civil and Criminal case; and the civil or criminal court, before which the issue arose, was competent to determine it, and that the tenant had no absolute right to appropriate the entire timber of the trees for their own purposes (*Jwala Prasad, J.*) PINCHI MANDAR v EMPEROR 1 P. L. T. 318 : 57 I. C. 273 : 21 Cr. L. J. 609.

Ss. 23, 25 and 155—Sp. Rel. Act, Ss. 54 and 55—Occupancy holding—Cremation ghat—Erection of—Suit for ejement—Relief in the alternative

The construction of a public cremation ghat with accessory platforms and sheds on an occupancy holding is a misuse of that holding so as to render it unfit for the purposes of cultivation. In a suit for ejement of the defts. from a holding as trespassers, with an alternative prayer that if the defts. were not found to be trespassers but tenants, an injunction should issue restraining them from misusing the holding, it was found that the defts. were occupancy raiyats who had misused the holding so as to render it unfit for cultivation. Hold, that as the piffs did not seek to eject the defts. if they were in fact their tenants, the suit to remedy the misuse based on S. 23 of the B. T. Act and Ss. 24 and 25 of the Sp. Rel. Act was maintainable. And it was not necessary for the plaintiffs to proceed in the manner indicated by Ss. 25 and 155 of the B. T. Act. (*Toum and Chauduri, JJ.*) DEHENDRA KUMAR ROY v. RADHA CHARAN ROY CHOWDHURY 57 I. C. 758.

Ss. 27, 29 and 30 to 35—Fair and equitable rent—Onus—Enhancement of rent in excess of two annas.

The rent of a tenancy was assessed in 1263 B. S. In 1311 B. S. there was a fresh measurement by the landlord and fresh rents were settled between the landlord and the tenants. From year to year, the rates of rent were increased. In a suit for rent of the years 1322 and 1323 B. S. on the ground that the rates fixed were not fair and equitable, Hold that under S. 27 of the B. T. A.

BENGAL TENANCY ACT, S. 29.

burden of proof was on the landlord to show that the rent claimed was fair and equitable.

The provisions in Ss. 30 to 35 of the B. T. Act are not conclusive tests for the purpose of ascertaining whether the rent of a raiyat is fair and equitable.

S. 29 of the B. T. Act is not a bar to the enhancement of two annas in the rupee where the increase of the rent has been agreed upon in order to settle a *bona fide* dispute between the landlord and the tenant as to the area of his tenancy. (*Beachcroft, J.*) DABIRUDDIN JOOR-DAR v. MIDNAPORE LEMINDARY CO., LTD.

57. I C 850.

Ss. 29 and 147 A.—Landlord and Tenant—Compromise of dispute regarding terms of tenancy—Consideration extraneous to suit—Effect of. See (1919) *Dig. Col.* 68. RAM PADARATH SINGH v. SOHRAI KOENI

(1920) *Pat* 114

S. 29—Rent—Suit for—Consolidated rent—Agreement to pay—Encroachment—New holding.

Where an occupancy raiyat agrees to pay a consolidated rent for the lands or the original holding as also the encroached lands, wherein he took possession without the consent of the landlord S. 29 of the Bengal Tenancy Act is not applicable as a new holding is constituted. 22 C. L. J. 81 toll. (*Mookerjee, C. J. and Fletcher, J. J.*) GANIBULLA SHEIK v. JNANADA SUNDARI RAI. **32 C L J. 184; 57 I. C. 998.**

S. 30—Kabuliyat—Occupancy—Tenant—Enhancement of rent.

Though the *Kabuliyat* of an occupancy tenant provides for an enhancement of the rent only in the case of a survey being made, the landlord can apply to have the rent enhanced under S. 30 of the B. T. Act, on his making out a proper case for enhancement. (*Fletcher, J. J.*) GOPAL PRAMANIK KAPALI v. KALI KANTA GHOSE. **55 I. C. 85.**

Ss. 32 (b) and 35—Rent—Enhancement—Mode of computation.

The provisions of S. 32 (b) of the B. T. Act, as to the mode of calculating an enhancement of rent, where there has been a rise in the price of staple food crops are imperative unless there are circumstances from which it can be established that it would be unfair and inequitable under S. 35 of the Act to allow enhancement in accordance with those provisions. (*Beachcroft, J.*) RAMALI MOHAN ROY v. ABDUL NASSYA. **57. I. C 115.**

S. 40—Commutation of rent—Compromise by some of the landlords if binding on others.

In proceedings for commutation of rent under S. 40 of the Bengal Tenancy Act a compromise between the tenants and some of the landlords is not binding on those landlords who were not parties to the compromise. (*Das, J. J.*) SURAT NARAIN SINGH v. NATHUNI RAI. **56 I. C 538.**

BENGAL TENANCY ACT, S. 50.

Ss. 46 and 158—Occupancy raiyat—Suit for settlement of equitable rent—Competency of—Enhancement of rent.

A non-occupancy raiyat under a lease for 9 years ending on the 1st Assin, 1319 held over after the expiry of the period. The plaintiff landlord sued for *khas* possession or, in the alternative for fair and equitable rent for the years 1319 to 1322 inclusive.

Held, that so far as the years 1319 to 1321 were concerned the plaintiff not having availed himself of the procedure under S. 46 of the B. T. Act, 1885 was entitled to rent at the rate provided in the lease only. For the year 1322 by which time the defendant had become an occupancy raiyat, the provisions of Chapter X and S. 158 not being applicable to the case, the plaintiff was entitled to sue for enhancement of rent under Chapter V but could not recover rent at an enhanced rate in the present suit.

Per Dawson Miller, J. :—Even had the present suit been one for the enhancement of rent the Court could not award rent at an enhanced rate for previous years (*Miller, C. J. and Mullick, J.*) DAYAL KUNDU v. MALHU PATHAK. **5 P L J 406; 57 I. C. 558.**

Ss. 49 and 85—“Kayam” ryot—Meaning of—Occupancy ryot—Grant of lease for over 9 years—Transeree from ryot, if may question its validity. See (1919) *Dig. Col.* 70. NANDRAM CHANDRA SIL v. SRINATH CHAKRABARTI. **54. I C. 906.**

S. 49—Notice to quit—Mode of Service—Tenants in common—C. P. Code O. 5, R. 15.

A notice to quit under S. 49 of the B. T. Act should be served in the manner prescribed in the C. P. Code for the service of a summons. If such a notice is issued to tenants-in-common and one of the tenants receives the notice for all, the Court should, deciding whether service has been properly effected on all, consider the facts with reference to O. 5, R. 15, C. P. C. or with reference to the rule that service upon the joint tenant is *prima facie* evidence that it reached all. (*Richardson, J.*) HARICHARAN MANDAL v. BIGMORE GAIN. **56 I. C. 127.**

Ss. 50 and 158—Applicability of—Denial of tenancy—Presumption under S. 50.

The principle underlying S. 158 of the B. T. Act is that there should be an admitted tenancy. Where there is a denial of tenancy, the inquiry contemplated by that section cannot be made.

In dealing with an application under S. 158 of the B. T. Act it is not necessary to find whether the tenant is entitled to the benefit of the presumption under S. 50, that section being applicable when the landlord seeks an enhancement of rent. (*Walsmley, J.*) MONMOHAN GHOSE v. NARAIN CHANDRA DAS. **55 I. C. 709.**

Ss. 50 and 115—Record of rights—Suit for enhancement of rent long after publication—Presumption.

BENGAL TENANCY ACT, S. 50.

Where after the publication of a Record of Rights a landlord brings a suit for enhancement of rent against an occupancy *raiyat*, the latter is precluded from relying upon the presumption raised in S. 50 of the Bengal Tenancy Act, for that section is controlled by S. 115 of the Act. (*Sultan Ahmed, J.*) SHEIK ABDUL BAQI v. KUNJA BEHARI PANDEY.

56 I. C. 818

Ss. 50 (2), 102 (b) and 115—Cadastral survey—Tenant entered as quaini—Presumption.

Once the status of a tenant is entered as *quaini* under S. 102 (b) of the Act, no presumption can thereafter arise under S. 50 from the fact of payment of rent at a uniform rate for twenty years. S. 115 bars any such presumption. The object is to conclude once for all the question as to the status of the tenant so far as it rests upon the presumption of twenty years' uniform payment of rent. The section does not, however, bar proof of the tenancy from the time of the permanent settlement at a fixed rate of rent by any other means, e.g., by the production of the original grant. (*Jwala Prasad, J.*) MAHARANI JANKI KUER v. HIRANAND PANDEY.

58 I. C. 25.

S. 50 (2)—Ejection—Limitation—Rent payment of—Enhancement of Presumption.

Defts. Nos. 1 and 3 who purchased the tenure in suit from deft. No. 4 paid rent for about 37 years and the rent was accepted from them.

Held, that plff. could not get *khas* possession of the tenure as his right to do so was barred by limitation and hence could not ignore the right of defts. Nos. 1 and 3 who were entered in the record of rights as tenants.

Plff. produced a *kabuliyat* of the year 1840 executed by the predecessor in interest of the deft. No. 4, the vendor of defts. Nos. 1 and 3. There was an express stipulation in the *Kabuliyat* that the tenants would pay enhanced rent according to the *pargana* rate.

Held, that the *kabuliyat* might be considered either as a new contract under which the tenants agreed to pay enhanced rent, or a contract containing receipts of the incidents of the tenancy which was in existence from before. The rent was therefore enhanceable. (*N. R. Chatterjee and Newbould, J.J.*) UPENDRA NATH GHOSE v. DWARKA NATH BISWAS.

31 C. L. J. 178: 55 I. C. 790

Ss. 50 (2) and 115—Presumption under—Effect of.

S. 115 of the B. T. Act controls S. 50 (2) and an occupancy *raiyat* is precluded from relying upon the presumption raised under S. 50 (2) after the publication of the Record of Rights when the landlord brings a suit for enhancement of rent. 26 Cal. 617, 12 C. W. N. 904. 1. P. L. J. 67, d'ss from, 37 Cal. 30, 22 I. C. 604, 22, I. C. 943, 30 C. L. J. 9 toll. (*Coutts*

BENGAL TENANCY ACT, S. 52.

and *Sultan Ahmed, J.J.*) JUGDEO NARAIN SINGH v. BHAGWAN MAHTON.

1 Pat. L. T. 27: 54 I. C. 672.
—**S. 50 (2)—Rent—Enhancement of—Presumption—Amalgamation of tenures.**

In a suit for enhancement of rent of a tenure defendants proved payment of rent at the same rate for a period of 20 years before the institution of the suit Plaintiff produced a *Kabuliyat* of the year 1853 and relied upon it as showing that the tenants had agreed to pay enhanced rent. There were originally four separate tenures which were amalgamated into one by the *Kabuliyat* of 1853. The *Kabuliyat* expressly stated that enhanced rent would be paid according to the rate of enhancement in the village. The other incidents of the tenure mentioned in the *Kabuliyat* were not shown by the defendants to be the incidents of the four original tenures.

Held, that the plaintiff was entitled to enhancement of rent, as he rebutted the presumption arising under S. 30 (2) of the B. T. Act, 18 C. W. N. 949 d'st. (*Chatterjee and Newbould, J.J.*) DHIRENDRA NATH GHOSE v. GOPICHARAN SAHA.

31 C. L. J. 12.

S. 50 (2)—Rent—Fixity of—Presumption from uniform payment of rent for 20 years.

When a tenant proves payment of rent at a uniform rate for a period exceeding 20 years, the presumption is that the tenant holds the land without being liable to have his rent increased unless and until the landlord shows something to the contrary. (*Fletcher and Teunon, J.J.*) GOPAL CHANDRA BANERJEE v. MOHAMMAD SOLEMAN MULLICK.

31 C. L. J. 11.

S. 52 Landlord and Tenant—Enhancement of rent—Suit for—Excess area—Onus of proof.

In a suit for enhancement of rent on the ground of excess area, S. 52 (5) of the Bengal Tenancy Act relieves the landlord from the necessity of proving the particular land as being the land held by the tenant in excess of the area originally held by him. Under this clause the landlord is only required to prove the area originally held by the tenant and the excess subsequently found, provided the standard of measurement is the same throughout. Where a consolidated *jama* is paid for a particular holding, the subsequent detection of excess area would not entitle the landlord to an increase of rent. If, on the other hand, the rent is paid according to the area, whether the area is arrived at in the beginning by measurement or not, the subsequent detection of any change in the area would entail a corresponding alteration in the rental, whether it be a reduction in favour of the tenant or an enhancement in favour of the landlord. (*Jwala Prasad, J.*) LALLA SHEO KUMAR LAL v. RAMPHAL DASS.

58 T. C. 950

BENGAL TENANCY ACT, S. 52.

S. 52—Rent—Enhancement of, or increase in area—Proof of increase in area

To enable a Court to grant an enhancement of rent under S. 51 of the Bengal Tenancy Act, it must be in a position to find what the area was at the inception of the tenancy; it is necessary therefore for the landlord to prove that there has been some increase in the area as compared with area of the tenancy at its inception.

The expression "area for which rent has been previously paid" in S. 52 of the B.T. Act means the area with reference to which the rent previously paid has been assessed or adjusted (*Beachcroft, J.*) **AZIZ KHAN v. SARAJUBALA DEBI.** 55 I.C. 430.

S. 52 (6)—Time of measurement—Meaning of—Onus of proving increase of area

The word "at the time the measurement on which the claim is based was made" in S. 52 (6) of the B.T. Act do not refer to the measurement upon which the excess area is found out before the institution of the suit but refer to the measurement made at the time of the original settlement.

A landlord has to prove under S. 51 of the B.T. Act that there has been an increase in the area for which rent was previously paid and in order to do so, he must show that the land was measured at the time of the inception of the tenancy by a particular standard of measurement and that there has been an increase in the area on measurement by the same landlord. The section merely provides that if the landlord proves that at the time the measurement on which the claim is based was made there existed a practice of settlement being made after measurement of the land assessed with rent it may be presumed that the area specified in the patta, kabuliat or counterfoil rent receipt was entered in it after measurement so that if the landlord can prove such a practice it will be presumed that the area entered in the patta, kabuliat or rent receipt was entered after measurement though he is not able to prove that as a matter of fact the lands in the particular case were settled after measurement. 19 C.L.J. 451 Ret (*N.R. Chatterjee and Duvval, JJ.*) **UMED ALI v. NA-WAB KHAJEH HABIBULLA.**

47 Cal. 266 : 31 C.L.J. 68 : 56 I.C. 38.

Ss. 53, 65 and 158 (b)—Produce rent—Arrears of—Sale of holding

It is not proper to hold that because produce rent is not paid in instalments, it cannot fall into arrears.

Under S. 65 of the B.T. Act holdings do not become liable to sale in execution of a decree for arrears of rent but "in execution of a decree for the rent of the holding." So far as S. 65 is concerned there seems to be no distinction between a holding which is held on produce rent and a holding held on a money rent.

The contention that only nagdi rent can fall

BENGAL TENANCY ACT, S. 65.

into arrear and that as holdings are only liable to sale for arrears of rent holdings held on produce rent or partly on produce rent and partly on money rent cannot be sold, is without authority (*Coutts and Sultan Ahmed, JJ.*) **MANBARAN RAUT v. BABU NOWBAT SINGH**

5 P. L. J. 341 : 1920 Pat. 257 : 58 I.C. 497.

S. 53—Suit for rent—Valid Tender—Interest due—Cess calculation of

Under S. 53 of the B.T. Act the rent for the quarter of the agricultural year becomes due on the 1st of Assin when the new year commences and a suit instituted during the currency of the 2nd Bhado's premature in so far as the arrear for the last quarter is concerned.

A tender of rent, in order to be valid must include the interest due at the date of the tender, and it is immaterial that the landlord demanded damages and not interest.

Under S. 41 read with S. 4 of the Bengal Cess Act, the landlord is entitled to only half an anna in the rupees on rental paid by the tenure holder. (*Coutts and Das, JJ.*) **SYED ABBAS v. PREMSUKH DASS.**

1 P. L. T. 455 : 58 I.C. 878.

Ss. 54 (8), 65 and 158 (b)—Rent decree—Produce rent—Arrears—Sale.

A holding which is held on produce rent or partly on produce rent and partly on money rent is liable to be sold in execution of a decree for arrears (*Coutts and Sultan Ahmed, JJ.*) **MANBARAN RAUT v. NOWBAT SINGH.**

5 P. L. J. 641 : 1920 Pat 257 : 58 I.C. 497.

Ss. 65 and 167—Rent sale—Holding sold after mortgage decree but before Mortgage sale—Rent sale purchaser—Priority

A mortgage lien is not extinguished on the passing only of the decree upon it. It is not extinguished till the sale takes place in execution of the mortgage decree and sale proceeds are distributed in satisfaction of the mortgage debt.

Where between the date of a decree obtained by a mortgagee of an occupancy holding and purchase in execution thereof by the mortgagee, the holding was sold in execution of the landlord's decree for rent;

Held, that the mortgage incumbrance subsisted at the date of the rent sale and not having been annulled under S. 187 of the Bengal Tenancy Act within time allowed by the section, the purchaser at the rent sale could not avoid it but was entitled to redeem the mortgagee purchaser.

The purchaser at a rent sale who does not annul a subsisting mortgage incumbrance upon the holding does not acquire priority over the purchaser at a subsequent sale in execution of the decree obtained on the mortgage by reason of the rent being a first charge upon the holding under S. 65 of the Bengal Tenancy Act.

BENGAL TENANCY ACT, S 66.

13 C. W. N. 411 (1909) not followed (*Chatterjee and Newbould, JJ.*) **BIDHUMUKHI DASI v. BHABA SUNDARI DASI.**

24 C. W. N. 961.

—**S. 66 Sub S 2**—Decree for ejectment executed pending appeal if liable to be set aside on payment of decree amount within 15 days of confirmation by appellate court. See (1919) *Dig. Col* 73 **ABDUL RASHID MONDAL v SHAHARALI MOLLA.** **54 I. C. 659.**

—**S 67 and 179—Applicability of Permanent mokarari lease—Evidence of**

S 67 of the B.T. Act applies only where the tenancy is not a permanent *Mokarari* tenancy situated within a permanently settled area

A permanent tenancy was created but there were no clear express ions in the *Kabuliyat* showing that the rent was fixed except a provis'on that if at any time the land on measurement be found larger in area than that on the bas's of which the rent was fixed the additional rent payable for such additional area would be in proportion to the rent originally fixed

Held that the lease was not only a permanent but also a *Mokarari* lease (*Shamsul Huda, J.*) **KRISTO DAS LAW v. KALIMUDDIN BHUIA.**

55 I. C. 507.

—**S. 70—Order without notice to parties—Suit for rent.**

An order made by a Collector under S. 73 of the B.T. Act without giving an opportunity of being heard to the parties as required by S. 76 (4) is *ultra vires* and is no bar to a subsequent suit for rent (*Coutts and Sultan Ahmed, JJ.*) **DEO LAL MAHTO v. BIBI RAKIYA.**

57 I. C. 572

—**S. 84—Applicability of—Landlord and tenant—Tenure holding under Kabuliyat—Custom—Acquisition of land for market**

If a tenant holding under a *kabuliyat* is bound according to custom, to give up possession of the land in the event of a market being established thereon the landlord is not bound to adopt the procedure laid down in S. 84 of the B.T. Act for acquiring the land for such purpose. That section is inapplicable to a contract contained in a *kabuliyat*. The tenant cannot insist on the landlord taking only a specific portion and no more (*Chatterjee and Panton, JJ.*) **BEJOY CHANDRA ROY v. PROD-YOT KUMAR TAGORE.** **55 I. C. 268.**

—**S. 85—Occupancy raiyat—Lease granted by—Creation of intermediate tenure—Suit for rent—Estoppel**

Deft. No. 2 an occupancy raiyat granted a lease of his holding to Deft. No. 1 for a term in excess of that authorised by S. 85 of the B.T. Act. Subsequently Deft. No. 2 created an intermediate tenancy in favour of the plaintiffs, also unauthorised by S. 85. In a suit by plfis. against deft. No. 1 for arrears of rent.

BENGAL TENANCY ACT, S 85.

Held that the deft. No. 2 and plffs having agreed between them that the rent was payable to the plffs it was not competent to the deft. No 1 to contest the plaintiffs claim for rent. (*Fletcher and Duval, JJ.*) **KARTICK MONDAL v MADHAB MONDAL.**

55 I. C. 615.

—**S 85 (2)—Occupancy raiyat—Permanent lease—Registration of lease null and void—Lease by raiyat representing himself to be tenure-holder or raiyat at fixed rate—Collusion—Estoppel**

Where a lease purporting to be of a permanent character, is granted, on the face of the document, by a raiyat (not being a raiyat holding at a fixed rate) to an under raiyat, the lease is not operative as a permanent lease between the raiyat and the under raiyat. Registration of such lease in violation of the statutory prohibition contained in S. 81 (2) of the B.T. Act, is null and void in law. But as the tenancy of an under raiyat may be created without a written lease, the grantee in such a case is an under raiyat who holds otherwise than under a written lease and his tenancy is liable to be terminated in the manner prescribed by S. 49 (b) of the B.T. Act. Till the tenancy has been terminated, the grantor cannot treat him as a trespasser.

Where the lease, purporting to be of a permanent character, is granted by a person who on the face of the document professes to have a higher status than that of a raiyat (for example, that of a tenure holder or a raiyat holding at a fixed rate), the grantee, when his title as paramount lessee is challenged by his grantor may invoke the aid of the doctrine of estoppel and plead that the grantor cannot be permitted to prove the falsity of the recitals in the document (on the faith of which he took the lease) so as to enable him to derogate from his grant.

Where the lease, purporting to be of a permanent character, is granted by a person who, on the face of the document, professes to have a higher status than that of a raiyat (for example, that of a tenure holder or a raiyat holding at fixed rate) and the grantee invokes the aid of the doctrine of estoppel in answer to a challenge of his title as permanent lessee by his grantor:

Quare. Whether such plea may be defeated by the grantor on proof that they had conspired by false recitals to evade the provisions of the statute, (*Mookerjee, A. C. J., Fletcher, Chatterjee, Teunon and Richardson, JJ.*) **CHANDRAKANTHA NATH v. AMJAD ALI HAZI.**

25 C. W. N. 4:32 C. L. J. 296. (F.B.)

—**S. 85 (2)—Sub-lease for more than 9 years—Registration with consent of landlord—Effect of.**

S. 85 (2)—of the B.T. Act operates as a statutory bar to the registration of a sub-lease by a *raiyat* for a term exceeding nine years. The consent of the landlord cannot validate

BENGAL TENANCY ACT, S. 86.

the registration and if such a lease is registered it is inadmissible in evidence. (*Newbold, J.*) MADAN MONDAL GOCHI v TARINI CHANDRA BANERJEE. 54 I. C. 625.

—S. 86—*Occupancy holding—Surrender of portion of holding sold by tenant to a stranger—Transferee not bound.*

As surrender by a raiyat of a part of his holding which he has already sold to another is not binding on the transferee.

Apart from authority a person who has parted with his interest in property cannot deal that interest by surrendering it in favour of the landlord and he cannot confer upon the landlord a higher right than he could have passed to any other person by assignment. It would be different in the case of the surrender of the entire holding because then the tenancy would cease to exist and the landlord would be in a position to re-enter on the land. (*Chatterjee and Panton, JJ.*) SAILESH CHANDRA BOSE v. UMESH CHANDRA RUDRA.

24 C. W. N. 573 : 57 I. C. 574.

—S. 86—*Occupancy raiyat—Transfer of a portion of the holding—Subsequent surrender to landlord—Effect of—Equitable estoppel.*

An occupancy raiyat who has transferred part of his non-transferable holding is not competent to surrender to his landlord the portion so transferred either by surrender of that portion alone or by surrender of the whole inclusive of such portion. This follows from the principle that no one is permitted to defeat or derogate from his own grant, a principle the application of which is not excluded by S. 86 of the B. T. Act since that act does not purport to be a complete code and even in respect of the law of landlord and tenant and does not profess to incorporate the general principles of the law of contract and the doctrine of equity jurisprudence, in so far as they may have to be applied in the determination of disputes between landlord and tenant. 35 C. 34 Ref (*Mookerjee, C. J. and Fletcher, Chatterjee, Teunon, and Richardson, JJ.*) SYED MOHSEN UDDIN v BAIKUNTA CHANDRA SUTRADHAR. 25 C. W. N. 29 (F. B.)

—S. 86—*Surrender of portion of holding already sold—Right of landlord to eject vendee.*

An occupancy raiyat having sold a portion of his holding surrendered his tenancy in respect of the portion sold to his landlord who thereupon sued his vendee for khas possession.

Held that the vendor having transferred a portion of the holding had nothing left in him in that portion to surrender. (Fletcher, Beachcroft and Greaves, JJ.) SHEIKH DASTUR ALI v. RAM KUMAR GOPE.

24 C. W. N. 571.

BENGAL TENANCY ACT, S. 87.

—S. 86 (1)—*Raiyati Holding—Registered lease—Oral surrender—Validity. See EVIDENCE ACT, S. 92 PROVISO 4.*

47 Cal. 129.

—S. 86 (i)—*Raiyat—Holding under lease not for fixed period—Surrender of holding—Validity of—Registration if necessary—Suit against persons to whom holding has been let.*

A raiyat holding under a lease which is not for a fixed period can surrender the holding under S. 86 (1) of the B. T. Act. Such surrender need not be by an instrument even though the tenant held under a registered lease.

When a raiyat surrenders his holding and the surrender is accepted by the landlord who enters into possession the tenant cannot sue to recover the holding from persons to whom the landlord has let it after the surrender. (*Chatterjee and Duval, J.J.*) PORAN CHANDRA v. INDRA SENI. 54 I. C. 752.

—S. 87 Co-sharer landlord—Rent decree—Sale in execution—Purchase by decree holder—Rent of other co-sharers to joint possession—Rent, Right to.

Where a co-sharer landlord purchases a holding sold in execution of a decree obtained by himself for his share of the rent co-sharer landlords are entitled to joint possession to the extent of their sharers in the Zemindari. But they would not be so entitled if the decree in execution of which the holding is sold a decree under S. 87 of the B. T. Act. In such a case they would only be entitled to fair rent to the extent of their shares. (*Chatterjee and Cuning, JJ.*) BEPIN CHANDRA ROY CHOWDHURY v. PROFULLA NARAIN ROY. 54 I. C. 787.

—S. 87—*Landlord and tenant—Abandonment of holding—Non transferable occupancy holding—Adverse possession.*

Where there is a transfer of a non-transferable occupancy holding it is only on the theory of abandonment under S. 80 of the B. T. Act that the landlord can re-enter. Where such abandonment took place 12 years before the landlord's suit to recover khas possession the only way of overcoming the bar of limitation to the suit would be by establishing a case within S. 18 of the Limitation Act. (*Beachcroft, J.*) MANULLA KOLU v. PRASANNA KUMAR SARKAR. 56 I. C. 811.

—S. 87—*Not exhaustive—Abandonment of holding—What constitutes—Transfer of whole of non-transferable raiyati holding—Effect of.*

S. 87 of the B. T. Act is not exhaustive and does not prescribe the only mode in which a holding can be abandoned.

To entitle a landlord to eject a transferee of the whole of a non-transferable raiyati holding it is necessary for him to prove as a fact that the raiyat has left the holding and disclaims any interest in it. It may be inferred from

BENGAL TENANCY ACT, S. 99.

the fact that the tenant has sold the entire holding and given possession of it to the purchaser and distinct repudiation or refusal to pay rent need not be proved. (*Chatterjee and Cuming, JJ.*) **ASANULLA MOLLA v. SANKAR DAS SANYAL.**

54 I. C. 548.

—**S. 99—Common manager—Application to Dt. Judge for restoration of management to co-owners—Party**

In an application by the co-owners under S. 99 of the Bengal Tenancy Act for restoration of the management of their estate the common manager is not and cannot be made a party to the proceeding (*Chatterjee and Panton, JJ.*) **BHAGABATI DEBYA CHAUDHURI-RANI v. NIL KANTHA CHATTERJEE**

24 C. W. N. 927.

—**Ss. 101, 102 and 103—Record of Rights—Record of custom—Value of—Presumption—Evidence Act, S. 35—Effect of**

Under S. 101, a Revenue Officer has power to prepare a Record of Rights in respect of lands in any local area notified by the local Government. He has no power to record the existence of any local custom that may affect such lands as part of the Record of Rights, as under S. 102 of the Act a village custom is not one of the particulars which has to be recorded. If a record of rights contains an entry as to custom, there can be no presumption under S. 103 B. of the Act as to its correctness, and although under S. 35 of the Evidence Act it is relevant evidence yet the burden of proving the existence of a custom lies on the party who relies on the custom. (*Das, J.*) **SURESH CH. RAI v. SITARAM SINGH.**

57 I.C. 126.

—**Ss. 103 A. & 103 B—Draft record of rights, admissibility in evidence—Procedure—Effect when admitted.**

A draft record of rights is inadmissible in evidence. Where the lower court has admitted inadmissible evidence the proper procedure for the appellate court is to remand the case, as it is not possible to ascertain how far the former was influenced in arriving at its conclusion by that piece of evidence (*Das, J.*) **SARUP RAI v. SRIKANT PRASAD.**

1 P. L. T. 224: 55 I. C. 922.

—**Ss. 103 A and 103—Record of Rights—Entry in—Suit before Settlement officer for declaration that entry incorrect—Custom of appropriation of trees—Onus.**

Where an entry having been made in the record-of-rights published under S. 103 A of the Act, to the effect that the tenants were entitled to appropriate the trees standing upon their occupancy holdings, the proprietress instituted suits before the Assistant Settlement Officer for a declaration that the entry was incorrect and that she was entitled to half the value of the trees.

Held, that the ordinary law is that the tenant has the right to cut and the landlord,

BENGAL TENANCY ACT, S. 105.

the right to appropriate. If the tenant's claim any right of appropriation he must prove a custom to that effect and it was open to the officer who prepared the record of rights to enquire whether the tenants had discharged the onus which the law had placed upon them. But as S. 103 B, B. T. Act, provides that the record of rights is presumed to be correct until the contrary is proved by evidence, the onus is upon the plff. to show that she had the right to a half share.

The record of rights is no doubt entitled to the benefit of the presumption attached to it but where the Court has before it the evidence upon which the record was prepared and the plff. denied the correctness of the record, the Court is bound to come to a finding whether that evidence is sufficient to justify the entry. 9 C. L. J. 284; 27. C. L. J. 107. ref. (*Mullick and Sultan Ahmad, JJ.*) **MAHARANI JANKIKOER v. SUDAGAR RAM.**

1 P. L. T. 221: 1920 Pat. 177:

56 I. C. 417.

—**S. 103 B—Record of Rights—Entry in—Value of evidence prior to publication**

Evidence of a date prior to that of the publication of a Record of Rights is admissible in evidence and ought to be taken into consideration by a Court and weighed in determining whether the presumption created by an entry in the Record of Rights has been rebutted. (*Das, J.*) **BHIKHAN QASSAB v. MARDAN ALI.**

56 I. C. 40.

—**S. 104 (4)—Settlement of fair rent by Court—Matters to be taken into consideration.**

In settling a fair rent under S. 104 H. (4) of the B. T. Act what the Court has to consider is the rent of other holdings of the same class comprised in the same settlement rent roll: the mere fact of the villages being neighbouring ones does not necessarily show that they are comprised in the same settlement rent roll (*Chatterjee and Dural, JJ.*) **NANMATHA NATH KAR v. SECRETARY OF STATE.**

54 I. C. 718.

—**S. 105—Fair and equitable rent—Duty of landlord to prove excess—Standard of measurement.**

In a suit for settlement of fair and equitable rent said to be held at consolidated rent, it is essential for the landlord to show what the standard of measurement was in the contemplation of the parties at the time when he demised the lands to the tenants. (*Das, J.*) **MAHARAJAH KESHO PRASAD SINGH v. AKLU MATON**

57 I. C. 502.

—**Ss. 105 and 109—Landlord and tenant—Fair and equitable rent—Settlement of—Suit for rent—Jurisdiction of Civil Court—Ex parte decree.**

There is no inherent want of jurisdiction in a Court to try a suit for rent although the matter has already been the subject of an

BENGAL TENANCY ACT, S 105.

application under S. 105 of the B. T. Act. It is for the party relying upon S. 109 of the Act as barring further enquiry into the subject to plead it. If no objection is put forward based on S. 109 the decision of the Court that the plaintiff is entitled to recover rent on the basis of the entry in the Record of Rights would operate as *res judicata* between the parties.

A decision in a previous rent suit as to the amount of rent payable does not ordinarily operate as *res judicata* in a suit for rent for subsequent years. But the decision on the question whether there is a formal agreement or contract between the parties as to the amount of rent payable does operate as *res judicata*.

An *ex parte* decree in a rent suit in which the defendant did not appear and filed no written statement cannot operate as *res judicata*. If the defendant appeared and filed a written statement upon which an issue was or could have been raised between the parties, the fact that the defendant subsequently did not appear to contest the suit with the result that an *ex parte* decree was passed against him, would not prevent the operation of the principle of *res judicata*. (*Das, J.*) MAHARAJA OF DAR-BHANGA v. YOUNUS MOMIN.

57 I. C. 48.

—**Ss. 105, 105 A, 107 and 109**—*Proceedings under S. 105—Issue raised by tenant as to whether land is mal or lakhraj—Rent settled on tenant's failure to adduce evidence—Decision if a bar to suit by tenant for declaration of title*

Plff's holding having been recorded in the record-of-rights as *mal* land liable to assessment of rent, the deft. landlord applied for settlement of fair and equitable rent under S. 105 B. T. Act, whereupon plff. pleaded that his holding was his *nishkar lakhraj*, and though an issue was raised on the point, owing to the plff's failure to adduce evidence in support of his case, the Settlement Officer proceeding upon the record-of-rights assessed the holding to rent. Plff. then instituted the present suit for declaration of his *nishkar lakhraj* title to the land of the holding.

Held, that the Settlement Officer had recorded a decision on the issue within the meaning of S. 107 of the Bengal Tenancy Act.

Where a question has been necessarily decided in effect though not in express terms between the parties to a suit, they cannot raise the same question as between themselves in any other suit in any other form (1747) 3 Atk, 626 and L. R. I. A. Sup. Vol. 212; 12 B. L. R. 304; 315 (1873) ref.

The suit was further barred under S. 109 of the Bengal Tenancy Ac..

It is not necessary for the application of S. 109 of the Bengal Tenancy Act that the matter in issue should have been raised by the applicant himself before the Settlement Officer. 21 C. W. N. 1004 and 18 C. W. N. 604 dist.

BENGAL TENANCY ACT, S. 105.

(*Chatterjee and Dival, JJ*) APURBA KRISHNA ROY v SHYAMA CH. PARAMANIK
24 C. W. N. 223 : 54 I. C. 952.

—**Ss. 105 and 188—Record of Rights—Application—Parties—Members of Joint Hindu family—Lim Act, S. 22.**

In a record of rights finally published on 12th March 1917, S. and G were recorded as landlords. S. G and an infant son of S who was born before 12th March 1917 applied on 20th April 1917 under S. 105, Bengal Tenancy Act, and on 19th June 1917 applied to amend their original application by joining an infant son of G who was born on 15th April 1917, five days before the date of the original application. S. G. and their infant sons were members of a joint Mitakshara family:

Held, that an amendment which would have the effect of extending the statutory period of two months from the date of final publication, (within which under S. 188 of the Bengal Tenancy Act, an application must be made by all the landlords) could not be allowed and the proceeding under S. 105, Bengal Tenancy Act, must therefore fail.

The persons entered in the record of rights are not the only persons entitled to apply under S. 105, Bengal Tenancy Act. 18 C. W. N. 268 (1913) relied on

An application under S. 105 of the Bengal Tenancy Act is not maintainable at the instance only of the managing members of a joint Hindu family. (*Chatterjee and Panton, JJ*) RAJA SATI PRASAD GARGA BAHADUR v. SONATON JHARA.
25 C. W. N. 38.

—**Ss. 105 and 107—Settlement Officer—Duty of—Non-compliance with procedure—Effect of.**

In a suit to recover rent at the rate determined by a Settlement Officer in a proceeding under S. 105 of the B. T. Act, the onus does not lie on plff. to show that all the requirements of the B. T. Act, were fulfilled when the Settlement Officer passed his decree. In a proceeding under S. 105 of the B. T. Act a statement by some of the co-tenants in a petition of compromise that they were willing to pay a higher rate of rent would be no evidence against the tenants to that document to prove that the rent was liable to enhancement. As the Settlement Officer is bound under S. 107 of the B. T. Act to adopt the procedure laid down in the C. P. Code for the trial of suits, it is necessary, before passing an *ex parte* decree against the tenants to take up some evidence other than the petition of compromise.

Where a settlement Officer decides a case under S. 105 of the B. T. Act, without following the procedure laid down by S. 107 of the Act, his order cannot have the force and effect of a decree of a Civil Court in a suit between the parties (*Nowbould, J*) JANADA GOBINDA CHAUDHURY v. BONOMALI SAHA.

57 I. C. 989.

BENGAL TENANCY ACT, S 105.

—**Ss. 105 and 109—Suit for enhancement of rent—Dismissal of prior application—Effect of.**

Where an application for enhancement of rent under S. 105 B.T. Act on the ground *inter alia* of increase in area, was dismissed for non-prosecution and a suit for enhancement on the same ground was subsequently brought.

Held, that the suit was barred by S. 109.

An application which has been made whether it is withdrawn or whether it is dismissed for non-prosecution is nevertheless an application made within the meaning of S. 109. (*Mukherjee, O C J and Fletcher, J.*) **SRIMATI ABEDA KHATUN v. MAJUBALI CHOWDHURY.**

24 C. W. N. 1020.

—**Ss. 105 A and 109—Decision under S. 105 A—Suit for ejection against persons not parties to proceedings.**

A decision in a proceeding under S. 105-A of the B.T. Act that certain persons are tenure-holder's does not bar a suit by those persons against certain other persons who were not parties to the proceeding under S. 105-A for ejection of the latter on the ground that they are mere trespassers. (*Das, J.*) **RAMYAD PANDE v. GENDA TEWARI.** **56 I. C. 993.**

—**S. 106—If bars civil suit to correct entry.**

S. 106 of the B.T. Act does not provide the only method of obtaining the correction of the entry in a finally published record of rights, and a civil suit instituted with that object is maintainable. **35 Cal. 1013** not foll. **MAHOMED AYEJUDDIN MEA v. PRODYAT CUMAR TAGORE.**

25 C. W. N. 13.

—**S. 106—Mouarsi tenure—Rent Enhancement of—Patni taluk—Value of retitle.**

A suit to enhance rent proceeds on the presumption that a Zemindar holding under the perpetual settlement has the right from time to time to raise the rents of all the rent paying lands within his Zemindary, according the per gunna or current rates, unless either he is precluded from the exercise of that right by a contract binding on him, or the lands in question can be brought within one of the exemptions recognised by Regulation VIII of 1793 and it also assumed, that the defendant had some valid tenure or right of occupancy in the lands which are the subject of the suit. **13 M. I. A. 248 Ref.**

The mere fact of a tenure being hereditary does not show that the rent of the tenure has been fixed in perpetuity.

The use of the expression *patni taluk* in the contract of tenancy does not necessarily create a *patni taluk* (*i.e.* a taluk subject to the summary procedure for realisation of rent provided by Reg. VIII of 1819.—(*Mukherjee, C. J. and Fletcher, J.*) **RAJA NIROD CHANDRA SINGHA SARMA v. HARIHAR CHAKRAVARTI CHOWDHURY.**

32 C. L. J. 19 : 58 I. C. 867.

BENGAL TENANCY ACT, S. 107.

—**Ss. 107 and 109—Decision by Special Judge—Costs—Order as to—Appeal—Limitation—Sec. III, Art. 4 and S. 185.**

G. was recorded as a raiyat at fixed rate by the survey authorities, and J., the landlord claimed an enhancement of rent under S. 30 (a) and (b) of the B.T. Act. The Revenue Officer decided the case on 30-12-16, and J. appealed to the Special Judge, who on 4-2-'19 held that G. was an occupancy raiyat and not fixed rate tenant, and allowed the appeal with costs, and on 8-5-19 of his own motion, recorded the following order. Respondent to pay Rs. 13-8 as costs of this appeal to appellant "no separate decree having been drawn up and G filed a second appeal to the High Court on 8-8-19

Held, that the appeal was barred by limitation as the time ran from 2-4-19 the date of the Judgment and not from 8-9-'19 the date of the additional order, defining the amount of the costs awarded under the previous order.

Per Mullik, J.:—The order of the Special Judge, dated 4-2-'19 was perhaps not a decree under S. 2 (2) C.P. Code but it had the force and effect of a decree under S. 107, B.T. Act and the principle of Rule 87 framed by the Government under Notification dated 31-10-'09 applying to it, he was not required to draw up a separate decree. The order in so far as it gave reasons for the findings, was a 'Judgment' and in so far as it made a declaration or order, it had the effect and force of a decree.

The additional order as to costs was not an amendment of the Judgment under S. 152 C.P. Code but it may be taken as an amendment of the decree under S. 151 which gave the start for limitation under Art. 182 (4) Sch. 1 of the Lim. Act. But under Art. 156 Sch. 1, the period for purposes of second appeal ran from the date of the original Judgment and not from the amendment and S. 5 will not apply unless the grounds on which the appeal is based, are intimately connected with the amendment.

Per Sultan Ahmad, J.:—The word 'decision' in S. 107, B.T. Act means "an adjudication on the merits" and is synonymous with "final Judgment" as understood in English Law.

The order for payment of costs having already been made by the first order dated 4-2-19 the subsequent order stating the amount of costs was simply interlocutory and therefore not a part of the final judgment.

43 Ch. D. 23 foll.

The indulgence which can be shown under S. 5 of the Limitation Act must be based upon proper materials.

Per Jwala Prasad, J.:—The definitions of 'decree' and 'order' agree with the definition of the word 'decision' all of them mean the same thing, *viz.*, the formal expression of any adjudication of a Court.

O. 20, R. 6 (2) requires a statement in the decree of the amount of costs incurred in the suit, and a Revenue Officer has to give his directions as to costs in his decision in any

BENGAL TENANCY ACT, S. 109.

proceeding under S. 105, 105 A and 105, S. 143 (2) B T Act making applicable the provision of S. 55 of the C. P. Code, read with O. 41, R. 35.

It no decree is to be prepared under the Rules framed by the Local Government the order as to costs must necessarily be in the decision itself and all the details that are required to be stated in the decree *vis à vis*, the amount or costs incurred by whom and in what proportion such costs are to be paid, must therefore be entered in the decision itself.

The subsequent order of 8-5-19 was not an amendment of the decision but it was a completion of the decision. A party intending to appeal from a decision is entitled to wait till the order as to costs is made in order to see if he will have to take objection as to the costs while appealing from the decision; and the time for appeal runs from that date.

6 Cal 22 followed 24 Mad 25 : 24 Mad 646; 32 Cal 908 : Relied upon 3 C. L. J. 183 ds. 13 C. L. 104 ; 1 P. L. J. 573 appi

The appellant having been misled by the practice to prepare a decree as to memo of costs separately, S. 5 Lim. Act was applicable 32 Cal 908 foll. (*Mullick, Jwala Prasad and Sultan Ahmad, JJ*) SHEIKH GULAM v. MAIAKANT J-NKI KUEN. 1 P. L. T. 403 :

5 P. L. J. 472 : 57 I C 286

S. 109 (c)—Mortgagor and mortgagee—Mortgagor in possession—Agreement between mortgagor and tenants if binding on mortgagee.

Where in proceedings under S. 109 C. of the B. T. Act there were agreements between the mortgagor in possession and the tenants by which the Bhooli rents were converted into Naqdi and at low rentals, the former taking large Nazranas, as the property was going to be sold in execution of the mortgage decree

Held, that the mortgagee was not bound by the said agreements which no prudent manager would have entered into in the usual course of management.

P. L. J. 563; 17 C. L. J. 284, (1902) I. K. B. 85 foll. (*Coutts and Sultan Ahmad, JJ*) M RAUNA RAI v. MANDAL DAS.

1 P. L. T. 392 : 56 I C 805

S. 120—Mortgage of land by landlord—Recital that property is Zerait.

The recital in a Rehan deed that the mortgaged land is a zerait is admissible in evidence as an admission.

S. 120 of the B. T. Act applies to contracts between landlords and tenants and does not exclude recitals in a Rehan deed in favour of a third person. 1 Pat L T 13 dsit. The question of onus becomes immaterial in second appeal (*Coutts and Sultan Ahmed, JJ*) CHADHURAY RAM KHELAWAN SINGH v. CHADHURAY RAM NATH SINGH.

1 P. L. T. 640.

S. 120 (2) "Any other evidence"—Meaning of Admissions as to proprietor's private lands in Kabuliyaat—Inadmissibility—

BENGAL TENANCY ACT, S. 148.

Right of occupancy not barred by agreements—B. T. Act, S. 178—Khudgahast—Meaning of.

S. 120 (2) (a) of the B. T. Act makes inadmissible in evidence document executed between landlord and tenant containing admission as to proprietor's Kamat rights and the absence of occupancy rights in the tenants

Where the terms of a lease contemplate that the land was to be cultivated by the lessess and rent in cash or kind was to be paid to the lessor the lessee becomes *Rayat* and not tenure-holder.

The word "Khudgahast" does not conclusively connote proprietor's private or Zerait lands.

The construction of the phrase "any other evidence that may be produced" used in S. 120 (2) B. T. Act in a restricted manner is not justifiable especially where the question is raised before a Civil Court. Sub-S. 2 merely directs a Revenue Officer as to the evidence for which he is to look in coming to a decision. 20 C. W. N. 145 ; 33 I. C. 978 ; 17 Cal. 466 ; 7 C. W. N. 400 ; 13 C. W. N. 661 ; 13 C. W. N. 125 ; 1 C. L. J. 456 ; ref. (*Coutts and Adami, JJ*) SUKAN SAO v. KARU MAHTON.

5 P. L. J. 87 : (1920) Pat. 131 : 1 P. L. T. 13 : 54 I. C. 652.

S. 147 A.—Rayat holding at fixed rent—Sub-lease if a transfer—Compromise not in accordance with law

A tenant who has been in possession of a holding for a long time and has acquired a right of occupancy cannot by any agreement contract himself out of that right nor can a compromise decree not passed in accordance with S. 147 A of the B. T. Act have that effect. (*Huda, J.*) SHEIKH NASARAT v. KALIDAS CHACKERBUTTY. 54 I. C. 750.

S. 148 (b) (2)—Plaint defective under—Dismissal of suit without giving leave to amend plaint—C. P. Code O. 7, R. 11 and O. 17, R. 3.—Revision—Interference.

Where the lower court dismissed plaintiff's suit as the plaintiff contravened the provisions of S. 148 (b) (2) of the B. T. Act and refused opportunity to the plaintiff to amend the plaint, explaining the alterations in the area and jama as recorded in the record of rights.

Held, that the court had no jurisdiction to dismiss the suit, without first asking plaintiff to amend the plaint within a time fixed by the court on the analogy of the procedure laid down in O. 7, R. 11 (b) and (c) and upon the plaintiff's failure to comply with the order, the court would decide the suit forthwith or dismiss it under O. 17, R. 3.

The High Court was justified in interfering under S. 115 of the C. P. C; an error of procedure resulting in a failure of justice is a material irregularity in the exercise of jurisdiction, under S. 115 (c). (*Das, J.*) MAHARAJA SIR RAMESHWAR SINGH BAHADUR v. SADANAND JHA. 1 P. L. T. 188 : 55 I. C. 445.

BENGAL TENANCY ACT, S. 153.

S. 153—Second appeal—Competency of—Suit for rent below 50 Rs.—Title of *pro forma* deft. set up—Effect of.

In a rent suit below Rs. 50 in value the principal defendant sets up no title of his own except that of tenant under *pro forma* defendant. There is no second appeal from the decree as in such a case the Appellate Court cannot be said to have decided a question of title to land, or some interest in land as between parties having conflicting claims thereto. (*Chatterjee and Walmsley, JJ.*) RAJA KRISHNA DAS LAW v. GOLAM NABI

55 I. C. 92.

S. 153—Second appeal—Jeth Raiyati Mafi—Amount of rent.

Where a Jeth Raiyati Mafi is claimed not as a personal right of the tenants but as an incident of their holding which the tenants are entitled to exercise by deducting the amount of the Mafi from any rent payable by them and for which they would have no separate cause of action against the landlord in a separate suit, the question is that of amount of rent annually payable by the tenants within the meaning of S. 153, Bengal Tenancy Act. (*Miller, C. J. and Mullick, J.*) JAGDISH MISER v. RAMESHWAR SINGH.

(1920) Pat 241

S. 153—Suit for rent—Less than Rs 100—Second appeal.

In a suit for rent valued at less than Rs 100, no second appeal lies from the decree of a District Judge, who, without deciding any question on the merits at all, holds that the appeal preferred to him is incompetent under S. 153 of the B. T. Act. (*Mookerjee, A. C. J. and Fletcher, J.*) KEDAR NATH CHOWDHURY v. DWIJENDRA NARAIN ROY. 57 I. C. 756

S. 153.—Suit for rent valued at less than 50 Rs.—Appeal.

In a suit for rent valued at less than Rs. 50 the first court held that the relationship of landlord and tenant did not exist between the parties and that one of the defts was also a landlord of the tenant defendant and on that basis dismissed the plaintiff's suit;

Held, that an appeal lay to the District Judge from the decision, 8 C. W. N. 434, followed. (*Walmsley, J.*) MONI MOHAN BANERJEE v. ANORADDI CHOWKIDAR. 55 I. C. 212.

S. 153—A—Second appeal—Suit for rent below Rs. 100.

S. 153 (a) of the B. T. Act bars a second appeal in a suit for rent for less than Rs 100 irrespective of whether the rent is payable in money or in kind and whether the plaintiff is a co-sharer landlord and the other co-sharers are impleaded as *pro forma* defendants. (*Jawala Prasad, J.*) MATHURA SINGH v. RATAN SINGH. 54 I. C. 662.

S. 153 (1) (b)—Decree or order by specially empowered Officer—Not appealable—Revision.

BENGAL TENANCY ACT, S. 167.

A decree or order by an officer specially empowered under S. 153 (1), (b) of the B. T. Act is not appealable but it is open to revision. (*Beachcroft, J.*) JOGAI DIDHUR FAKIR v. BARADA KANTA BOSE. 55 I. C. 653.

S. 158.—Failure to give notice—Sale if valid. Sec. (1918) Dig. Col. 72. SARIP HOCHAN v. TRILOTTAMA DEBI

31 C. L. J. 73.

Ss. 162 and 163—Rent decree—Execution—Mode of—Intention of decree-holder.

If the holder of a rent decree takes every step necessary to be taken under the B. T. Act to execute the decree as a rent decree, the mere fact that the Court failed to issue simultaneously the order of attachment and the proclamation cannot make the decree any the less a decree for rent. But the decree holder must intend to take execution proceedings as in a decree for rent. If it is shown that certain steps for the execution of a decree as rent decree were not in fact taken by the decree holder then the decree will not have effect as a rent decree. (*Das, J.*) DHUNMUN SINGH v. LATCHMI LAL. 57 I. C. 492.

S. 167—Annulment of interest—Notice—Proof of service of.

Before the interest of a party can be terminated under the S. 167 of the B. T. Act it is necessary that the service of notice in accordance with the statutory procedure laid down in the section should be proved (*Fletcher and Duval, JJ.*) BADAR UDDIN BISWAS v. HERAJ-TULLA JOORDAR. 54 I. C. 797.

S. 167—Putni—Purchase at rent Sale—suit for possession—Incumbrance—Adverse possession—Possession of tenant—Entry in road cess return—If evidence against tenant.

The Plaintiffs purchased a putni in execution of a decree for arrears of rent and duly annulled a darputni which was in existence by notice, under S. 167, Bengal Tenancy Act. Within twelve years of this purchase they sued for khas possession of the lands of two jamas originally held by one R and subsequently purchased by the Defendant seven years after the creation of the darputni:

Held, that it was for the Plaintiffs to show that the Zemindar was in possession of these lands before the creation of the putni and that the possession of the Defendants commenced after the putni came into existence, or that such possession was not adverse.

The decision of the Judicial Committee in *Secretary of States for India v. Sir Rajah Chelkani Rama Rao* [20 C.W.N.1311 P.C.] does not lay down any principle contrary to that laid down in the case of *Kalikanand Mookerjee v. Bipradas Pal Chowdhury* [19 C.W.N. 18].

Possession as a tenant, however long cannot be adverse to the landlord and cannot be held to be an incumbrance.

BENGAL TENANCY ACT, S. 167.

The fact that some of the lands in suit were entered in a road cess return filed before the creation of the putni by the tenant in respect of lands held under the Zemindar showed *prima facie* that they were not held adversely to the Zemindar unless the Defendant could establish satisfactorily that the inclusion of the land was erroneously made.

As to the question whether the adverse possession of the Defendant in respect of any of the lands subsequent to the creation of the putni constituted an incumbrance.

Held, that the interest of an adverse possessor is an incumbrance only when the adverse possession has continued for statutory period but in this case the adverse possession of the Defendant had not ripened into an incumbrance when the darputni was created. The defendants adverse possession was an incumbrance not on the putni but on the darputni and it was not necessary for the plaintiff to serve a separate notice under S. 167, Bengal Tenancy Act, on the defendant, the notice served on the darputnidar being operative on all interests created or carved out of the darputni.

What is required to be annulled by a purchaser of a putni at a rent sale under S. 167, Bengal Tenancy Act, is only the Sub-tenancy created by the putnidar and the purchaser is not called upon to find out the claim of subordinate interests which may be in existence.

Incumbrance within the meaning of Sec. 161 Bengal Tenancy Act, must be some interest created (or suffered to be acquired as in the case of adverse possession) by the tenant on his tenure or in limitation of his own interest therein and the words do not refer to the creation of an interest by an tenure-holder of an inferior grade. (*Chatterjee and Greaves, JJ.*) MONMOTHA NATH MITTER v. ANATH BANDHU PAL. 25 C. W. N. 106.

S. 167—Suit for possession by purchaser—Incumbrance set up in written Statement—Suit if maintainable when plff. was not aware of it.

Where the purchaser at a rent sale, suing in ejectment became aware of the existence of an incumbrance in favour of the deft. only when the latter set it up in his written statement the Court passed a decree for possession in plff's. favour subject to the reservation that the incumbrance would stand good if not annulled within one year of plff's. knowledge thereof. (*Ghose and Pratt, JJ.*) GOPINATH BISWAS v. RADHASHYAM PODDAR.

24 C. W. N. 657 : 58 I. C. 671.

S. 170 (3)—Deposit—Right to make—Usufructuary mortgagee of part of holding.

A usufructuary mortgagee in possession of part of a non-transferable occupancy holding put up for sale in execution of a rent decree is entitled to make a deposit under S. 170 (3) or

BENGAL TENANCY ACT, S. 185.

the B. T. Act. (*Coutts and Adami, JJ.*) CHAUDHURI MAHADEO SINGH v. SK. AZMAT. (1920) Pat. 49.

Ss. (3) and 161—Usufructuary mortgagee, if an incumbrance—Voidable on sale of holding.

An usufructuary mortgagee in possession of a non transferable occupancy holding has an incumbrance which is an interest voidable on the sale of the holding entitling him to make a deposit under S 170 (3) of the B. T Act. (*Coutts and Adami, JJ.*) SHEIKH AZMAT v. BIBI TAMZAM

5 P L. J. 83 : 1 P. L. T. 108 : 56 I. C. 490.

S. 173 (3) — Applicability of—Purchase of tenure.

S. 173 (3) of the B. T. Act applies only where a tenure of holding sold in execution or a decree is purchased by the judgment debtor either by himself or through another. (*Sultan Ahmed, J.*) JAGDHAR MISKER v. DHORAI KHATWA. 57 I. C. 404.

S. 174—Appeal—Competency of—Application to set aside sale—Deposit falling short through mistake of Court—Effect of—Revision C.P. Code, S. 115.

An application was made under S. 174 of the Bengal Tenancy Act to set aside on deposit of the amount within 30 days from the date of the sale. The amount deposited fell short by a few rupees of the amount of the compensation due to the purchaser, through the mistake of the Court. As soon as the mistake was found out, the deficit amount was deposited by the applicants. An application for setting aside the sale, made by the purchaser in which the decree-holder was no party was rejected by the primary Court, which order was upheld by the Lower Appellate Court.

Held that no second appeal lay.

The High Court could not revise the proceedings under S. 115 of the Code of Civil Procedure. (*Chatterjee and Panton, JJ.*) KARAMALI MOLLA v. TAMIJUDDIN MOLLA.

32 C. L. J. 12 : 58 I. C. 816.

S. 185 (2) and Sch. III, Art. 3—Dispossession of tenant by landlord—Constructive dispossession.

The term 'dispossession' implies coming in of a person and the driving out of another from possession. 22 C. L. J. 284 ; 20 C. W. N. 481 ref.

The plaintiffs took a lease of 12 cottahs of land from the defendants; they obtained delivery of possession of seven cottahs only, and the defendants agreed to vacate the remaining portion after three months. The defendants however failed to carry out the terms of the agreement and continued in occupation of the five cottahs notwithstanding the lease in favour of the plaintiffs.

BENGAL TENANCY ACT, S. 197.

Held, that there was no dispossessment such as would attract the operation of art 3 of Sch. III, of the B. T. Act. S 185 (2) of the said Act makes article 144 of the Limitation Act applicable and the suit instituted within 12 years from the date when the possession of the defendants become adverse after the lapse of three months would be within time.

The Court discourages recourse to the fiction of constructive dispossessment in cases under art. 3 Sch. III of the B. T. Act. 13 C. L. J. 89 and other cases referred to. (*Mookerjee, C. J. and Fletcher, J. J.*) **PANCHOO KAPALI v JANESWAR MAJHI** 32 C. L. J. 9 : 58 I.C. 844.

—**S. 197—Suit by purchaser at rent sale for ejectment—Incumbrance set up in written statement—Notice annulling incumbrance given thereafter.**

Where a purchaser at a rent sale did not become aware of the existence of an incumbrance until after the same was set up by the deft. in his written statement and notice of annulment under S. 167 was in consequence given subsequently to the institution of the suit.

Held that the suit could not fail because notice of annulment was not given prior to the institution of the suit. (*Beachcroft, J. J. EASIN v. INTIJENNESSA BIBI.*

24 C. W. N. 659 : 58 I. C. 745.

—**Sch. III, art. 3—Applicability of—Occupancy tenant—Dispossessment by stranger—Suit by tenant for recovery of possession—Landlord made party to suit—Limitation.**

If the landlord is in any way responsible for the dispossessment of an occupancy tenant by any person, a suit by the tenant to recover possession of the holding will be governed by Art. 3 of Sch. III of the Act, whether the landlord is made a party to the suit or not. If on the other hand, the landlord has not in any way caused the dispossessment, the suit will be governed by the Limitation Act irrespective of the fact whether the landlord is or is not made a party to the suit. (*Jwala Prasad, J. J. DWARKA CHAUDHURY v. ISHWARI PANNEY.*

58 I. C. 46.

—**Sch. III, art. 3—Dispossessment—Landlord or his authorised agent—Limitation.**

The plaintiffs sued to recover possession of the disputed land on the allegation that they were wrongfully dispossessed by the defendants who denied the title of the plaintiffs and alleged that the land was in the occupation of the landlord who settled it with them:

Held, that Art. 3 of Sch. III of the Bengal Tenancy Act does not specify the person by whom the dispossessment had been made, but as this provision is found in a statute, which

BENG. TENANCY ACT, Sch. III.

amends and consolidates enactments relating to the law of landlord and tenant the article can be made applicable only where the dispossessment has been effected by the landlord. It further follows that the article also applies where the dispossessment has been effected not by the landlord personally but by an agent acting within the scope of his authority.

That it was not found that the defendants though they had obtained a settlement from the landlord were authorised by him to oust the Plaintiffs and Art 3 had therefore no application to the case (*Mookerjee, C. J. and Fletcher, J. J.*) **HARAN CHANDRA BARAI v. MADAN MOHAN BARAI.**

25 C. W. N. 102.

—**Sch. III, art 3—Landlord and Tenant—Suit to recover possession on dispossessment—Limitation—Landlord if necessary party—Amendment of plaint.**

A plaintiff joined several persons as defendants and proceeded against one only, describing the others as *pro forma* defendants. *Held* he cannot, in second appeal be allowed to amend his plaint so that the defendant against whom he was proceeded may be left out of the suit altogether and the suit be so framed as to claim relief against the *pro forma* defendants. In a suit by a tenant to recover possession of a holding of which he has been dispossessed through tenants inducted by the landlord, the landlord is a necessary party, and the suit must be brought within the period prescribed by Article 3 of Schedule III to the Bengal Tenancy Act. (*N. R. Chatterjee and Panton, J. J.*) **RAJA PEARI MOHAN MOOKERJEE v. ARUNDOY GHOSH.**

58 I. C. 581.

—**Sch. III, art 3—Limitation—Suit for joint possession as heir of the tenant against Co-sharer landlords who have purchased from another heir.**

The plff. an heir of the original tenant brought a suit for joint possession in respect of his share of the land against the defts. who were co-sharer landlords who having secured a Kobala of the entire land from another heir of the original tenant dispossessed the plff. from the land.

Held, that the suit was governed by Art. 3, Sch. III of the Act.

When the landlord purchases at a sale held in execution of a decree, possession is delivered to him by the Court as auction purchaser. (i.e.) on the footing that there is no longer any relation of landlord and tenant and the possession of the landlord as purchaser cannot be challenged so long as the sale is not set aside or declared ineffective aga'inst the tenants. In the case of a private purchase such as the present there is a relation of landlord and tenant between the plff. and the deft. and the

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mere fact that he obtained a Kobala from one of the heirs of the original tenants cannot take the case out of the purview of Art. 3 Sch. III. (*Chatterjee and Panton, J.J.*) NABIN CHANDRA SAHA v. SHEIKH WAJID.

24 C. W. N. 382=31 C. L. J. 199:
58 I. C. 598

BERAR LAND REVENUE CODE (1896) S. 4 (5)—Separate survey—Pot number.

An officer in charge of the Record of Rights in Berar is not an officer authorized under S. 4 (5) of the Berar Land Revenue Code to recognize the sub-division of a survey number and a recognition by that officer of a pot number does not constitute the pot a recognized sub-division of a survey number and is no bar to pre-emption. (*Findlay, A. J. C.*) VITHOBHA v. NARAIN.

57 I. C. 260.

—Ss. 4 (14) and 205—Co-occupant—Right of pre-emption—Survey number in Jagir.

A person who is not a co-occupant within the meaning of the Berar Land Revenue Code, S. 4 (14) has no right of pre-emption in respect of an alienation of a survey number. The term "occupant" relates only to a holder of unalienated land, and S. 205 of the Berar Land Revenue Code therefore, does not permit a holder or occupier or owner of a survey number situated in a jagir village, the same being alienated land, to exercise the right of pre-emption. (*Pridcaux, A. J. C.*) ARJAH v. SITARM.

57 I. C. 265.

—S. 96—Record of rights—Entry in—Presumption as to correctness—Trees standing on land—Suit for setting aside entry.

Under S. 96 (i) of the Berar Land Revenue Code an entry in the record of rights must be presumed to be true until the contrary is proved of a new entry lawfully substituted therefor. This presumption arises even in a suit brought to have the entry set aside and extends to trees standing on land. (*Mittra, A. J. C.*) MUSSAMMAT BULKI v. DAGDIA.

54 I. C. 334

—S. 96 B. (6)—Entry in record of rights—Maintenance—Admissibility of entry—Presumption.

S. 96 B. (b) of the Berar Land Revenue Code requires that the conditions or liabilities attaching to the interests of holders shall be entered in the Record of Rights and an entry in such record of an arrangement fixing a charge on certain fields for maintenance is admissible in evidence and raises a presumption in favour of the person claiming maintenance. (*Macnair, A. J. C.*) FAKIRYA v. TULSI.

57 I. C. 271.

BOMBAY ACT, III of 1865 S. 1.

BIHAR AND ORISSA PUBLIC DEMANDS RECOVERY ACT (IV of 1904 S. 26—Arrears certificate in respect of part of holding—Priority over purchaser under money decree

If a decree-holder in execution of a rent decree chooses to sell part of a holding though the decree is against the whole, the decree loses the character of a rent decree. **11 C. W. N. 359 Rel.**

If all the tenants of a holding are not made parties to a rent suit, the decree obtained will not be a rent decree but will be a money decree.

Where a holding stood in the name of several tenants but a certificate under the Bihar and Orissa Public Demands Recovery Act was issued only in the name of one of the tenants and only a portion of the holding was sold in execution of the certificate held, the purchaser was in the position of a purchaser in execution of a money decree and had no priority over a previous purchaser of the holding under a money decree. (*Sultan Ahmed, J.J.*) RAMNANDAN v. HARNANDAN PRASAD.

56 I. C. 463.

BIRT JAJMANI—Pragwals—Flag—Right to hoist rival flag—Cause of action.

One S, a pragwal, used a particular kind of flag to attract the notice of pilgrims who wanted to find him out. The defendant who acted as his agent in his life time and as his widow's agent after his death, put up a flag similar to the one used by S. so as to mislead pilgrims into the belief that he was the representative of S. Held, that the action of the defendant was unlawful and the plaintiffs true heir had a right to maintain a suit to restrain defendant from making use of the emblem or flag. (*Piggott and Kanhaiya Lal, J.J.*) BENI MADHO PRAGWAL v. HIRA LAL.

18 A. L. J. 679.

—Right heritable and transferable.

The right of *birt jajmani* is a heritable and transferable property. Where therefore the owner of such a right makes a will in favour of the daughters they can claim the share bequeathed. (*Tudball and Kanhaiya Lal, J.J.*) MUSSAMMAT LOKYA v. SULLI.

18 A. L. J. 835:
57 I. C. 315.

BOMBAY ACT (III) of 1865, Ss. 1 and 2—Wagering contract—Pakka adatia—Status of—Contracts for sale and purchase of Cotton—Agreement to pay differences—Delivery not to be given or taken—Effect of. See CONTRACT ACT, S. 30.

22 Bom. L. R. 1018.

BOM. BHAG. & NAR ACT, S. 3.

BOMBAY BHAGDARI AND NARVDABI ACT (V of 1862), S. 3—Lease of an unrecognised sub-division of a bhag—Tenant can not plead invalidity of lease when sued in ejection. See EVIDENCE ACT, S 116.

22 Bom. L. R. 149.

BOMBAY COURT OFWARDS ACT (I of 1905) S. 14—Notices—Publication in newspapers—Notice calling upon creditors to submit their claim in writing.

Notices under Ss 13 and 14 of the Bombay Court of Wards Act, 1905 are sufficiently published if they are printed in the Government Gazette in English and in the local newspapers in vernacular. It is, however desirable that there should be some further publication of the notice calling for claims under S. 14 than the mere publication in the Government Gazette. (*Macleod, C. J. and Heaton, J.*) **SHANKAR SANA v. SHIVABAI VALLAV BAI.** 44 Bom. 493:

22 Bom. L. R. 223 : 55 I. C. 939.

—Ss. 31, 32 and 3 (c)—Estate of talukdar under management of Talukdar Settlement Officer—Applicability of.

The provisions of Ss 31 and 32 of the Bombay Court of Wards Act, 1905 do not apply to a suit by a creditor against a Talukdar whose estate is under the management of the Talukdar Settlement Officer, even though he has been constituted a Court of Wards under a notification issued under S. 3 (c) of the Act (*Heaton, Shah and Crump, JJ.*) **HARGOVIND FULCHAND DOSHI v. BAI HIRBAL.** 22 Bom. L. R. 619;

53 I. C. 205.

BOMBAY DT. MUNICIPALITIES ACT (Bom. Act III of 1901) S. 59 Cl. (ii) Wheel tax—Vehicle kept outside, but plying for hire inside Municipal District—Liability to tax.

A vehicle which is kept outside, but plies for hire inside a municipal district, is not liable to pay wheel tax, under S. 59 (ii) of the Bombay Dt. Municipal Act, 1901. (*Norman Macleod, C. J. and Heaton, J.*) **THE SURAT CITY MUNICIPALITY v. MANEKLAL ICHHARAM & Co.** 22 Bom. L. R. 1104.

—S. 59 (b) (vi) Proviso—District Municipality—Special sanitary cess—Levy of—Construction of main sewer by Municipality—Connection between house and sewer at plaintiff's expense.

The municipality of Ahmedabad constructed a main sewer along the road on which the plaintiffs' premises abutted. On these premises, the plaintiffs had private latrines for their operatives, and at first they had them cleansed by manual labour. Later on, the plaintiffs converted their privies to the flushing system and carried out at their own cost the connection between the privies and the main sewers of the Municipality. The Municipality, thereupon, levied special sanitary cess for the

BOM. DT. MUN. ACT, S. 92.

connection from the plaintiffs, under the provisions of S. 59 (b) (vi) of the Bombay District Municipal Act, 1901. The plaintiffs having sued to recover the amount of the cess levied from them.

Held, dismissing the suit that the Municipality were entitled to levy the special sanitary cess from the plaintiff inasmuch as although the owner of private premises with private latrines, must pay the whole of the expense of the connection between his premises and the manhole, still it could be said that the Municipality had made provision for the receiving of sewage from his private latrines by having laid down the sewer, with manholes at intervals, with which connections were made with private premises. (*Macleod, C. J. and Heaton, J.*) **AHMEDABAD MUNICIPALITY v. GUJERAT GINNING AND MANUFACTURING CO.**

22 Bom. L. R. 747 : 57 I. C. 433.

—Ss. 92 and 160—Municipality—Acquisition of land—Possession—Mistake—Effect of—Contract Act, S. 21—Price not fixed nor ascertainable—Suit against Municipality.

A Municipality, purporting to act under S. 92 of the Bombay District Municipal Act, offered plaintiff a certain price for a plot of land or to refer the matter to a Panchayat to fix the price. Plaintiff gave possession of the land but the parties were unable to agree to the price and the plaintiff was referred to the District Court to have the price fixed. Subsequently it was discovered that the action of the Municipality was not authorised by law and the plaintiff brought the present suit to recover possession. The suit was dismissed by the court below holding that as the plaintiff had agreed to part with the land at a price to be fixed under S. 160 of the Bombay District Municipal Act, there was a contract binding on him and that the mistake as to the right of the Municipality to act under S. 92 of that Act was a mistake of law which under S. 21 of the Contract Act did not invalidate the contract.

Held, that the mistake of the parties in respect of the right of the Municipality to acquire the land was one of fact and, therefore, did not fall under S. 21 of the Contract Act. The contract between the parties was merely one for the sale of immoveable property which under S. 54 of the Transfer of Property Act, did not itself create any interest in, or charge upon property.

The Municipality had no power to act under S. 92 of the Bombay District Municipal Act, and consequently S. 160 of that Act did not apply.

Price being the essence of a contract of sale, as the price in the present case was not ascertainable in the manner contemplated by the parties, there was no price promised within the meaning of S. 50 of the Contract Act, there was no valid sale and the plaintiff was entitled to recover possession. (*Fawcett,*

BOM. DT. MUN. ACT. S. 96.

J. C. and Raymond, A. J. C.) HEMUMAL HERPILMAL v. THE COMMITTEE OF MANAGEMENT, HYDERABAD

14 S. L. R. 22 : 58 I. C. 591.

—**S. 96—Notice of new building—Addition of *otla* to existing building without permission or land forming part of public street—Effect of.**

Where a person builds an *otla* to his house without permission of the Municipality under S. 96 of the Bombay Dt. Mun. Act he is liable to have the *otla* removed at the instance of the Municipality independently of the question whether the *otla* is built on a street-land or on a kind forming part of the public street. (*Macleod, C. J. and Heaton, J.) THE VIRAMGAM MUNICIPALITY v. BHIMCHAND DAMODAR.*

44 Bom. 198 : 22 Bom. L. R. 61 : 55 I. C. 318

—**S. 142 (1)—Sale of unwholesome meat—Destruction of—Prosecution for**

When a person is found selling at a beef-stall meat unfit for human food, the Municipality may order the unwholesome meat to be forthwith destroyed; but it is not competent to a Magistrate to convict the person under S. 142 (1) of the Bombay D'strict Municipal Act, 1901. (*Shah and Kajji, JJ.) EMPEROR v. HAJI ABOO*

22 Bom. L. R. 880 : 53 I. C. 157 : 21 Cr L J 733

—**Ss. 151 (1)—Nuisance—Lime-kiln—Order passed by Municipality—Interference by Civil Court**

A District Municipality has powers under S. 151 of the District Municipal Act 1901 to require the owner of a lime-kiln within the limit of the Municipality to desist from carrying out or allowing to be carried out the intention to use it as a lime-kiln if it is of opinion that it is or is likely to become a nuisance to the neighbourhood.

The Civil Court will not interfere with the exercise of that power unless it can be shown that the Municipality has exercised it in an improper manner. It is only for the purpose of seeing whether the Municipality has exercised its power in the proper way that the Court will consider the evidence to see what steps the Municipality took before it issued the notice.

It is not for the Court to deal with the question whether what is complained of by the Municipality has been or is likely to be a nuisance and to consider whether as a matter of fact that particular use of land within the municipal limits is a nuisance or is likely to become a nuisance to the neighbourhood. (*Norman Macleod, C. J.) NUR MAHOMED GULAM RASUL v. THE SURAT CITY MUNICIPALITY.*

44 Bom. 738 : 22 Bom. L. R. 888 : 57 I. C. 988.

—**S. 167—Suit for injunction against Municipality—Notice if necessary.**

The expression "anything done or purporting to be done in S. 167 of the Bombay District Municipal Act applies only to a case where

BOM H. C. CIV. CIRCULARS, R. 69.

something has been done and not where there is mere apprehension that something will be done. A suit against a Municipality to restrain an apprehended injury is not bad merely because the notice required by the section was not given for in such a case no notice is necessary. (*Kemp, A. J. C.) VIRJI v. THE KARACHI MUNICIPALITY.*

56 I. C. 527.

BOMBAY DT POLICE ACT (1V of 1890), S. 62—Cruelty to animals—Liability to trial and conviction.

The extracts on of the provisions of the Prevention of Cruelty to Animals Act, 1890 by the Bombay Government to a certain District under S. 1 sub-S 2 of the Act does not by itself carry the repeal of S. 62 of the Bombay District Police Act, 1890 within that District. (*Shah and Crump, JJ.) EMPEROR v. BHAGVAN KRISNA THORTI*

22 Bom. L. R. 892.

BOMBAY HEREDITARY OFFICERS ACT, S. 15—Grant of whole village under settlement—Grant of revenue or of the soil—Vatans—Sarangjams

Where a whole village is mentioned in a *Sahad* evidencing a settlement under S. 12 of the Bombay Hereditary Offices Act, 1874, it is for the party alleging that a particular Survey number of that village's outside the scope of the settlement to prove it.

In the case of Vatan property, the distinction between grants of the royal share of the revenue and grants of the soil which is admissible in the case of *Inams* and *Sarangjams* cannot be conveniently made without detriment to the statutory restriction on the Vazadar's power of alienation and should not be made unless it is clearly justified by the terms of the settlement. (*Shah and Hayward, JJ.) AMRIT VAMAN v. HARI GOVIND.*

44 Bom. 237 : 22 Bom. L. R. 275 : 56 I. C. 411.

BOMBAY HIGH COURT CIVIL CIRCULARS, R. 69 (VII) —Decree—Execution—Court sale—Proclamation of sale—Interests of sons of judgment-debtor if passes—Conditions.

In execution of a decree, the judgment debtor's share (which was eight annas) in certain property was put up to sale. The proclamation of the sale contained a condition that the interests of the sons of the judgment debtor were not sold. At the Court sale, the share was purchased by the decree holder. The decree holder brought a suit to recover the eight annas share by partition and obtained a decree. The judgment-debtors had three sons, but their existence was not known to the decree-holder; and they were not made parties either to the suit or to the proceedings. The sons having sued for a declaration that their share in the property, which was six annas, was not affected by the decree or by the sale which followed it.

Held, that the son's share was not affected by court sale inasmuch as their share, if any, was expressly saved by an express condition in

BOM. H. C. RULES. R. 127.

the proclamation of sale (*Macleod, C. J. and Heaton, J.*) *SANKAR v. PARASHRAM.*

22 Bom. L. R. 970 : 58 I. C. 391.

—Rule. 91, cl. 16—Collector—Execution of decree—Leave to bid at sale. See *MARTAND v. DAYA.*

22 Bom. L. R. 106

—Rule. 92. Sub. Rules. 16, 17—Collector—Execution of decree. See.

22 Bom. L. R. 759.

BOMBAY HIGH COURT RULES. R. 127, 128 and 129—*Third party notice—Defendant outside the jurisdiction of the Court—Leave of Court—Letters Patent (cl) 12*

The Court of first instance held that the defendant on whom the third party notice was served could not at the hearing of the suit question the jurisdiction of the Court on the ground that he was residing outside the jurisdiction of the Court because the Judge issuing the Third Party notice and making the summons absolute must have decided whether the Court had jurisdiction to bring in the third party at the hearing of the suit between the plaintiff and the defendant and that such question was therefore *res judicata*. It further held that as the third party notice contained a direction that the notice should be served upon the third party who was residing outside the jurisdiction of the Court, by sending it by registered post to his address it must be assumed that this was equivalent to leave under cl. 12 of the Letters Patent:—

Held, reversing the decree of the Lower Court (1) that such question was not barred as *res judicata* because the Court on summons for directions in a third party notice did not decide any question of jurisdiction and from the fact that the Court gave direction it could not be assumed that the court decided the point of jurisdiction; that the order on the summons for directions merely enabled the third party to come into the suit as if he was an added party defendant and then it was open to him at the trial to raise any issue which an added defendant was entitled to raise.

Leave under cl. 12 of the Letters Patent could not be presumed to have been given because before it could be assumed that leave had been granted under cl. 12 of the Letters Patent it must be proved that an application was made to the Judge under cl. 12 of the Letters Patent and if the Judge made the order it should appear clearly on the face of it that he was giving leave under cl. 12 of the Letters Patent.

Per *Macleod, C. J.*—When a defendant asks the Court to issue a third party notice in a case in which leave has to be obtained under cl. 12 of the Letters Patent, an application should be made to the Judge for such leave to be endorsed on the notice in the same way as it is endorsed in a plaint (*Macleod, C. J. and Heaton, J.*) *KARIM ELAHI SAETI v. SAIFU AHMED.*

22 Bom. L. R. 863.

BOM. LAND REV. CODE. S. 83.

—R. 130 and 131—Directions to third party—Order refusing directions—Not a Judgment within cl. 12 of the Letters Patent. See *LETTERS PATENT (BOM.) CL 12.*

22 Bom. L. R. 1169.

BOMBAY IRRIGATION ACT (VII of 1879) Ss 31, 38—*Diminution of dimension of sluice—Deficiency of water—Suit for damages.*

Ss 31 and 38 of the Bombay Irrigation Act do not bar a suit against the Secretary of State for compensation for deficiency of water caused by reducing the dimensions of a sluice for the admission of water from a Government Canal. (*Fawcett, J. C. and Komp, A. J. C.*) *GANGARAM v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.* **58 I. C. 769.**

BOMBAY KHOTI SETTLEMENT ACT (I of 1880) Ss 9 and 10—*Occupancy tenants—Transfer of occupancy tenancy without consent—Occupancy if forfeited to the Khot.*

Defendants Nos. 2 to 4 who were occupancy tenants (Khatedar Kuls) of Khoti lands transferred without the consent of the Khot their occupancy rights to defendant No. 1. The plaintiff Khot claimed that the defendants had thereby forfeited their occupancy rights and sued to recover possession of Kholi lands:—

Held, that the transfer having taken place before the amendment of the Khoti Settlement Act in 1913 the occupancy rights had not been forfeited owing to the transfer but that the transfer was null and void as against the khot and the defendants Nos. 2 to 4 still remained his occupancy tenants (*Macleod, C. J. and Shah, J.*) *DAMODAR RAGAUNATH KARANDIKAR v. VASUDEO.*

44 Bom. 267 : 22 Bom. L. R. 102.

BOMBAY LAND REV. CODE (V of 1879) S. 37—Amendment by Act XI of 1912—Land forming part of a river bed—Lease by Collector—Order by Collector negating plaintiff's right to the land—Appeal by plaintiff—Suit to recover possession of land—Bar. See *LIM. ACT. ART. 14.*

22 Bom. L. R. 146.

—S. 74—*Rajnamah—Kabuliyat—Transfer of property.*

The execution of Rajnamah and Kabuliyat does not necessarily by itself amount to a transfer of the property. The transfer can be rebutted by evidence regarding the manner in which the parties concerned dealt with property. Each case however must necessarily depend upon its own facts. In one case the court may be satisfied that the parties who executed a Rajnamah and Kabuliyat intended that the property should be transferred and in another case the Court may find from the evidence that the execution of these documents was merely for the convenience of the parties. (*Macleod, C. J. and Heaton, J.*) *CHANDANMAL HAMBIR-MAL v. B. JASKAR WAMAN DESHPANDE.*

22 Bom. L. R. 140 : 55 I. C. 619.

BOM. LAND REV. CODE S. 83.

S. 83—Antiquity of tenancy—Presumption—Landlord and tenant—Ejectment—Onus—Tenancy—Nature of.

In a suit for ejectment, the plaintiff landlord has not to prove that the tenancy is an annual one. The presumption is that the tenant is an annual tenant and the onus is upon him to prove he is something more. A defendant who wishes to prove he is a permanent tenant must prove first of all, if he has not got a document of permanent tenancy the antiquity of his tenure. Where the antiquity of the tenancy at a uniform rent is established, it is for the landlord to prove that there is evidence of an intended duration of the tenancy either by agreement or by usage. In the absence of this a presumption arises that the tenancy is co-extensive with the duration of the tenure of the landlord. (*Macleod, C. J. and Fawcett, J. J.*) *MANEKLAL VAMANRAO v. BAI AMBA*

22 Bom. L. R. 1394.

S. 83—Landlord and tenant—Permanent tenancy—Enhancement of rent.

Where there is not satisfactory evidence of the commencement of a tenancy the tenancy is presumed to be permanent under S. 83 of the Bombay Land Revenue Code, 1879. Such a tenant is not, however, a Mirasi tenant.

In the case of a permanent tenant, not an occupancy tenant the landlord has the right by usage to enhance the rent. (*Macleod, C. J. and Heaton, J. J.*) *VYASACHARYA v. VISHNU*

44 Bom. 566 : 22 Bom. L. R. 717.
58 I.C. 289

S. 83—Permanent tenancy—Setting up of—No denial of title—Presumption.

There is no need for a person who sets up a permanent tenancy to rely upon grant; for the second para of S. 83 of the Bombay Land Revenue Code 1879, expressly provides that where by reason of the antiquity of a tenancy there is no evidence of its commencement or its intended duration, it shall be treated as co-extensive with the duration of the landlord's interest in the property. 2 Bom. L. R. 93

It lies on the party, who wishes to rebut the presumption arising from the antiquity of a tenancy to establish, first, that there is no evidence of the period of its intended duration, and, secondly, that there is no usage of the locality as to the duration of such tenancy.

A tenant and his ancestors cultivated the land as far as memory could go; and there was no evidence as to when they commenced to cultivate the land. In 1882, the tenant executed a rent note for one year; but he continued thereafter in possession as before although he paid the same amount of rent to his landlord. A question having risen whether the tenant held on a permanent tenure:—

Held, that the tenant had shown the antiquity of his tenancy; and that there was nothing to rebut the presumption of permanency of the tenancy which arose from its antiquity. (*Macleod, C. J. and Fawcett, J. J.*) *RAMA SAVAD ABDUL RAHIM* 22 Bom. L.R. 1214.

BOM. LAND REV. CODE, S 217.

S. 121—Fixing of boundaries—Collector—Jurisdiction of Civil Court to decide if any disputant has acquired title by adverse possession.

When the settlement of a boundary has been made by a Collector, under S. 121 of the Bombay Land Revenue Code, 1879, it does no more than establish where the boundary line lies, and that the owners of the respective Survey Numbers are entitled to their property according to the boundary lines fixed by the Collector.

The Collector's decision however, does not prevent one of the disputing parties filing a suit in the Civil Court on the ground that he has acquired a portion of his neighbour's Survey Number by adverse possession. (*Macleod, C. J. and Heaton, J. J.*) *BHAGA MOTIJI v. DORABJI SORABJI*. 22 Bom. L. R. 1111.

S. 135 J.—Record of rights—Entry in—Presumption of correctness—Retrospective effect.

The provisions of S. 135 J of the Land Revenue Code, 1879 are not retrospective with regard to entries which for the purpose of determining the rights of the parties were until after the year 1913 innocuous (*Scott, C. J. and Beaman, J. J.*) *HATHISING JEEBHAI v. KUBER JETHA*.

44 Bom. 214 : 22 Bom. L. R. 83 : 54 I.C. 667.

S. 214—Sandalwood trees grown on occupancy holding after survey settlement—Right of Government to—Reserved trees See FOREST ACT S. 75(c) 22 Bom. L. R. 834.

S. 217—Alienated village—Survey settlement, introduction of—Expiration of period of settlement—Right of Inamdar to enhance assessment—Summary settlement Act (Bom. Act 11 of 1863).

Survey settlement was extended to an alienated village in 1870 on the application of the Inamdar under Bombay Act I of 1865. The period of the settlement having expired in 1888 the Inamdar recovered from 1895 to 1910 higher assessment than that allowed under the survey settlement. The Commissioner objected to his doing so in 1910 whereupon the Inamdar sued to establish his right to charge higher assessment:

Held, that the Inamdar had no such right, since S. 217 of the Bombay Land Revenue Code applied when a survey settlement had been introduced into an alienated village with the consent of the alienee under Bombay Act I of 1865 and when the period of the settlement had expired after the Land Revenue Code came into force. (*Shah and Hayward, J. J.*) *DAONDO VASUDEO KANITKAR v. The SECRETARY OF STATE FOR INDIA*

44 Bom. 110 : 22 Bom. L. R. 247 : 58 I.C. 198.

S. 217—Kadim Inamdar—Enhancement of rent—Mirasdari—Survey—Introduction of.

An Inamdar though he is a grantee of the soil and not merely of the royal share of the revenue is not at liberty, after the introduction

BOM. MUN. ACT, S. 122.

of the survey settlement into his village, to enhance the rent of his Mirasdar tenant beyond the amount of the land revenue dues 49 Bom 77; *Ioll*

A kadim inamadar who is a grantee, by a kadim grant of the soil of a small part of the village, and who has consented to or acquiesced in the introduction of the survey settlement into the village, is equally precluded by S. 217 of the Bombay Land Revenue Code from enhancing the rent of his Mirasdar tenant beyond the amount of the land revenue dues (*Shah and Hayward, JJ.*) PANDU BALAJAGTAP v. RAMCHANDRA GANESI DESHPANDE

22 Bom. L. R. 665

BOM. MUNICIPAL ACT. (III of 1901). S 122—Encroachment on public street—Right of Municipality to revenue—Limitation.

When a person has his (otta) (verandah) encroaching upon the street lands for upwards of thirty years, it is not competent to the District Municipality to direct him to give up possession of the encroached land, under S. 122 of the Bombay Dt. Mun. Act 15 Bom. L. R. 833, commented upon. (*Macleod, C. J. and Heaton, J.*) TAYABALLI v. THE DOHAD MUNICIPALITY.

22 Bom. L. R. 951:

58 I. C. 326

BOMBAY PREVENTION OF GAMBLING Act (IV of 1887), S. 8—Gambling in common gaming house—Cash and ornaments—Order of forfeiture.

A Magistrate has no power under S. 8 of the Bombay Prevention of Gambling Act to order forfeiture of cash ornaments and currency notes found on the persons of the accused convicted of gambling in a common gaming house (*Shah and Crump*) EMPEROR v. SADASHIV BABA ABBU.

44 Bom. 686:

22 Bom. L. R. 197 : 55 I. C. 864 :
21 Cr. L. J. 384

BOMBAY REGULATION (II of 1827) S. 56—Pleader—Misconduct—Civil disobedience to laws—Satyagraha movement—Signing of the pledge—Effect of unprofessional conduct. See LETTERS PATENT (BOM). CL. 10

22. Bom. L. R. 13.

BOM. RENT ACT (II of 1918) S. 9—Object of—Pulling down of old house and building new ones—Reasonable requirement—Bona fide.

It is not the intention of the Bombay Rent Act that the improvement of old, ill-erected, badly ventilated premises should be entirely stopped until the Rent Act is repealed. All that the Courts have to do in construing S. 9 of the Bombay Rent Act is to see that the landlord is acting reasonably. (*Macleod, C. J. and Heaton, J.*) PUDUMJI v. SIR DINSHAW MANEKJI PETTI.

22 Bom. L. R. 880:

58 I. C. 27.

(II of 1918) S. 9 (2)—Eviction of tenant—Building by landlord.

BOM. REV. JUR. ACT, S. 4.

S. 8. cl. (2) of the Bombay Rent Act does not require either expressly or by implication that the building must be erected by the landlord. The wording of the clause does not suggest that if a building is erected by some person other than a landlord under some arrangement with the landlord then the landlord is prohibited from requiring the tenant to leave the premises (*Macleod, C. J. and Heaton, J.*) RUSTAN SORABJI POWWALLA v. RAMACHANDRA BALAJI GAIKWAR.

22 Bom. L. R. 860:

57 I. C. 993.

BOM. RENT (WAR RESTRICTIONS) ACT (VII of 1918) S. 7 (1)—Standard Rent—Additional charges for supplying electric light—No Offence

The accused a landlord, used to charge his tenants rent at the rate of Rs. 12 per month before the year 1916. He then put up electric lights in the passages and charged each tenant Rs. 2 per month extra. When the matter went before the Controller of Rents he fixed the rent inclusive of the statutory increase of 10 per cent. at Rs. 13-3-2. Thereafter the landlord charged his tenants Rs. 13-3-2 as rent and recovered Rs. 0-4-0 for the light. He was thereupon convicted of an offence under S. 7 (1) of the Bombay Rent (War Restrictions No. 2) Act, 1918 :

Hold, that the accused was not guilty of the offence charged inasmuch as the supplying of, electric light on the passages of the building was a matter of arrangement or contract between the tenant and the landlord and did not necessarily form a part of the rent. (*Shah and Kajiji, JJ.*) EMPEROR v. RAM GOPAL RUPJI.

22 Bom. L. R. 900 :

58 I. C. 149 : 21 Cr. L. J. 725.

BOMBAY REVENUE JURISDICTION ACT (X of 1876) S. 4—Suit for declaration that plffs. are hereditary Vatandar Kulkarnis.

A suit for a declaration that plffs. are hereditary Vatandar Kulkarnis and that they are entitled to the Vatandars and entitled to the vahivars of the Vatans hereditarily, is barred by S. 4 (a) of the Bombay Rev. Jurisdiction Act, 1876 (*Macleod, C. J. and Heaton, J.*) DAMODAR KRISHNA KULKARNI v. THE COLLECTOR OF NASIK.

44 Bom. 261 :

22. Bom. L. R. 99 : 55 I. C. 358.

S. 4 Proviso (k)—Khatlie inam—Resumption of inam—Suit against to set aside resumption—Civil Court—Jurisdiction. See 1919, *Dig. Col.* 96 FAKARUDIN SAB v. SECRETARY OF STATE FOR INDIA.

44 Bom. 130.

S. 4—Proviso (k)—Land exempted from payment of land revenue by inam Commissioner—Suit claiming exemption—Jurisdiction—Civil Court. See (1919) *Dig. Col.* 97. MAHOMED SHAHEB APPA LAL KAJI v. SECRETARY OF STATE. 44 Bom. 120:

54 I. C. 98.

BOM TRAMWAYS ACT, S. 24

S 11—Suit for injunction—Absence of appeal to revenue authorities, suit barred

The Collector of Surat ordered the plaintiff, on the 6th February 1917 to remove an encroachment on a public road. No appeal was made to the Revenue Commissioner or to Government. On the 21st April, the Collector intimated to the plaintiff that unless he filed a suit, the encroachment would be removed.

On the 27th April 1917, the present suit was filed for a reversal of the order and for an injunction to restrain the defendant from carrying out the order :—

Held, that no appeal from the Collector's order having been made either before the suit was filed or afterward, the suit was barred by the provisions of S. 11 of the Bombay Revenue Jurisdiction Act, 1875. (*Macleod, C. J. and Heaton, J. J.*) DAYAL KHUSHAL v. THE SECRETARY OF STATE FOR INDIA

22 Bom. L. R. 1089.

BOMBAY TRAMWAYS A C T, Ss. 24 and 25—Bye-Laws framed by the Tramway Company—Sanction of Governor in council—Notice by the company suspending a bye-law—Subsequent notice suspending the first—Want of sanction of Governor-in-council to both notices—Effect of—Breach of bye-laws—Offence. See (1919) Dig. Col. 98.

EMPEROR v. SORAB MERWANJI

54 I. C. 488 : 21 Cr. L. J. 88.

BOMBAY VILLAGE ACT (V III of 1867) S. 3—District Magistrate—Power to appoint non-Vatandar village servants in a talukdari village—Pagi, appointment of—Talukdar's liability to pay the salary—Suit by talukdar to recover salary from the Jivaidar.

The plff. the Chief of Patri, having appointed at the instance of the District Magistrate of Ahmedabad two pagis non Vatandar village servants on a monthly salary of Rs. 5 each for his Talukdari village of Kamijla sued to recover a moiety of the salary from the defendant who as *jivaidar* of the villages was entitled to an eight annas share in the revenues of the village.

Held, that it was primarily a matter of evidence as to whether the village organization in question did exclude or did include the appointment of non-Vatandar village servants, the Pagis, by the District Magistrate of Ahmedabad. (*Macleod, C. J. and Heaton, J. J.*) DOLATSANGJI SURAJMALJI DARBAR v. BAWA BHAI.

44 Bom 377 : 22 Bom. L. R. 127 : 55 I. C. 585.

BOUNDARIES AND AREA—Conflict between—Description by map—Map decisive on the question of boundaries. See DEED, CONSTRUCTION.

1 P. L. T. 84.

BUDDHIST LAW—Burmese—Adoption—Kittima form—Evidence of notoriety and publicity.

BUDDHIST LAW.

Under Burmese Buddhist Law direct evidence of giving and taking is not necessary to prove an adoption. Nor is any documentary evidence or ceremony required. But in the absence of evidence of giving and taking it is necessary to give clear and unambiguous evidence as to the publicity and notoriety of status as a Kittima child.

The facts that the adoptive child's name is inserted as joint lender with the adoptive parents, in promissory notes and in invitations issued by the parents are circumstances of great weight as showing an intention to adopt with a view to inherit, but they are not conclusive.

The fact that a child was brought up in the family of the alleged adoptive parents, and treated like a natural child of the family may prove adoption but it does not prove adoption with a view to inherit. (*Twomey, C. J. and Robinson, J.*) MAUNG SEIN v. U. PO KO.

12 Bur. L. T. 236 : 56 I. C. 954.

—Burmese—Damages for seduction—Burma Laws Act, S. 13.

In an action for damages for breach of promise of marriage the fact that there was seduction must be taken into account in measuring damages

Under Burmese Buddhist Law an action did lie for damages for seduction. The ancient law on this point is approved by public opinion and is in accordance with present customs and practice but as seduction is not a question relating to marriage suits relating to seduction cannot under S. 13 of the Burma Laws Act be decided according to the Buddhist Law. (*Pratt, Offg. J. C.*) MA NGWE GAING v. TUN YA.

13 Bur. L. T. 6 : 57 I. C. 815.

—Burmese—Divorce—Re-union—Revival of marriage.

Under the Buddhist Law mere physical reunion with a divorced wife is not sufficient to revive the status of marriage. In order to have this result the re-union must be of such a nature that had there been no divorce it would have amounted to a valid marriage. (*Pratt, J. C.*) MAUNG PO LAT v. MA NGWE MA.

54 I. C. 575.

—Burmese—Husband and wife—Payin property—House built during coverture—right to.

A house built during coverture on the payin property of the husband or wife becomes the joint property of the husband and wife and neither can oust the other from possession. (*Maung Kin, J.*) MASHIN MIN v. BA THAUNG.

12 Bur. L. T. 202 : 58 I. C. 225.

—Burmese—Inheritance—Preference of full blood to half blood—Rule against ascent of inheritance—Competition between younger brother or sister and elder. (See (1919) Dig. Col. 100.) TAUNG MRO v. AUNG NYUN.

58 I. C. 488.

BUDDHIST LAW.

Burmese — Inheritance — Rule against ascent of—Daughter of divorced wife to estate of step-brother—Filial relation.

The rule against ascent of inheritance applies in favour of brothers and sisters of the half blood as against parents when there are no full brothers or sisters. It is doubtful if the rule would apply in favour of a step child who had left the father's establishment and become separately settled in life, and when the estate in dispute is that of a boy who has lived with, and was controlled and supported by his father up to the time of this death.

A daughter taken away by her mother on divorce loses her rights of inheritance in her natural father's family especially if there has been a division at the time of the divorce and the father and daughter have not resumed filial relations. The severance of the tie binding her to her father involves the severance of the tie connecting her with his son by an earlier marriage. 7 B. L. T. 105. (*Twomey, C. J. and Robinson, J.*) LE MAUNG v MA KWE. 13 Bur. L. T. 3 : 56 I. C. 681

Burmese — Inheritance—Shares of children of the marriage during which property was acquired—Dogson.

Under Burmese Buddhist Law no man has power to disinherit an heir.

Under Burmese Buddhist Law the children of the marriage during which the property is acquired take double the share taken by the children of other marriages, and the out of time and children not being the children of an *orasa* child together take a quarter of what their parents would have taken had they survived the deceased.

A son who can be proved to have behaved in an unnatural or unfilial manner towards his father during his life-time is called a Dogson and forfeits his right to inherit in his father's state. The rule of forfeiture operates on proof of unfilial conduct independently of the father's wish. (*Twomey, C. J. and Maung Kin, J.*) SAN PAW v. MA YIN.

12 Bur. L. T. 207 : 55 I. C. 258.

Burmese joint and separate property—Coveture—Obligation undertaken—Gift of separate property — Profits of property acquired during coveture—Nissayo and Nissito.

In deciding what is joint property under Burmese Buddhist Law all payments of money the obligation for which was undertaken during coveture must be debited to the joint account even though the actual payment was made by the survivor after the death of one of the parties to the marriage.

A gift of the separate property of one of the parties to a marriage even though the name of the other party was joined as donor must be held to be made out of the separate property of the party to whom the property belonged.

BUDDHIST LAW.

Property inherited by either of the parties to a marriage during coveture is to be divided equally between the parties and the same rule applies to the profits of separate property brought by either party to the marriage.

The rule of Nissayo and Nissito does not apply to the profits during coveture of the separate property of either of the parties. (*Twomey, C. J. and Ormond, J.*) MA DWE v. MA TIN LUN 12 Bur. L. T. 228 : 56 I. C. 972.

Burmese—Lettebwaa and hnapanzone Interest of husband or wife—Nissayo and Nissito

Property acquired by the husband or wife by inheritance during marriage is *lettebwaa* property not *hnapanzone*.

Both husband and wife have a vested interest in property acquired by either of them by inheritance after marriage and when they are living together. The rule of Nissayo and Nissito applies to such property and a wife is entitled to one-third share in the property inherited by her husband during marriage. (*Maung Kin, J.*) PALANIAPPA CHETTY v. MA TU.

13 Bur. L. T. 35 : 57 I. C. 950.

Burmese — Marriage—Consent of Guardian. See (1919) Dig. Col. 101 MA SA v. SAN TUN U. 54 I. C. 81.

Burmese—Marriage—Validity of.
The validity of a marriage must be decided by the *lex loci contractus*.

Scrub: The marriage of a Burmese Buddhist woman with a Chinese Buddhist would be valid if the requirements of the Burmese Buddhist Law are complied with. (*Robinson, J.*) MA TWE v LWE HAIN.

13 Bur. L. T. 105.

Burmese—Minor—contract of Marriage—Power of Minor to enter into—Breach of contract—Suit for damages—Contract S. II. See (1919) Dig. Col. 101. TUN KYIN v. MA MAI TIN. 12 Bur. L. T. 219.

Burmese — Partnership — Husband and wife jointly borrowing money.

Under Burmese Buddhist Law there is no presumption that whenever a husband and wife borrow money there is a partnership between the two and that the money is borrowed for the purposes of that partnership. (*Saunders, J. C.*) MAUNG TAW v. MOOSAJI AHMED & CO.

54. I. C. 513.

Burmese—payin property—House built during coveture

See 58 I. C. 225.

Chinese—Inheritance—Share of widow in property of deceased husband—Alienation of minor's property.

BUDDHIST LAW.

Questions of inheritance amongst Chinese Buddhists are to be decided according to Chinese customary law, and in the absence of any definite authority as to Chinese law according to justice, equity and good conscience,

In the absence of any evidence as to customary law in China a Chinese Buddhist widow is entitled to one-third share in her deceased husband's estate.

7 B.L.T. 246 foll

A sale by a Chinese Buddhist mother as guardian of her minor children's estate is valid only to the extent of her interest in the estate (*Twomey, C.J. and Robinson, J.*) *Ma Si v Hoke Hu.*

13 Bur. L.T. 9: 57 I.C. 888.

—Chinese—Testamentary power

The law applicable to succession amongst Chinese Buddhists is Chinese Customary Law which allows disposition of property by will

2 L.B.R. 95 followed. (*Twomey, C.J. and Robinson, J.*) *Maung Kwai v. Yeo Choo Yone.* 18 Bur. L.T. 18: 57 I.C. 900

—Ecclesiastical Law—Monastic property—Management by layman—Sanghika and poggalika.

Under the Buddhist Ecclesiastical Law it's permissible to a monk to hand over monastic property for management to a layman or a laywoman.

A person to whom monastic property has been handed over by a monk for management can maintain a suit for possession of such property.

A monk cannot treat sanghika property as his own poggalika property. (*Maung Kiu, JJ.*) *U. Pyinnya Thiba v. Po Thin.*

12 Bur. L.T. 264: 56 I.C. 939

—Monk—Ayanzouings—Kyaung property—Right to recover.

"Ayanzouings" are persons who are in charge of a Kyaung and its precincts, and are entitled to sue to recover possession of land alleged to form part of a Kyaung. (*Moing Kin, J.*) *U. Pyinnya Thiba v. Po Thin.*

12 Bur. L.T. 264: 56 I.C. 939.

BUNDLEKHAND LAND ALIENATION ACT. (II of 1903) 16 and 17—Member of agricultural tribe—Mortgage by—Insolvency of agriculturist—Vesting of property in receiver—Prov. Ins. Act, S 16.

A member of an agricultural tribe in Bundelkhand, mortgaged his property to S. who obtained a decree for sale. H was declared an insolvent. S applied for sale of the mortgaged property whereupon H preferred objections on the ground that the property was not saleable.

Held, that S. 17 had no application inasmuch as the mortgage was made after the passing of the Act and that H being a member of the agricultural tribe the court had no power to sell the property mortgaged by him.

The property not being saleable by reason of S. 16 of the Bundelkhand Land Alienation

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Act could not vest in the Receiver, being exempted by S. 16 of the Provincial Insolvency Act. (*Banerji and Piggott, JJ.*) *HANUMAN PRASAD NARAIN SINGH v. HARAKH NARAIN.*

42 All 142: 18 A.L.J. 59: 58 I.C. 551.

BURDEN OF PROOF—Benamidar—Suit for possession or declaration of title—Onus.

Where in a suit for recovery of possession of land or declaration of title the deit. in possession does not admit the title of the plff. but says that the plff. is his benamidar, it is for plff. to prove that deit. is not the owner. The statement by the deit. that plff. is his benamdar would not shift the burden of proof. (*N.R. Chatterji and Newbold, JJ.*) *LAL MAMMUD TALUKDAR v. AYEJUDDI SHAIKHI.*

57 I.C. 972.

—Claim suit—C.P. Code O 21, R. 63—Onus of proof of title on defeated claimant. See C.P. Code O. 21, R. 63. 55 I.C. 72.

—Consideration—Mortgage—High rate of interest — Mortgagor a young man of dissolute habits—Onus on mortgagee. See PRES. TOWNS INS ACT, S 25.

39 M.L.J. 345.

—Consideration—Mortgage—Suit on—*Undue influence exercised by mortgagee over mortgagor who was a weak man of bad habits—Trusts Act, Ss. 3 and 6.*

B, a very young man leading a most immoral life mortgaged the ancestral property of his family to N and gave N possession of practically all his property which included other villages not mortgaged to N, who sold a considerable part of the property including some of the mortgaged villages, and some of the mortgaged villages were purchased by N. Neither N nor the plaintiffs who claimed through N rendered accounts of what had been received by him from and in respect of any of the properties not even of the mortgaged properties. B was completely under the influence of N, an unscrupulous man who exercised that influence regardless of the interest of B and his infant son who was born subsequently to the two mortgages on which Plaintiffs sued :

Held, That this was not an ordinary case of a suit for sale based on a mortgage in which it would be for the defendant, the mortgagor to prove that nothing remained due under the mortgage, if that was his defence and the onus lay on the Plaintiffs to prove that the mortgages had not been satisfied and what, if any was due under each mortgage before they could get a decree for sale. The plaintiffs having failed to prove that any thing was due the suit should be dismissed.

Shortly after the first of the mortgages B executed an agreement by which he appointed N manager and receiver of all his property moveable and immoveable for 10 years and

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put N in possession under that agreement. N was to keep accounts and explain them to D in July of each year and was to receive certain remuneration for his work.

Held, that the agreement did not constitute N a trustee within the meaning of the Indian Trusts Act (*Sir John Edge*) B. L. RAI v. BHAIYALAL 24 C. W. N. 769:

16 N. L. R. 94 : 28 M. L. T. 345 : (1920) M. W. N. 685 : 53 I. C. 13 (P. C.)

—*Consideration*—*Promissory note*—*Admission of execution*—*Effect of*

Where in a suit on a promissory note the debt admits execution but pleads want of consideration for the note the burden of proof is on him to prove his plea (*Shau Lal and Martineau, JJ.*) ANANT RAM v. THE BHARAT NATIONAL BANK, LTD.

2 Lah. L. J. 609 : 56 I. C. 638.

—*Consideration*—*Sale-deed*—*Recitals as to payment of consideration*—*Rebuttal*

In a suit to recover the consideration for land sold by plaintiff to defendant under a registered conveyance whereby plaintiff acknowledged receipt of the consideration in full the onus is not upon the debt but on the plaintiff to prove that the recital in the document was incorrect. (*Teuon and Chaudhuri, JJ.*) SHAHED ALI MIA v. MOIOMED FAZLAN RAHMAN 57 I. C. 954.

—*Custom*—*Alienation*—*Status of collaterals in the 10th degree to challenge alienation of a childless proprietor*—*Awans in the jullunder District* See (1919) Dig. Col. 105. QASIM ALI v. GULAM MAHOMED

2 Lah. L. J. 76.

—*Custom*—*Non-transferability of property*.

Where in a suit for possession of a site in a village under a sale-deed executed by a person who had been in possession of the site for a long time the defendant alleges that according to the custom of the village the vendor had no right to transfer the site, the burden of proving the existence of such a custom lies upon the defendant. (*Macnair, A. J. CJ*) SAHEBRAO v. JAIWANTRAO 58 I. C. 192

—*Custom*—*Proof*.

Any person who relies on an alleged custom has to prove that the custom exists and applies to the circumstances of the case. (*Chevins and Dundas, JJ.*) SHAH MAHOMED v. FAZL ILAHI

2 Lah. L. J. 475 : 56 I. C. 918.

—*Dedication*—*Waqf*—*Onus on person asserting*.

In a suit for a declaration that certain property is waqf the onus is on the plaintiff to prove that the property has been dedicated as waqf. 33 P. R. 1917 foll. 7. A. L. J. 1095 foll. (*Broadway and Martineau, JJ.*) RAHIM BAKHSH v. CHANNAN DIN. 55 I. C. 210.

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—*Discharge Onus*—*Plea of*—*Circumstances shifting onus*.

In an ordinary case of a suit on a mortgage, if the defence is that nothing remained due under the mortgage, it will be for the defendant to prove it. Where, however, the mortgagor was a young man leading a most immoral life and he mortgaged the ancestral property of the family to the plaintiff and gave him possession of his entire property including other villages not mortgaged and a considerable part of the property including some of the mortgaged items was sold and some items were purchased by the mortgagor but no account's were rendered. Held there was undue influence on the part of the mortgagor and that it was for him to establish that the mortgage debts were outstanding. (*Sir John Edge*) B. L. RAI v. BHAIYALAL (1920) M. W. N. 685 : 24 C. W. N. 769 : 16 N. L. R. 94 : 28 M. L. T. 345 : 58 I. C. 13 (P. C.)

—*Ejectment*—*prima facie title in plff. Shifting of onus*.

In every case where the plaintiff sues for recovery possession of land on establishment of his title the onus is primarily on him to prove his title. But when he makes out a *prima facie* case for establishment of his title and the defendant seeks to contradict his case by establishing title of his own it is for the defendant to prove the title he sets up whether it be lakheraj or whether it be any other kind of title (*Newbold, J. J. DURGA CHARAN Biswas v. KAILASH CHANDRA Das*) 54 I. C. 645.

—*Ejectment suit*—*Admission of plff's title as land-lord*—*Claim of rayati interest*—*onus of proof on tenant*. See *EJECTMENT*. (1920) Pat. 39.

—*Landlord and Tenant*—*Tenancy*—*Proof of*—*Onus*.

Where a landlord brings a suit for recovery of possession of land on the ground that the land in suit was not included in the tenancy.

Held, that the onus of proving that the land was included in the tenancy of the defendant lay on the defendant. (*Walmsley, J.*) NABIN CHANDRA NATH v. TIRTHABASI BHOWMIK. 56 I. C. 180

—*Land tenure*—*Inalienability*—*Onus of proof on landlord*. See *LAND TENURE*.

38 M. L. J. 275.

—*Malicious prosecution*—*Damages*—*onus on plff. to prove absence of reasonable and probable cause*. See *MALICIOUS PROSECUTION*. 55 I. C. 161.

—*Materiality of after evidence is gone into*.

The question of onus is only one of evidence and when the evidence, has been adduced in the case the Court is entitled to come to any

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findings. (*Jwala Prasad and Adami, JJ*)
BANAMALI SATPATHI v TALUA KAMHARI
 1 P. L. T. 102 : 5 P. L. J. 151 :
 55 I. C. 841

—Materiality of after evidence gone into.

Where a Court has the full evidence of both parties before it, the question of onus hardly arises. (*Coutts and Adami, JJ*) **SUKAN SAW v. KARU MARTON**, 5 P. L. J. 87 : (1920)

P. 131 : 1 P. L. T. 13. 54 I. C. 652

—Materiality of, after whole evidence gone into. See (1919) *Dig. Col.* 106 **JHAN SINGH v. TOKHARAM MARWARI**.

1 P. L. T. 57

—Materiality of—Second appeal.

The question of onus becomes immaterial in second appeal. (*Coutts and Sultan Ahmad, JJ*) **CHAUDHURY RAM KHELAWAN SINGH v CHAUDHURY RAM NATH SINGH**

1 P. L. T. 640

—Minority—Onus on person setting up

The burden of proving that a person at a particular date was a minor, lies upon the person making the allegation. (*Halifax A. J. C. J. THAKU: BALWANT SINGH v. NARAYAN*)

53 I. C. 196

—Question of — Maintainability of after, evidence goes into.

Where the relevant facts are before the Court and all that remains for decision is what inference is to be drawn from them, the question of the burden of proof is not pertinent. (*Sir Lawrence Jenkins*) **SETAURATHAMINE v. VENKATACHELLA GOUNDAN**

43 Mad. 567 : 38 M. L. J. 476 :
 27 M. L. T. 102 : 22 Bom. L. R. 573 : (1920) M. W. N. 61 : 18 A. L. J. 707 :

11 L. W. 399 : 56 I. C. 117 :
 47 I. A. 76 (P. C.)

—Redemption—Limitation—onus of proof. See (1919) *Dig. Col.* 108 **KALNU LAL v. FAZAL**.

1 Lah. 89

—Ryotwari land—Occupancy right—claim of, by tenant under pattadar—Onus on tenant. See LANDLORD AND TENANT, OCCUPANCY RIGHT. 27 M. L. T. 102 : 22 Bom. L. R. 578 : (1920) M. W. N. 61 (P. C.)

—Undue influence—Onus on person seeking to avoid instrument on the ground of. See CONTRACT ACT S. 16. 11 L. W. 112

—Will—Disinheritance of natural heirs—Onus on propounder. See WILL, PROOF OF

24 C. W. N. 674

BURMA EXCISE ACT (V of 1917)
 S. 41 (c) and 63 (1) (a)—Offence under S. 41 (c) Sanction for prosecution by Collector—Form of.

An order by the Collector sanctioning the prosecution of a person under S. 41 (c) of the Burma Excise Act on the report of the Police is not a sufficient compliance with the provi-

BURMA MUN. ACT, S. 142.

sons of S. 63 (1) (a) of the Act. The Collector must authorize some particular Excise Officer to make the report or complaint (*Pratt J. C.*) **KAUNG KI v. EMPEROR**.

56 I. C. 436 : 21 Cr. L. J. 452.

BURMA GAMBLING ACT (I of 1899) Ss. 6 and 7—Gaming instruments—Finning of—Resumption—Irrregular search—Effect of.

A ten house going being a police officer is not a competent witness to a search under S. 103 of the Cr. P. Code.

If a search is not carried out strictly in compliance with law no presumption arises under S. 7 of the Gambling Act. (*Robinson, J.*) **PO MIA GYI v. EMPEROR**.

12 Bur. L. T. 269.

—S. 7—Common gaming house—Persons found in—Presumption

The presumption under S. 7 of the Gambling Act that persons found in a common gaming house were there present for the purpose of gaming may be rebutted by showing that they were inmates of the house, or were there for some legitimate business. (*Maung Kin, J.*) **BA GYI v. EMPEROR**. 13 B. L. T. 103.

BURMA LAWS ACT S. 13—Burmese law—Damages for seduction—Law applicable to suit. See BUDDIST LAW, BURMESE

13 Bur. L. T. 6.

BURMA MUNICIPAL ACT (III of 1898) Ss. 92 and 146—Refuse, rubbish and offensive matter—Duty to provide.

The words “refuse, rubbish, and offensive matter,” in S. 98 (2) of the Burma Municipal Act include night soil.

S. 98 (2) of the Burma Municipal Act imposes on the municipal committee an imperative duty of providing sites and places for the deposit and disposal of nightsoil.

The general provision in S. 146 of the Burma Municipal Act for payment of compensation does not take away the right to an injunction.

13 Bur. L. T. 26.

—S. 142 (d)—Byelaws—Validity of—Bodies working for profit—Reasonableness.

A court has no jurisdiction to interfere with the byelaws of Municipal bodies unless they are either (a) *ultra vires* as exceeding the powers given by statute, or (b) invalid as being repugnant to the general principles of law, and should support them if possible by a benevolent interpretation, crediting those who have to administer them with an intention to do so in a reasonable manner.

By-laws of public bodies working for profit are on a different footing from those of the public representative bodies acting under statutory powers. The former may be disallowed if unreasonable.

A bylaw of a municipal body requiring keepers of lodging houses to pay a licence fee

BURMA MUNICIPAL ACT, S 180

reckoned on the maximum number of lodgers authorised, although the actual number of lodgers in the house may be less than the authorised number is not illegal or *ultra vires* (*Robinson, J.*) *P S. PILLAY v MOULMEIN MUNICIPAL COMMITTEE.* 13 B. L. T. 107.

S. 180 (1)—Disposal of surface water—Order regarding—Disobedience to, if illegal

There is nothing in Chapter VI of the Burma Municipal Act which empowers a Town Committee to pass general orders or directions regarding the disposal of surface water. The neglect to comply with such an order therefore is not an offence under S. 180 (1) of the Act. (*Pratt, J. C.*) *SOHAN SINGH v. EMPEROR.*

54 I. C. 494.

CAL HIGH COURT RULES & ORDERS (Original Side) Ch. XIII R. 9—Lease—Covenant not to assign without consent of land-lord—Consent unreasonably withheld—Assignee a limited company—Originating summons.

Under a lease containing a clause that the lessee would not assign, etc., the premises without the consent of the lessor, but such consent should not be unreasonably withheld, the lessee (Plaintiff) applied to the lessor (Defendant) for his consent to assign his interest in the said lease for the residue of the term to the Bijou Ltd., but the Defendant refused to give his consent. The Plaintiff applied on an originating summons for the determination of the question whether the Plaintiff was entitled to assign without the consent of the Defendant.

Held, that the court was competent to decide the question on an originating summons (1909) 1 Ch. 214; (1903) 2 Ch. 112; (1905) 1 Ch. 456; (1910) 1 Ch. 454; (1920) 1 Ch. 128, 48 Sol. Jour. 636; (1905) 2 Ch. 340; (1920) 36 T. L. R. 513 referred to.

Held also that in the circumstances of the case, the consent was unreasonably withheld and that the lessee was entitled to assign without the consent of the lessor.

A "person" in a covenant against assignment includes a corporation and a limited company is capable of being "a respectable and responsible person" within the meaning of such a covenant. (1920) 2 Ch. 525, referred to.

"Unreasonable means" without fair solid and substantial cause.

L. R. 9 Ex. 151 (1874); 8 T. L. R. 637; (1891) 1 Q. B. 417, (1906) 1 Ch. 596; referred to (*Ghose, J.*) *DUCASSE v. COHEN.*

24 C. W. N. 1007.

CAL. IMPROVEMENTS ACT (V of 1911)—S 39—Sanction of Scheme—Place it to be delineated before—Enquiry.

The Board of Improvement Trust are not required to delineate the plan building sites before the scheme is submitted to Government for sanction.

CAL MUNICIPAL ACT, S. 299

The fact of Board's making enquiry under Sub-Sec. 1 of S. 73 of the Calcutta Improvements Act, does not disentitle them ultimately to reject the application on the ground that it does not come within that section (*Moorjee and Fletcher, J.J.*) *BEPIN BEKHWYSEN v. THE TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.* 47 Cal. 604. 31 C. L. J. 384: 57 I. C. 37.

S. 42 A—Scope of—Power of trustees to acquire land—Recoupment—Land 'attached'.

Under S. 42 (a) of the Cal Imp. Act it is competent to the Board of Trustees, in carrying out a scheme under that Act, to acquire compulsorily, for the purpose of recoupment, land which is not required for the execution of the scheme but the trustees are of opinion will thereby be increased in value (*Lord Purmoor*) *TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA v. CIANDRA KANTA GHOSH.*

47 Cal 500: 38 M. L. J. 511: 11 E. W. 586: 18 A. L. J. 521: 22 Bom. L. R. 586: 24 C. W. N. 831: 32 C. L. J. 65: 56 I. C. 32: 47 I. A. 45 (P. C.)

CALCUTTA MUNICIPAL ACT (III of 1899)—Ss. 299 and 575—Proceedings—Abandonment of—Delay.

The petitioner was convicted on the 28th January, 1916 for not having complied with the requisition which was served upon him in May 1915, requiring him to do certain things in connection with his premises and relating to the drainage therein and, he was fined Rs. 2. He did not comply with the requisition and on the 12th of August, 1916, a fresh complaint was made against him. The charge was for failing to comply with the requisition under S. 299 of the Calcutta Municipal Act requiring him within 60 days to make a house drain emptying into the sewer and to do other matters (after being convicted and fined Rs. 2 on the 28th January, 1916). These proceedings were taken under S. 575 of the Act. On the 29th of August, the accused's son appeared and said he was making arrangement for departmental execution of work. The order was "Two weeks time allowed. Fix 12th September, 1916." On the 12th September proceedings were stayed for one month at the instance of the prosecution. On the 25th February 1919, an application was made to the Municipal Magistrate for the revival of the proceedings which were stayed in the case pending the disposal of the party's application for departmental execution of work. On that the Magistrate made the following order on the 18th September "Case revived; Issue summons for 16th October, 1919." On the 20th November, the petitioner was convicted and was sentenced to a daily fine of eight annas for 30 days from the 16th of May, 1916 that is, Rs. 15 in all:

Held, under the special circumstances of the case and the very great delay that occurred

CAL MUNICIPAL ACT, 341.

namely, from the 12th of September 1916 till the 25th of February 1919 as nothing was done with regard to the proceedings, the proceedings were abandoned, and the order of the Magistrate convicting the petitioner of offences committed from the 16th of May and 30 days afterwards, was invalid (*Sanderson, C. J. and Walmsley, J.*) NANDO LAL GUHA v CORPORATION OF CALCUTTA.

31 C L J. 342 : 56 I.C. 862 :
21 Cr L J. 558.

—S 341—Fixture attached to a building—Meaning of. See (1919) *Dig Col. 112* SYED MAHOMED RAZIUDDIN v THE CORPORATION OF CALCUTTA. 58 I.C. 352 : 21 Cr L J 768

—S 466 (c)—Carrier—Promises for keeping animals—Hire

A carrier who has to take out a trade license and a license for the animals kept by him must, over and above that, take out a license for the premises where he keeps the animals under cl. (c) of S. 466 of the Calcutta Municipal Act. (*Chaudhuri and Newbould, JJ.*) HOWRAH MUNICIPALITY v. LEWIS AND CO. 24 C. W. N. 744 : 58 I.C. 924

—S. 495—Article of human food or drink—Tea dust if. See (1919) *Dig Col 112* THE CORPORATION OF CALCUTTA v. PAGLI. 47 Cal 53

—S. 495 (a) Sub Cl 1—Amendment Act (I of 1911) S. 2—Ghee—Adulteration—Standard of purity—Chemical tests—Value of.

There is no standard of purity of ghee fixed by the Indian Legislature. The Courts of Law have, therefore to decide the question of adulteration upon such evidence as is available in each case. As there is no statutory presumption, every case must depend on its own evidence.

A statutory standard should be laid down as raising a presumption of adulteration and such case should not be made to depend on evidence forthcoming in each case to test the value of the Corporation standard.

The Court should determine whether the Corporation standard ought to be acted upon or not, but the Court ought not to fix a standard of its own.

The Court did not accept the R. W. figure arrived at by the Corporation as by itself raising a presumption of adulteration on account of the limited number of its expert's experiments and the fact that sufficient allowance had not been made for climatic conditions, nature of food, period of lactations, breed, stabling and local conditions nor for the temperature of manufacture, but considered the Corporation B. R. and Saponification figures to be fair.

Where the two samples of ghee in respect of which the accused was convicted gave the following figures:—R. W. 26 and 24, 9 B. R.

CAL MUNICIPAL ACT, 578.

44 and 15 and Saponification 222 and 220,—and shewed colour under wellman's test the Court held that the ghee was adulterated. (*Chaudhuri and Newbould, JJ.*) GRANDE VENKATA RATNAM v. CORPORATION OF CALCUTTA.

47 Cal 633 : 24 C. W. N. 388 :
56 I.C. 586 : 21 Cr L J 490.

—Ss. 559 (52) and 591—Bye-law—Limitation of hours of theatrical performance—Validity of—Abetment offence created by law—Liability.

Bye-law, 45 framed by the General Committee of the Corporation of Calcutta to regulate the hours of theatrical performance is not *ultra vires*. Statute 21 and 22 Vict., Chap. 67 gives ample authority to the Bengal Legislature to pass such an Act as the Calcutta Municipal Act and to empower the General Committee of the Municipality to frame bye-laws and the General Committee has clear authority to make breaches of the bye-laws punishable.

The abetment sections of the Penal Code apply to an offence created by a bye-law framed under the Calcutta Municipal Act. (*Chaudhuri and Newbould, JJ.*) PROBODH CHANDRA BOSE v. CORPORATION OF CALCUTTA.

47 Cal. 547 : 24 C. W. N. 196 :
54 I.C. 781 ; 21 Cr. L.J. 173

—Ss. 578 and 631—Pleader practising without licence—Offence when committed—Limitation—Revision against acquittal—Interference when justified.

A pleader practised in a Court in the year 1917–18 without taking a license:

Held that he was guilty of an offence under S. 578 of the Calcutta Mun. Act on the last date of 1917–18, that is on the 31st March 1918 and a complaint lodged within three months of that date was not barred under S. 631 (1).

Per Richardson, J. The offence under S. 578 of the Act lies in the person exercising a profession on after the 1st of July in any year without having the prescribed license. If the profession is so exercised on subsequent days there may be a doubt whether a separate offence is committed on each day or whether it is all one continuing offence.

If the profession is exercised on one day only the profession must be commenced within the following three months. If it is exercised on a number of days whether the offence is a continuing one or not the prosecution must be commenced within three months of the last of such days.

Per Shamisul Huda, J.—For the purpose of carrying on a pleader's profession it is not necessary that he should every day conduct a cause or attend or address the Court. For instance the fact of keeping an office for the purpose of receiving his clients, giving them advice, or being generally open to engagement as a pleader will all constitute the carrying on of a pleader's profession.

Per Curiam:—As a rule the High Court does not interfere with an order of acquittal. But

CAL. POLICE ACT, S. 13.

when a case is not a criminal one in the strict sense of the term and concerns the interest of a public body it interferes (*Richardson, and Syed Shamsul Huda, JJ*) THE CHAIRMAN OF THE HOWRAH MUNICIPALITY v BARADA PRA-SANNA PAIN 24 C.W.N: 415 : 31 C.L.J. 127 : 55 I.C. 731 : 21 Cr. L.J. 363.

CALCUTTA POLICE ACT, (IV of 1866) S. 13—Detention of suspended police officer in custody—Legality—Police circular Order No. 1156—Legality See (1919) *Dig. Col. 112*. PRAMATHA NATH BARAT v. LAHIRI 54 I.C. 63 : 21 Cr. L.J. 15

CANTONMENT ACT (XIII of 1839), S. 32—Scope of—Oral gift of property in Cantonment—Validity of.

The Effect of S. 32 of the cantonment Act is that a gift of property situate in a Cantonment must be made in the manner provided by S. 120 of the T.P. Act.

An oral gift by a Muhammadan of such property is therefore not valid (*Abdul Raooif, J*) MUHAMMAD BEG v. AMIR NATH.

54 I.C. 829.

CANTONMENT CODE, Ss. 92 and 107—Scope of—Liability of occupier—Magistrate ordering prosecution if can try the case himself—Cr. P. Code, Ss. 191 and 556

A offence against S. 92 of the Cantonment Code may also be committed by the occupier or even a trespasser and not merely by the owner or lessee

Where on a report being made by a cantonment official the Cantonment Magistrate directed a prosecution and then proceeded to try the case himself and convicted the accused

Held, that the Magistrate should have informed the accused that he was entitled to have the case tried by another Magistrate and should not have tried the case himself. (*Wilberforce, J*) ANANDI PRASAD v. EMPEROR. 55 I.C. 1002 : 21 Cr. L.J. 394.

CANTONMENT LAND—Permanent tenancy—Evidence of—Building on land—Permanent Structures—Estoppel.

In Cantonment areas defendant's allege they have acquired a permanent tenancy, the burden of proving such tenancy lies upon them. The facts that they and their predecessors held the lands without a lease for a very long time, that the rent was never altered, that succession to the lands by transfer and inheritance has been established, and that buildings have been erected on the lands do not by themselves establish a permanent tenancy. Nor do such circumstances raise any presumption of ownership in favour of the defendants or their predecessors-in-title. The fact that permanent structures are constructed on such lands to the knowledge of the plaintiff would not estop him from denying the permanent character of the tenancy of the defendants. (*Sultan Ahmed, J*) ONKAR MAL MARWARY v. SECRETARY OF STATE FOR INDIA.

56 I.C. 813.

CATTLE TRESPASS ACT, S. 24.

CARRIER—Common carriers—Liability for injuries to goods—Through booking of goods by one company and injury while the goods were in the custody of another company—Carriers Act Ss. 5, 8 and 9—Negligence—Onus of proof—Nonfeasance and misfeasance See (1919) *Dig. Col. 114*. DEKHARI TEA, CO LTD. v. ASSAM BENGAL RAILWAY CO., LTD.

47 Cal. 6.

—Railway—Consignment of goods—Shortage—No duty to reweigh and certify.

A Railway Company is not bound by law either to re-weigh goods or certify shortage at the time of delivery to the consignee. The refusal of a Railway Company to re-weigh goods before delivery does not justify a consignee in refusing to take delivery of goods. (*Das and Adami, JJ*) SURAJ MAL MARWARI v. THE AGENT BENGAL NAGPUR RY. COMPANY.

58 I.C. 200.

—Railway—Loss of goods—Liability—goods left unclaimed for unreasonable time—Effect of.

A consignee of goods cannot make the carriers responsible for any loss if he for his own convenience or by his own laches allows them to remain with them for an unreasonable time after the goods have arrived at their destination and the carriers are ready to deliver them.

A different liability as warehousers would arise if the evidence established such an agreement. The charging of demurrage does not necessarily give rise to such an implication. (*Piggot and Walsh, JJ*) B. N. W. RAILWAY v. MOOL CHAND.

18 A.L.J. 784 :

58. I.C. 1000.

CASTE—Right to own and enjoy property, though a fluctuating body. See C.P. CODE, O. 1, R. 8.

24 C.W.N. 206.

CASTE DISABILITIES REMOVAL ACT (XXI of 1850)—Muhammadan Law—Non-Muslim—Right to succeed—Pre-emption.

The Caste Disabilities Removal Act has abrogated the rule of Muhammadan Law by which a non Muslim is excluded from succession to a Muslim 11 A. 100 foll.

The sons of a Christian convert to Islam sold six villages to their first cousin once removed. Plaintiffs, occupancy tenants in one of the villages, sued for possession by pre-emption of that village.

Held, that the fact of the vendees being Christians did not deprive them of their right of succession to the vendors; and that, therefore, the plaintiff's right of pre-emption was inferior to that of the vendees and their suit was liable to be dismissed. (*Shadi Lal and Martineau, JJ*) RUPA v. SARDAR MIRZA.

1 Lah. 376 : 2 Lah. L.J. 523 :

55 I.C. 420.

CATTLE TRESPASS ACT (1 of 1871) S. 24—No evidence for the prosecution—Effect of—Compromise.

CATTLE TRESPASS ACT, S. 24.

An offence under S. 24 of the Cattle Trespass Act is not compoundable. But a case under that section being a summons case the effect of not giving evidence by the prosecution would be an acquittal of the accused. Where therefore a Magistrate allowed a case under the Cattle Trespass Act to be compounded and acquitted the accused held that although the procedure was not quite irregular yet the Magistrate was substantially right. (*Piggot, J.*) EMEROR v. JULUA. 42 A. 202.

18 A. L. J. 96 : 55 I. C. 465 :
21 Cr. L. J. 305.

—S. 24—Offence under—Proof of damages necessary.

There can be no conviction under S. 24 of the Cattle Trespass Act unless it is proved and found that the cattle was liable to be seized within the meaning of S. 10, and that damage was caused (*Das, J.*) DASSI GOALA v. SARDAR MAHTON. 1 P. L. T. 176.

57 I. C. 464 : 21 Cr. L. J. 640.

CAUSE OF ACTION—Bailment or pledge—Unlawful withholding of goods—Refusal to deliver—Action on contract or test. See (1919) *Dig. Col.* 116. KALYAN MAL v. KISHEN CHAND. 55 I. C. 45.

C P LAND REVENUE ACT (XVIII of 1881) S. 65 (4) (a)—Thekadari tenure—Transferability of—Legality of award directing sale of thekadari tenure

The transfer of interest in a thekadari tenure is prohibited under S. 65 A sub-S. 4 (a), of the C. P. Land Revenue Act and an arbitration award directing a sale of such an interest is illegal and unenforceable and no decree can be passed on such an award. (*Prideaux, A. J. C.*) TIKARAM v. TEJRAM. 54 I. C. 274

—Ss 136 F. H and 22—Partition—Title of applicant admitted—Duty of court—Rights of the parties decision as to—Appeal

If the title of an applicant for partition is admitted the Court is bound to partition the land unless an objection has been made by a co-sharer in possession under S. 136 F of the C. P. Land Rev. Act and the objection has been upheld by the Court.

If no such objection has been made and the Court declines to partition the land the decision is appealable to the High Court 1 P. L. J. 290 re. Such a decision virtually decides "the right of the parties" within S. 136 H inasmuch as it decides whether the land should be held jointly or separately. (*Jwala Prasad and Adami, J.J.*) ANANDA CHANDRA PATI v. SADANAND PATI. 5 P. L. J. 140 : 55 I. C. 438.

—(II of 1917)—Not retrospective—Settlement record—Entry in—Effect of.

A Statute like the Central Prov. Land Rev. Act II of 1917 which prejudicially affects vested rights in existence and claimed before its enactment cannot be applied retrospectively.

C. P. TENANCY ACT, 45.

The bare entry in a settlement record of a person as *malik makbuza muafid* is not sufficient to justify a Civil Court in holding that his heir is entitled to enjoy a like privilege (*Drake Brockman, J. C.*) NATHURAM v. JAGANNATH.

16 N. L. R. 106 : 55 I. C. 426.

—Ss. 188 and 192—Co-sharer—Non Resident—Lambardar—Servants, wages.

Were a lambardar, who does not reside in the village, appoints a private servant to do his work for him, he cannot charge his co-sharer with the wages of this servant without a previous agreement with the co-sharers. (*Batten, A. J. C.*) RAGHUBARDAYAL v. MADHORAO. 58 I. C. 958.

C P TENANCY ACT, (XI of 1898) S. 41 (7)—Occupancy tenant—Alienation of part of holding—Right of landlord to re-enter.

An alienation by an absolute occupancy tenant of a part of his holding without the consent of the landlord does not entitle the *Malguzar* to sue for ejectment of the transferee as a trespasser and to re-enter on the ground that the transfer is void as against him under S. 41 (1) of the C. P. Tenancy Act. (*Halifax, A. J. C.*) JODHRAJ v. DAULAT.

58 I. C. 112.

—S. 42—Mortgage—Decree—Execution—Power of executing Court.

A mortgage decree for sale should expressly direct the sale and not leave this to be inferred by implication. The decree, however, need not for the purpose of S. 42 of the C. P. Tenancy Act of 1883 be self-contained. Although it is desirable that the decree should be self-contained, what the Court executing it has to look at is its substance and not merely its form and it is at liberty to look at anything which is outside the decree. For example, the fact that the mortgage deed has not been copied in the form of a schedule to the decree, would not preclude the Court from looking at the terms of the deed. (*Prideaux and Mittra, A. J. C.*) BALLABADAS v. GULABSINGH.

57 I. C. 177.

—S. 45—Sale of exproprietary rights—Rights in sir lands.

An ex-proprietor whose rights in a village are sold in execution of a decree has only the status of an occupancy tenant of the sir lands, unless the decree expressly directs the sale of his rights therein. (*Findlay and Mittra, A. J. C.*) GANAPAT RAO v. KUAR DAULATSHA.

55 I. C. 573.

—S. 45—Sir land—Transfer by cultivating tenant—Sanction.

When the Financial Commissioner grants an unconditional sanction for the transfer of cultivation rights in sir land and such sanction does not restrict the transfer to any particular transferee, it is open to the person securing the

C. P. TENANCY ACT, S. 45.

sanction to use it in favour of any person whatsoever. (*Halifax, A. J. C. MUNIOR MAHOMED v. RAMA*) **58 I.C. 23**

—**S. 45 (1)—Sale of share in a village—Surrender of occupancy rights in Sir, if valid.**

Defts. sold to plff. their share in a village reserving to themselves the occupancy rights in the Sir land. On the same day they executed another deed by which they surrendered their occupancy right in the Sir land accrued to them by virtue of the sale. Plff. took possession of the village share under the sale deed and of the land under the surrender deed, but defts. ejected him on a subsequent date. Plff. brought the present suit for possession of the land surrendered:

Held, that the mere fact of the possession having been delivered to Plff. did not suffice to separate the transaction of surrender from that of sale and the surrender must be held void under S. 45 (1) of the C. P. Ten. Act

Plff. was not entitled to a refund of the consideration for the surrender as both the parties knew that they were contravening the provisions of the C. P. Ten. Act and the max in *in pari delicto, potior, est conditio etc.* applied.

The test as to whether a surrender in such a case is an evasion of S. 45 (1) of the C. P. Ten. Act consists in the fact as to whether the transaction is distinctly separate from that of sale of the village share.

If a covenant to relinquish the Sir lands is part of the transaction of the sale or of mortgage then the agreement to surrender will be void and unenforceable no matter what ingenious devices may be employed to give colour to it. If the court is satisfied that there was first of all a transfer by way of sale or mortgage and that the transferee having obtained the status of an ex-proprietary tenant with full knowledge of the fact and of the rights preserved to him by the Statute deliberately chooses as a separate transaction to relinquish his ex-proprietary tenancy into the hands of the new proprietor of the mortgagee in possession then the law cannot further protect a reckless and imprudent man against the consequences of his own acts. (*Drake Brockman, J. C. BHURE v. SHEOGOPAL.*) **54 I.C. 794**

—**S. 56 (2)—Kotwar—Service holding—Kotwar in possession after loss of office—Settlement.**

J. and N. were two Kotwars in a village each holding one of two fields constituting the village service holding. It was decided that one Kotwar would suffice and the question of who was to be retained was decided by the parties drawing lots. It was understood that the loser would continue for his lifetime in possession of the field he was cultivating. J. lost and was thus deprived of the office of Kotwar, but he continued in possession of the field. In the new settlement some years later the village service holding was recorded in the

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sole name of N's son D, who consequently ejected J.

Held, that S. 56 (2) of the C. P. Tenancy Act did not apply; that as the sub-tenancy created in favour of J. was part of the arrangement whereby N became the village service tenant, it would be inequitable to permit the ejection of J. merely because a new settlement had been made or because N had ceased to be Kotwar. (*Drake Brockman, J. C. JHIBLIA v. DAWLATYA.*) **56 I.C. 749.**

—**S. 81—Appeal—Maintainability of—Test of**

The criterion for determining whether an appeal lies from a decree under S. 81 of the C. P. Tenancy Act is the nature of the suits as originally framed, and not the form it may subsequently assume. **32 B. 356 foll.**

Although a suit for rent due by a tenant of *malik makbuza* fields is not triable by a Small Cause Court it is none the less one of a nature cognizable by a Court of Small Causes and unless the subject-matter involved in the suit exceeds Rs. 500 in value there is no second appeal from a decree in such a suit. (*Findlay, A. J. C. RAMKRISHNA v. NARAIN.*)

56 I.C. 845.

—**Ss. 95 and 97—Civil and revenue Court—Suit for possession by occupancy tenant; if cognizable by Civil Court—Claim for mense profits—Effect of.**

A suit for possession of land of which plff. became occupancy tenant by operation of law upon the sale of the proprietary rights in Sir, is a suit between landlord and tenant and cognizable by a Revenue Officer even though plff. has not obtained possession of the land as tenant and has been recognised as such by the deft. landlord.

In such a suit a claim for mense profits and for a house which plff. seeks to recover as an agriculturist is ancillary to the main relief asked for and does not change the nature of the suit. (*Mitra, A. J. C. POONABAI v. SETH BALLABHADAS.*)

54 I.C. 827.

CHAMPARAN AGRARIAN ACT. (I of 1918) S. 4 (3)—Decision under, finality of.

The decision of the authority prescribed under cl (a), sub S. 3, of S. 4 has been declared to be final under the Champaran Agrarian Act with respect to the matters contained therein. As to any questions other than those referred to in S. 4, no finality is declared under the Act, (*Mullick and Jwala Prasad, J. J. DR. JAMES HENRY GEORGE HILL v. SATAN SINGH.*) **(1920) Pat. 4.**

CHAMPERTY—English Law—Inapplicable to India. See CONTRACT ACT, S. 23.

1 Lah. 124.

CHARGE—See also T. P. ACT, S. 100.

—**Creation of — Pension — Provision for.**

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Where in order to secure the payment of a pension granted in perpetuity, an agreement is entered into whereby certain property is charged with such payment, the agreement enures for so long as there are any descendants or representatives of the original grantee, and is not limited to the lives of the parties to the agreement. (*Lindsay, J. C.*) RAJA RAM v. SANT BAKSH. 57 I.C. 618.

—Revenue—Payment of by person interested in a portion of the assessed land—Right to a charge.

A compromise decree awarded a certain land included in the patta of the plaintiff to the defendant but provided that the defendant should pay the assessment annas eight to the plaintiff the registered holder. The assessment of the land was enhanced. In a suit for the additional assessment.

Held, that the assessment was a charge on the land, and that the plaintiff the registered holder, of the land in which the defendant was interested was in the position of a co-mortgagor and that he was entitled to contribution from the defendant as regards the assessment by him. 20 Mad 689, foll. (*Wallis, C. J. and Krishnan, J. J.* MAHAMMAD KALI v. KUNNI KANNA NAIR

(1920) M.W.N. 477 : 12 L.W. 180

CHAUKIDARI CHAKRAN LANDS—Resumption—Settlement—Patni grant—Zemindar's power to appoint chaukidari.

On 20th May 1906 the predecessor in interest of the defendants executed a *patni kabuliati* in favour of the zemindar, by which a *patni* was granted in respect of 17 villages for a premium and an annual rent. All the lands included in the villages except certain specific lands were demised to the *patnidar* but the zemindar was entitled to appoint a chaukidar should there be a vacancy in the office of *chaukidar* by reason of his dismissal, death or disappearance.

Held that the *chaukidari chakran lands* which formed part and parcel of the permanently settled estate of the zemindar vested in the *patnidar* subject to the rights of the *chaukidars*: 44 Cal. 84 P.C.

The clause authorising the zemindar to appoint a *chaukidar* did not exclude *chaukidari chakran lands* from the *patni* lease.

The terms of an unambiguous document cannot be controlled by the conduct of the parties. (*Mookerjee, O.C.J. and Fletcher, J.*) KIRANSASHI DEBI v. ANANDA CHANDRA MUKHERJEE. 32 C.L.J. 15 : 58 I.C. 841.

CHIT FUND—Hypothecation by subscriber of amount payable by Karaswan—Right of mortgagee to sue—Limitation—Starting point. See *CHOSE IN ACTION*

11 L.W. 238

CHOTA NAG. TEN. ACT, S. 208

CHOSE-IN-ACTION—Mortgage of—Right to sue for debt—Limitation—Starting point.

A mortgagee from the subscriber to a chit fund of the amount that will thereafter become payable to such subscriber from the Karaswan can maintain a suit for the recovery of the debt given to him as security and he is the only person that can sue for recovering that amount. Limitation for such a suit against the Karaswan will begin from the date when the chit money became payable and not from the date of the mortgage. (*Seshagiri Aiyar and Moore, J.J.*) ARUNACHALAM CHETTIAR v. MADASWAMI. 11 L.W. 238 : 27 M.L.T. 269 : 56 I.C. 146

CHOTA NAGPUR TEN. ACT (VI of 1908) S. 87—Suit under—Second appeal—Limitation Act, S. 14—Deduction of time spent on appeal to Commissioner.

No second appeal lies to the High Court from the decision of a Judicial Commissioner passed on appeal against the decision of a Revenue officer under S. 87 of the Chota Nagpur Tenancy Act : 39 Cal. 241 foll.

“Decision” in the Chota Nagpur Tenancy Act does not mean “decree” as used in S. 100. of the C.P. Code

Where the three months provided for the instituting of a suit under S. 87 of the Act having expired, the plff sought to exclude, under S. 14 of the Limitation Act, the time taken up by a previous application under S. 89 followed by an appeal to the Commissioner.

Held, that though the appeal to the Commissioner was incompetent, the Settlement Officer had jurisdiction to entertain the application under S. 89 and the period during which the application was pending before the officer could not be excluded. (*Coutts and Adam, J.J.*) TEAKUR JAGDESHWAR DAYAL SINGH v. BHAGDI MAHTON. (1920) Pat. 302 : 1 Pat. L.T. 785 : 58 I.C. 434.

S. 177—Suit for rent—Plea of payment to third person—Necessary party.

If in a suit for rent the tenant put forward a third person as the real landlord, the plaintiff is not bound to bring that third person on the record. S. 177 of the Chota Nagpur Tenancy Act does not, in such a case constitute a bar to the trial of the suit.

The essential condition for the applicability of S. 177 of the Chota Nagpur Tenancy Act is that the right to receive rent must be claimed by or on behalf of the third party, (*i.e.*) by the third party himself or by an agent of his, (*Das, J.*) BUDHAN SINGH v. MAWAR KALI CHARAN SINGH. 57 I.C. 28.

Ss. 208 and 209 (a)—Sale certificate—Order directing issue of—Appealability—Bengal Rent Recovery Act, S. 11.

No appeal lies to the High Court from an order of a Deputy Collector directing the issue

CHOTA NAG-TEN ACT, S. 211.

of a sale certificate under S. 208 of the Chota Nagpur Ten Act, read with S. 11 of the Bengal Rent Recovery Act, unless the order is one passed after decree and relating to the execution thereof. To come within this category the order must be one made on a question arising between the parties to the suit or their representatives.

The provisions of S. 208 that "the officer holding the sale shall give the purchaser the sale certificate is mandatory, and the Act contains no provision for confirmation of sale although the phrase "confirmation of sale" is used in S. 209 (a). That expression must refer to the completion of the sale proceedings by deposit of the balance of purchase money under S. 11 of the Bengal Rent Recovery Act.

The practice of confirming sales held under the Chota Nagpur Tenancy Act, is not warranted by the Act (*Coutts and Sultan Ahmed, JJ.*) *LAL NILMANI NATH SAHI DEO v. RAI BAHADUR BALDEO DAS BIRLA.*

**5 P. L. J. 101 : (1920) Pat. 73 :
1 P. L. T. 146 : 55 I. C. 27.**

—**Ss. 211 and 270—Execution of rent decree—Objection by transferee from tenant upheld by Deputy Collector—Appeal**

No appeal lies to the Deputy Commissioner from a decision of a Deputy Collector under S. 211 of the Chota Nagpur Tenancy Act, 1908.

If a Deputy Collector, whilst exercising the delegated powers of Deputy Commissioner fails to exercise a jurisdiction or usurps a jurisdiction then the Deputy Commissioner has power to order him either to exercise that jurisdiction or to restrain from exercising it as the case may be. The same rule applies in the case of the Commissioner and the Board of Revenue dealing with acts performed by the Deputy Commissioner.

Where on an application to the Deputy Collector by the landlord for execution of a rent decree certain transferees of the tenant objected *held* that the Deputy Commissioner has power to revise the decision of the Deputy Collector upholding the objection of a transferee from a tenant under S. 211 to execution of a rent decree. The decision of the Deputy Collector upholding the objection amounted to a finding that the circumstances of the case shewed that as there had been recognition by the landlord of the tenancy of the objectors there was sufficient reason for not having it registered within the proviso to S. 211. As there was no failure on the part of the Deputy Collector to exercise jurisdiction nor any attempt to usurp jurisdiction, the Deputy Commissioner was right in refusing to interfere in revision: (*Dawson Miller, C. J. and Das, J.*) *TIKAIT GANESH NARAYAN SAHI DEO v. CHANDU MISTRI*.

5 P. L. J. 468 : 1 P. L. T. 729

CIVIL PROCEDURE CODE (XIV of 1882) S. 244 (S. 47 New Code)—Suit maintainability of—Sale of share of a

C. P. CODE (1908), S. 2.

member of a joint Hindu family—Decree holder purchaser—Suit for partition—Competent.

Where a decree-holder purchased in execution sale the share of the judgment-debtor who was a member of a Joint Hindu family and subsequently brought a suit for partition.

Held, that S. 244 C. P. C. which was applicable did not give the executing Court power to effect a partition and that the present suit was therefore necessary and competent 29 Mad. 294; 31 All 82 F. B. fol.; 30 All 72 not foll. (*Broadway and Abul Reoof, JJ.*) *BRIJ LAL v. DURGA.* **1 Lah. 134 : 1 Lah. L. J. 10.**

—**S 257 A—Agreement—Satisfaction of judgment-debt—Sanction—Order referring to compromise.**

An agreement by which the money was to be payable by instalments and interest was to be paid at the stipulated rate and in default of two instalments the whole of the unpaid balance was to be recoverable at once, was entered into between the parties in execution proceedings. The statements of the parties in regard to the agreement were taken, and the Court then passed an order stating that the parties had compromised and the Judgment-debtor had paid Rs 100 and directing the release of some animals which had been attached.

Held, that the Court had sanctioned the agreement, and there was no necessity for it to give the sanction in express terms.

The agreement was binding on the appellant and the respondents are entitled to interest in accordance therewith and that it was recoverable in the execution proceedings.

The fact that litigation was going on was no reason for the appellant stopping the payment of instalments (*Shadi Lal and Martineau, JJ.*) *RAHMAT KHAN v. SHIBRAM DAS*.

1 Lah. L. J. 222.

—**Ss. 294, 321—Benamidar for decree-holder mortgages—Purchase at auction—Leave to bid, not obtained by decree-holder—Effect of absence of leave. See**

21 Bom. L. R. 296.

—**S. 325 A.—Incompetency whether extends to lessee from Collector.**

The incompetency created by S. 325 of the Civil Procedure Code 1882, does not extend to the lessee from the Collector. An alienation by such lessee would be binding upon him for the term of the lease even though the lease may contain conditions making the transfer voidable at the instance of the lessor 14 N. L. R. 181 ref. (*Mittra and Pridaux, JJ.*) *MOTIRAM v. RAM GOPAL.* **16 N. L. R. 64.**

C. P. CODE (V of 1908) Ss. 2 (2) and 96, 100—Decree—Appeal—Dismissal of suit for deficient Court fee.

If a suit is dismissed for deficient Court fees, an appeal lies from the decision of the Court below. A second appeal also lies on a question of law such as the interpretation of

C. P. CODE (1908), S. 2.

the Court-Fees Act. (*Ashworth, J.*) MUSSUMAT GUMANI v. BANWARI 22 O. C 289 : 54 I. C 733.

—Ss. 2 (2) and 47—*Decree—Decision on question as to valuation to be inserted in sale proclamation.*

A decision under S. 47 C. P. C. is not a decree within S. 2 (2) unless it in some way determines the rights of the parties with regard to all or any of the matters in controversy.

A decision on a question of the valuation to be inserted in a sale proclamation is merely an interlocutory order and although the court acts judicially in coming to its conclusion that does not in itself make the decision a decree, and therefore, it's not appealable. 30 Cal. 617 ; 27 Mad. 219 ; 18 Cal. 469 appr (*Dawson Miller, C. J. and Coutts, J.*) SAURENDRANATH MITHRA v. MRITUNJAY BANAJI 5 P. L. J. 270 (1920) Pat. 227 : 1 P. L. T. 645

—Ss. 2 (2) and 100—*Decree—Dismissal of suit on appeal on the ground that Court under had no jurisdiction—Decision if appealable—Jurisdiction—Objection to—Duty of Court to adjudicate upon—Res judicata.*

The decision of a District Court on appeal holding that the Revenue Court had no jurisdiction to decide the validity of the resumption claimed by the plaintiff in a suit for rent is a decree within S. 2 (2).

S. 100 C. P. Code gives a right of second Appeal to the High Court against such a decree passed on appeal. 41 Mad. 156 distinguishes.

Where on allegations of the plaintiff the suit was cognisable only by the Revenue Court in which it was filed, that Court is bound to decide any question necessary for the disposal of the case whether its decision on the point would finally determine the question between the parties so as to make it *res judicata* or not. 41 Mad. 426 and 41 Mad. 121 followed (*Spencer and Krishnan, JJ.*) VENKATAPATHI NAYAKIN VABU v. GADDAM CHOWDENNA.

11 L. W. 3 : 54 I. C. 749.

—S. 2 (2) and O. 9, R. 8.—*Decree—Mearing of—Decree on admission*

The word "decree" in O. 9, R. 8 C. P. C. is governed by the definition given in S. 2 (2). A decree passed on the admission of the debt. Is appealable by the person aggrieved thereby. (*Findlay, A. J. C.*) RAM KRISHNA v. NAPAIN.

56 I. C 845

—S. 2 (2)—*Decree—Order of abatement—Dismissal of application to bring legal representative on record*

The C. P. Code makes no provision for an appeal from an order dismissing an application by a legal representative of a deceased plaintiff to be brought on the record, nor can such an order be regarded as a decree.

An order directing the abatement of a suit in consequence of there being no legal represen-

C. P. CODE (1908), S. 2.

tative of the deceased plaintiff, having applied within the time prescribed by law to be brought upon the record, is a decree and as such is appealable by a person who is a party to it. (*Broadway and Dundas, JJ.*) RAM SARUP v. MOTI RAM.

1 Lab. 493 : 57 I. C 137.

—Ss. 2 (2)—*Decree—Order refusing to implant a person as legal representative—Abatement—Appeal.*

Where an application to bring on record as the legal representative of a deceased plaintiff is refused, the order is a decree, as it negatives the right of the applicant to the relief which the original plaintiff had sought in the suit and is an adjudication of the applicant's claims. The order is therefore appealable.

42 Mad. 219 applied; 39 Mad. 481 d'st (*Oldfield and Sesagiri Iyer, JJ.*) AYYA MUDALI VELAN v. VEERARAJU.

43 Mad. 812 : 39 M. L. J. 218 : 12 L. W. 188 : 1920 M. W. N. 467 : 58 I. C 498.

—Ss. 2 (2) and 47—*Decree—Order under S. 47 when a decree and open to appeal—Order refusing decree-holder leave to execute decree against a property*

It is not every order made in execution proceedings which is a decree.

An order granting or refusing a process for the examination of witnesses or an order merely determining a point of law arising incidentally or otherwise in the course of execution proceedings and not refusing or granting such a decree and is therefore not appealable.

An order finally negativing the rights of the decreeholder to proceed against the land of the Judgment-debtor comes within and is appealable. (*Shadi Lal and Broadway, JJ.*) DATAR KAUR v. RAM RATTAN.

56 I. C 173.

—Ss. 2 (2), 96 and 115—*Order disallowing interrogatories—Not a decree—No appeal Revision.*

An order disallowing interrogatories is not a decree and is not open to appeal. Nor is such order open to revision, as the party adversely affected thereby has a remedy by way of appeal from the final decision of the Court (*Kincaid, J. C. and Raymond, A. J. C.*) FIRM OF YUSUFALLY ALIBHOY v. FIRM OF HAJI MAHOMED HAJI ABDULLAH.

14 S. L. R. 28 :

58 I. C. 721.

—S. 2 (2) and O. 21, R. 66—*Order rejecting judgment debtor's objection to statement of value in sale proclamation.*

An order rejecting a Judgment-debtor's petition in objection to the valuation given by the decree-holders for the purpose of sale proclamation is merely an interlocutory order and not a decree within S. 2 C. P. C. and is therefore not appealable.

C. P. CODE (1908), S. 2.

The words "the decree shall be deemed to include the determination of any question within S. 47 C.P.C." in S. 2 (2) of the Code must be limited by the words which immediately precede and unless the decision appealed from is one which in some way determines the rights of the parties with regard to all or any of the matters in controversy in the suit, it cannot be included under the definition of decree. *30 Cal. 617; 27 Mad. 25; 16 C.W.N. 124; 18 Cal. 460.* *Ref. (Dareen Miller and Coutts JJ.)* SURENDRA NATH MITRA v. MIRTU JOY BANERJEE

5 P. L. J. 270 : 1 P. L. T. 645
(1920) Pat. 227

—3 2 (2) *Rent application under S. 73 whether a suit—Appeal, against order of rejection — Revision — Other remedy open Practice of Patna High Court*

An order under S. 73 C. P. Code is not an order under S. 47 and being consequently not a decree within the meaning of S. 2 (2) is not appealable.

(1914) 43 Cal. 1 followed

(1908) 36 Cal. 130 referred to.

Under S. 73 (2) a remedy by suit is available and it is the settled practice of the Patna High Court that it will not interfere in revision where there is another remedy available except under very exceptional circumstances (*Coutts and Adami, JJ.*) *MUSSAMAT HAMMOZI BEGUM v. MUSSAMAT AYESHA* 5 P. L. T. 415 : 1 P. L. T. 296; 57 I. C. 421

—Ss. 2 (17) and 80—*Manager of Court of Wards—Not a public Servant—Notice of suit against, if essential*

The manager of a Court of Wards is not a public servant within the meaning of S. 2 clause (17) of the C. P. Code and is therefore not entitled to a notice under S. 80 of the Code (*Walmsley, J.*) *NANDA LAL BOSE v. ASHUTOSH GHOSE*.

55 I. C. 515

—Ss. 2 (17) and 80—*Public officer—Receiver appointed under the Prov. Ins. Act—Notice of suit*

A receiver appointed under the Prov. Ins. Act is a public officer within the meaning of S. 2 (17) of the C. P. Code of 1908, and he is entitled to have notice of suit under S. 80 of the Code. (*Macleod, C. J. and Heaton, J. J.*) *AMNA LATICIA v. GOVIND*

22 Bom. L. R. 987 : 58 I. C. 411.

—S. 6—*Execution of decree—Mesne profits in excess of Court's pecuniary jurisdiction—Decree sent for execution to another Court—Jurisdiction.*

In a suit for possession and mesne profits the Munsif made a decree for a sum beyond his pecuniary jurisdiction. The decree was sent for execution to another Court of equal pecuniary jurisdiction.

Held, that irrespective of the question as to whether the Munsif's Court which made the decree was competent to do so, the equality

C. P. CODE (1908), S. 10.

in pecuniary jurisdiction of the two Courts was not sufficient to override the general rule that Courts of limited pecuniary jurisdiction may not entertain execution proceedings in suits in excess of the limit, and the latter Court had no jurisdiction to execute the decree. (*Teunon and Beachcroft, JJ.*) *RAMA NRTH BANERJEE v. RAJ NARAIN CHANDRA*.

57 I. C. 722.

—Ss. 7 (6), 94, O. 38, R. 5 and O. 50—*Small-Cause Court—Power to order attachment of moveables before Judgment. See (1919) Dig. Col. 132 KUMUD BENARI LAL v. HARI CHARAN SARDAR.* 31 C. L. J. 179.

—S. 9—*Hindu priest—Hereditary office—Interference—Injunction. See HINDU LAW HEREDITARY OFFICE*

22 Bom. L. R. 1202.

—S. 9—*Jurisdiction of Civil Court—Suit concerning mere honor or dignity. See (1919) Dig. Col. 133 GURKHA ASSOCIATION SIMLA v. MAHOMED UMAR.* 1 Lah. L. J. 161.

—S. 9—*Religious Office—Mataandar barber—Right to officiate on ceremonial occasions—Suit for fees—Maintainability in civil court. See RELIGIOUS OFFICE.*

22 Bom. L. R. 410.

—S. 9—*Suit of a civil nature—Right to worship in a temple—Right to carry processions through public streets accompanied with music—Public streets*

A suit to establish the right to worship in a temple and to carry processions accompanied with music through public streets is a suit of a Civil nature within the meaning of S. 9 of the Civil Procedure Code, 1908.

Per Shah, J.:—"The right to conduct religious processions in public streets is a right inherent in every person provided he does not thereby invade the rights of property enjoyed by others or cause a public nuisance or interfere with the ordinary use of the streets by the public and subject to such directions or prohibitions as may be issued by the Magistrate to prevent obstructions to the thoroughfare or breaches of the public peace. Further the right to carry on the worship of any deity in any manner that a person pleases subject to similar conditions is also a right inherent in every person." (*Shah and Hayward, J. J.*) *WAMAN BALVANT KASHIKAR v. BABU HARSHE SHETE* 44 Bom. 410 : 22 Bom. L. R. 307 : 56 I. C. 419.

—S. 10—*Applicability of—Same plea—Deft sued as heir in former suit—Subsequent suit by former defendant as creditor—Stay of suit.*

Z. and H sued the widow of a deceased person for possession of a certain share in the estate as having been gifted to them by the mother of the deceased. The widow resisted the suit on the ground that the deed of gift was invalid but the plea was decided against her and the suit was decreed. During the pendency of an

C. P. CODE (1908), S. 10.

appeal against the decree the widow brought a suit for recovery of a part of the dower from the estate of the deceased in the hands of Z and H and another, again raising the plea that the deed of gift in the r favour was invalid. The court below ordered the proceedings to be stayed pending the decision of the High Court in the previous suit. Held, that S. 10 of the Code of Civil Procedure applied and the proceedings were rightly stayed.

Per Piggott, J.:—In so far as the widow contested the deed of gift on any such grounds as undue influence or incapacity on the part of the executant or the like the decision arrived at in that litigation would be binding upon her in a subsequent litigation even though she might come forward in that subsequent suit with a different claim also based upon her marriage.

Per Walsh, J.:—(obiter)—When a widow claims to set aside a deed of gift so far as it affects her name as heir of the deceased and when she claims to establish her right to the dower debt, she is making both claims under the same title within the meaning of S. 10 of the Code of Civil Procedure. (*Piggott and Walsh, JJ.*) WAHID-UN-NISA BIBI v. ZAIN ALI SHAH. 42 ALL. 290.

18 A. L. J. 145 : 55 I. C. 89.

S. 10—Stay of suit—Court having Jurisdiction to grant relief claimed.

To justify the stay of a suit under S. 10 C. P. C. it's not necessary that the relief sought in the two suits should be identical. If the matter in issue in the two suits is the same, the latter suit must be stayed without regard to the relief sought.

The words "jurisdiction to grant the relief claimed" do not mean territorial jurisdiction and the later suit must be stayed if the matter in issue is the same as in the first suit although the Court in which the first suit was instituted has no territorial jurisdiction over the subject matter of the later suit. (*Twoomey, C. J. and Robinson, J.*) M. BOGLA v. M. KHEMKA. 12 Bur. L. T. 203 : 55 I. C. 254

Ss. 10, 11 and 13—Stay of suit—Court having jurisdiction—Relief claimed.

The words "court having jurisdiction to grant the relief claimed" in S. 10 C. P. C. have a wider application than the words, "Court competent to try the subsequent suit" in S. 11 and "court of competent jurisdiction" in S. 13. The words "court competent to try the subsequent suit" in S. 11 and "court of competent jurisdiction" in S. 13 apply only to courts having both pecuniary and territorial jurisdiction.

The rule as to stay of suit though based on principles similar to those underlying the doctrine of *res judicata* is not part of the rule of *res judicata*. (*Twoomey, C. J. and Robinson, J.*) KHEMKA v. BOGLA. 13 Bur. L. T. 19: 57 I. C. 904.

C. P. CODE (1908), S. 11.**S. 11—Co-defendants — Decision when res judicata**

A judgment can operate as *res judicata* between co-defendants where their interests are conflicting (*Kanhaiya Lal, A. J. C. J.*) KHANAM v. HUSNARA BEGAM 57 I. C. 594.

S. 11—Co-defendants—Issue between—Decision on, when res judicata.

In a previous suit the parties to a subsequent suit were on the record as co-defendants and there was a necessary issue between them which was decided. Held that the decision was a bar to a second suit or defence raising the same issue between them in the position of plaintiff and defendant (*Piggott and Walsh, J.J.*) MANNU v. MT. PATIA. 55 I. C. 932.

S. 11—Competency of court—Subsequent increase in value of property—Effect of.

The competency of the Court to try the subsequent suit has to be judged with reference to the time when the first suit was brought, that is, as if the second suit had been instituted at the time when the first suit was filed. Thus where the suit was within the jurisdiction of a Munsif and the subsequent suit by reason of increase in the value of the property was beyond his jurisdiction and within the jurisdiction of a Subordinate Judge such subsequent suit would nevertheless be barred, inasmuch as if the subsequent suit had been brought at the time when the first suit was filed the Munsif would have been competent to try it. 9 C. 439, 11 C. 301 (P.C.) dist. (*Kanhaiya Lal, J. C.*) GOPAL v. RAM HARAKH.

22 O. C. 331 : 54 I. C. 335.

S. 11—Competent court—Competency of court trying former suit—Joinder of causes of action to evade rule.

Under the rule of *res judicata* in determining whether the Court which tried the previous suit had power to try the subsequent suit, we must look to the suit as it could have been framed but for the option given in the C. P. C. in the way of joinder of causes of action. A plff cannot therefore evade the rule by joining several causes of action against the deits in the subsequent suit and instituting it in a Court of superior jurisdiction. (*Mittra, A. J. C.*) SUKHDEO v. BHULAI.

16 N. L. R. 91.

S. 11—Competent court—Decision of revenue court—Not *res judicata* in a suit in civil court on matter within the cognizance of the latter court. See MAD. ESTATES LAND ACT, S. 189. (1920) M. W. N. 639.

S. 11—Competent court—Different courts—Decision of lower court not res judicata.

The decision on a question in the Court of a Munsif does not operate as *res judicata* on the same question in a subsequent suit between

C. P. CODE (1908), S. 11.

the same parties brought in the Court of a Subordinate Judge. (*Chatterjee and Panton, JJ.*) PROMOTHO BHUSAN DEB ROY BAHADUR v. NARENDRA BHUSAN ROY. 56 I. C. 932.

S. 11—Competent court—Res-judicata—Test of Jurisdiction.

In determining whether a decree operates as *res judicata* in a subsequent suit, the test is whether the court which tried the former suit had jurisdiction to entertain the subsequent suit; if it had not the decision in the previous suit does not operate as *res-judicata* to bar the subsequent suit (*Piggot and Walsh, JJ.*) MATA PRASAD SHUKLA v. DEVI SHUKLA 58 I. C. 576.

S. 11—Competent court—Settlement Court—Decision of—Res-judicata.

Where Settlement Courts have fully gone into rival claims and dealt with and decided all points raised, it is not open in subsequent proceedings to one party to deny the status of another party as found by such Settlement Courts, or to assert more than was awarded by such Settlement Courts. (*Mr. Amer Ali,*) RANI INDAR KUAR v. THAKUR BALDEO BAKSH SINGH. 39 M. L. J. 115 : 28 M. L. T. 334 : 57 I. C. 397 (P. C.)

S. 11—Directly and substantially in issue—Obiter not res-judicata.

An issue which is not vital to the decision of a suit and the finding on which is by no means clear does not operate as *res judicata* in a subsequent suit. (*Hoskins, S. M. Harrison, J.*) HAR GOBIND v. JWALA PRASAD. 55 I. C. 938.

S. 11—Directly and substantially in issue—Plea of res judicata to be decided with reference to pleadings and judgment.

The question of *res judicata* is to be decided with reference to the pleadings the issues and the judgment 16 C. 173, 19 C. 159 ; 38 C. 116 Ref.

In the previous litigation, the plaintiff sued to eject defendant on the allegation that he himself was a raiyat and the defendant herself was an under raiyat. The claim for ejection failed, because the court found it established that the defendant had a "protected interest" within the meaning of S. 160 of the Bengal Tenancy Act.

Held, that the decision of the question of status involved in the subsequent suit to restrain the defendant from cutting trees on her holding was not barred by *res-judicata*, as it was not directly and substantially in issue in the previous suit. (*Mookerjee, and Fletcher, JJ.*) INDUBALA DEBI v. ATUL CHANDRA GHOSH. 31 C. L. J. 507 : 57 I. C. 344.

S. 11—Directly and substantially in issue—Prior suit in ejection—Finding that defts. were sub-mortgagors in possession—**C P CODE (1908), S. 11.**

Dismissal of prior suit—Subsequent suit for redemption—Res judicata.

The plff. brought a previous suit against the same defts. in ejection on the ground that they were trespassers but they contended that they were usufructuary mortgagees from a third person who and not the plffs. were the owners of the land. The Court found against both the trespass alleged by the plff and the title of the third person set up by the defts. and held that the defts. were sub-mortgagors with possession from a usufructuary mortgagee of the plff's predecessor in title, that the plff. was not entitled to eject the defts. w/out redeeming the usufructuary mortgage created by his predecessor and his suit was dismissed. Both sides appealed but the appeal was dismissed. There was no second appeal to the High Court. In a subsequent suit for redemption by the same plff. the same defts. claimed to have the question of title gone into again on the grounds (1) that the decree in the prior suit having been in their favour any adverse finding in that suit could not operate against them as *res-judicata* and (2) that they need not and could not have appealed against such a finding.

Held, (1) that the question of title was directly and substantially in issue in the prior suit;

(2) that in order to constitute *res judicata* the finding in the prior suit need form the basis of the decree in that suit, and

(3) that the finding in the previous suit on the question of title therefore operated as *res-judicata* in the present suit. 10 Mad. 102 and 9 L. W. 180 foll., 11 Cal. 301, 18 Cal. 647 and 40 Bom. 562 ref. 37 Mad. 25, 2 L. W. 101, 9 L. W. 84, 36 Cal. 193 and 12 Beng. L. R. 304 dist.

Per *Sadasiva Aiyar, J.*—Where a deft. files an appeal against a finding notwithstanding the suit itself has been dismissed, that finding on appeal would be *res judicata* in a second suit between him and the plff. (*Sadasiva Aiyar and Spencer, J. J.*) MUTHU PILLAI v. VEDA VYASA CHARIAR. 12 L. W. 277.

S. 11 and O. 9, R. 9—Heard and decided—Dismissal for default—Suit for possession—Subsequent suit for abatement of rent.

Where a suit by a tenant against his landlord for recovery of possession of certain property comprised in the plaintiff's *dar-mourashi* tenure is dismissed for default it does not preclude him, in a subsequent suit for rent brought by the landlord from claiming abatement of rent owing to dispossession by the landlord. (*Chatterjee and Panton, JJ.*) PROMOTHO BHUSAN DEB ROY v. NARENDRA BHUSAN ROY. 59 I. C. 932.

S. 11—Heard and decided—Mortgage—Successive suits when maintainable.

C. P. CODE (1908), S. 11.

The plaintiff sued for possession of the land mortgaged to the husband of one N on the 17th July 1888, that N had subsequently sold her rights to one K who in turn sold them to the plaintiffs. Held, that N having once obtained a decree for possession on the basis of the mortgage no further suit could be maintained unless it could be shown that possession had been taken under the decree and the judgment creditor had been subsequently dispossessed (*Lcslie Jones and Dundas, JJ.*) HAR CHAND SINGH v. NARAIN SINGH.

2 L. L. J. 678.

S. 11—Heard and decided—Rent suit—Ex parte decree—How far a bar to subsequent suit for rent. See B. T. Act, ss 105 AND 109.

57 I. C. 48.

S. 11—Heard and finally decided—Decision, the subject of the appeal—No bar

When an appeal is filed and admitted the matters decided by the lower court cease to be *res judicata* and if the appeal is disposed of on some other ground, the finding of the lower court will not stand concerning matters not referred to by the appellate court (*Sadasiva Iyer and Burri, JJ.*) VENGANAT RAJA VASU-DEVA RAVI VARMA v. RAMA KUTTY MENON.

27 M. L. T. 54: 56 I. C. 199.

S. 11—Heard and finally decided—Decision of trial Court—No decision on appeal—Authority to adopt—Finding as to its genuineness and admissibility.

Plif sued for a declaration that a Will pronounced by one G was no genuine. The trial court held that the Will was genuine and that the document was not merely an authority to adopt. On appeal the High Court only confirmed the finding as to genuineness but did not adjudicate on the validity of the document as a power to adopt. In the present suit by the plaintiffs for a declaration that the adoption made by the widow of G. was invalid. Held, that the decision on the question of adoption in the prior suit did not operate as *res judicata*, no decision having been given on it by the Appellate Court.

26 B. 661; 4 Bom. L. R. 499 expd.

Per *Seshagiri Aiyar, J.*—A mere ground of attack relating to the main relief should not be regarded as a separate relief, and the refusal to entertain a ground which relates to the relief which is adjudicated upon by the judgment cannot be regarded as a refusal of relief under Exptn. 5 to S. 11 C. P. C.

Per *Oldfield, J.*—Where a matter is heard but not decided, the matter is not *res judicata*.

Where there is an appeal, the finality of the conclusion of the Lower Court disappears.

Where a competent Court refuses to decide an issue, that issue does not operate as *res judicata* in a subsequent litigation, whether the refusal is due to the view of the court that an enquiry into it is unnecessary or whether it reserves the determination of the question for

C. P. CODE (1908), S. 11.

a future occasion. (*Oldfield and Seshagiri Iyer, JJ.*) MARUVADA VEKATARATNAMMA v. MARUVADA KRISHNAMMA.

57 I. C. 735.

S. 11—Heard and finally decided—Ex parte decree—Co-defendants

An *ex parte* decree on a bond against two joint debtors does not operate as *res judicata* as between those two debtors, when the question of their respective liability is raised in a contribution suit brought by one of them against the other (*Ncroftbold, J.*) PRASANNA KUMAR CHANDA v. KULADHAR RAKSHIT.

57 I. C. 252.

S. 11—Issue of law—Decision if res judicata.

The fact that in a previous suit the law was wrongly applied to a particular state of facts, does not prevent the operation of the rule of *res judicata* in a subsequent suit where these facts come into issue therein. (*Hopkins, S. M. and Porter, J. M.*) MUSAMMAT ULFAT v. BAR-KAT-UN-NISA.

56 I. C. 983:

21 Cr. L. J. 276.

S. 11—Issue left open.

Where a certain question was left open in the Judgment of a previous suit between the parties there was no decision on the point and consequently there can be no *res-judicata* between the parties. (*Miller, C. J. and Mullick, J.*) JAGADISH MISSER v. RAMESWAR SINGH.

(1920) Pat. 241.

S. 11—Issue—Raised and decided—Decision if res judicata.

Where an express issue is raised and evidence is given thereon by both parties, it is incumbent upon the Court to come to a conclusion thereon (*Das, J.*) RAM NIRANJAN SINGH v. RAM GOBIND SINGH.

57 I. C. 524.

S. 11—Litigating under the same title—Trustee—Individual capacity distinction.

A decision against a person in his individual capacity does not bind his successor in the office of trustee of an endowment. (*Richardson and Huda, JJ.*) NARAIN DAS v. KAZI ABDUR RAHIM.

24 C. W. N. 690:

58 I. C. 705.

S. 11—Parties and representatives—Prior Suit between tenant and thekadar—Subsequent suit between tenant and Zemindar.

The decision in a previous suit between a tenant and his Zemindar's thekadar does not operate as *res judicata* in a subsequent suit between the tenant and Zemindar for the previous suit was not between the same or persons under whom they claim (*Harrison, J. M.*) PARTAB DUBEY v. AJUDHIA ESTATE.

58 I. C. 990.

S. 11—Previous suit—Decision in previous stage of the suit—Suit by pliffs to establish right to trusteeship—Witharawal of

C. P. CODE (1908), S. 11.

suit power to transpose—C. P. Code O. 1, R. 10 and O. 23, R. 1.

Plaintiff brought the suit for a declaration that he was the lawful trustee of a trust or if plaintiff is not found to be the trustee to appoint him as the trustee. At a previous stage it was held by the High Court that S. 92 Civil Procedure Code did not bar the suit, that the plaintiff was not appointed trustee and the case was remanded to the lower court for making the heirs of the donor parties and for appointing a proper trustee.

After remand the plaintiff put in a petition to withdraw the suit. The lower court ordered one of the defendants to be made plaintiff and gave him the conduct of the suit.

Held, that the previous Judgment decided that S 92 was no bar to the suit (2) that the Court had power in this suit itself to appoint a proper trustee under Muhammedan Law (3) that the plaintiff could not by withdrawing from the suit prevent the court from making a proper appointment and (4) that the Court had power under O. 1, R. 10 to make any person whether the party to the suit or not plaintiff and give him the conduct of the suit (*Sadasiva Aiyar and Odgers, JJ.*) SYED MOHAMED SIRAJUDDIN SAHIB v. SYED SHAWGHULAM JAILANI SATURI SAHIB

* 12 L. W. 25.

S. 11 Expln. IV—Might and Ought—Applicability of—Omission to raise a point

S 11 Explanation IV applies even where the matter in dispute was not heard finally and decided in the former suit.

The determination of the question whether a person ought to have raised it in a suit so that his failure to raise it should preclude him from raising it in a subsequent suit must depend on the particular facts of the case. (*Drake-Brockman, J.J.*) PYARELAL v. PAN-NALAL 56 I. C. 193.

S. 11 Expln. IV—Might and ought to have been made ground of attack.

Where it is not certain that a matter, if proved, would have affected the result of the suit, it cannot be said that the matter ought to have been made a ground of attack within S. 11 Expln. 4 C. P. C. (*Chapman and Atkinson, JJ.*) SHAH DEO NARAIN DAS v. KUSUM KUMARI. 5 P. L. J. 164.

S. 11 Expln. IV—Two mortgages on the same property—Suits on—Independent decrees—How to be executed.

There is nothing in the Code of Civil Procedure or in the Transfer of Property Act to prevent the holder of two independent mortgages over the same property, who is not restrained by any covenant in either of them, from obtaining a decree for sale on each of them in a separate suit subject, however, to the reservation that he cannot sell the property twice over, nor sell it under the second decree subject to the first. The right course to

C. P. CODE (1908), S. 11.

follow in such circumstances is to direct that the property be sold free of both charges, whether in execution of the decree on the first mortgage or of the decree on the second mortgage and that the balance of the sale proceeds, after payment of incidental expenses, be applied in discharge of the dues on the first mortgage and the second mortgage one after the other the residue if any to stand to the credit of the holder of the equity of redemption. (*Mookerjee, C. J. and Fletcher, J.J.*) NILU v. ASIRBAD MANDAL. 25 C. W. N. 129.

S. 11 Expln. V—Res judicata—Partition suit claim for past and future mesne profits—Decree silent as to future—Fresh suit barred

Where in a suit for partition past as well as future *mesne profits* are asked for, but the Court in decreeing partition only awards *past mesne profits* and makes no mention of the future profits, a separate suit for such future profits is barred under Expl. V to S. 11 of the C. P. Code. (*Mazclod, C. J. and Heaton, J.J.*) ATMARAM v. PARASHRAM. 22 Bom. L. R. 982; 58 I. C. 419.

S. 11 Expln. VI—Hindu reverisoner—Decision in suit by some—Binding on the entire body. See HINDU LAW REVERSSIONER. 57 I. C. 541.

S. 11 Expl. VI—Representative suit—C. P. Code O. 1, R. 8—Kattubadi—Suit between Zemindar and agraharamdars for settling—Decision in—Effect on other agraharamdars—Representation at one stage of the suit

Two of the agraharamdars sued the Receiver of the Nidadavole estate and the Zemindar for a declaration that the Kattubadi was only 500 joining the other agraharamdars as defendants. The suit was decreed by the First Court but its decree was on appeal by the receiver reversed by the District Court; and the decree of the District Court, was on second appeal by plaintiffs confirmed by the High Court. Pending the appeal to the district court A one of the agraharamdar defendant died, but her representatives were not brought on the record in that Court nor were they made parties in the second appeal. In a subsequent suit between the Zemindar as plaintiff and the agraharamdars as defendants (the 10th defendant being the representative of A) as to the amount of the Kattubadi payable to plaintiff, held, that by virtue of Explanation VI of S 11 of the Code of Civil Procedure, the question of the amount of the Kattubadi was *res-judicata* against the 10th defendant by reason of the decree in the second appeal in the prior suit.

Per The Chief Justice—The Courts should hesitate to hold that any litigation had been *bona fide* within the meaning of Expl. VI of S. 11 in which there had been a substantial departure from the accepted rules as to the joinder of parties as for instance by suing

C. P. CODE (1908), S. 11.

without the leave of the Court in a cause properly falling under O. 1, R. 8.

The failure of the plaintiffs in the prior suit to implead the legal representatives of A in the second appeal could not in the circumstances of the case be said to constitute such a want of *bona fides* as to render the Explanation inapplicable.

Scope and applicability of the Explanation considered.

Per *Spencer, J.*—A suit instituted for settling the amount of Kattubadi due to the Receiver of an estate upon agraharam is one in which all the agraharamdars are necessarily interested and the decision therein is, if the litigation is conducted *bona fide* binding on all agraharamdars by virtue of Expl. VI of S. 11. Cases in which a party is represented at one stage of the suit and afterwards cases to be represented owing to a failure to bring his legal representatives on record are not exceptions to the rule laid down by the explanation.

(*Sir John Wallis, C.J. and Spencer, J.*) *SRIMAN MADABHUSHI GOPALACHARYULU v. EMMANI SUBBANNA.*

43 Mad 487:

38 M. L. J. 493 : 27 M. L. T. 219 : (1920) M. W. N. 435 : 55 I. C. 984

—S. 13—*Foreign Judgment—Judgment on the merits—Filing of written statement—solicitor reporting no instructions.*

The defendant was sued in the Courts of Straits Settlements. Written statement was filed but at the trial the defendant's Solicitor reported no instructions. Thereupon judgment was given for the plaintiff examining his witnesses. On this judgment a suit was laid against the defendant in the Courts in British India.

Held, that the judgment of the foreign Court was given on the merits and that the same was conclusive against the defendant in the present suit. 40. Mad 112. dist. (*Abdur Rahim and Sesagiri Aiyar, JJ.*) *VENKATA-CHALAM CHETTY v. PICHAKI ANMAL.*

11 L. W. 609 : (1920) M. W. N. 412; 57 I. C. 742.

—S. 15—*Scope of—Suit instituted in court competent to try it—Transfer of, if proper.*

S. 15 of the C. P. C. requires every suit to be instituted in the court of the lowest grade competent to try it. Once the institution takes place in accordance with the provision, the operation of the section is exhausted. The sections gives no authority to transfer a pending suit, merely because in the course of the trial it is found that plff. is entitled only to a part of the claim which would have been cognizable by a lower court. (*Stanion, A. J. C.*) *SHRIKH NUR KHAN v. SHAIKH RAHIM.*

54 I. C. 655.

—S. 20—*Cause of action—Suit for compensation for loss—Inferior goods supplied—Payment to be made in one place made in another—Interlocutory order—*

C. P. CODE (1908), S. 20.

Revision—Punjab Courts Act, (IV of 1919) S. 44.

Plaintiffs, who resided at Ludhiana sent orders to debtors who resided at Darbhanga, for the purchases of a large quantity of oil cakes. The plaintiffs alleged that the goods supplied were of inferior quality and they accordingly instituted this suit for compensation for the loss at Ludhiana. The defendants pleaded that the Court in Ludhiana had no jurisdiction to try the suit. It appeared that the plaintiffs had remitted a part of the purchase money to Darbhanga, but the defendants were unwilling to despatch the goods without the payment and suggested that the railway receipts should be sent by V. P. P. To this plaintiffs agreed but subsequently when it was found that the post office did not issue a V. P. P. For a sum in excess of Rs 1,000 the sum payable by the plaintiffs being Rs. 7,070, they sent receipts through an agent of their own who obtained payment in Ludhiana.

Held, that the Ludhiana Court had no jurisdiction to entertain the suit. 11 Cal. 712 fol. 70 P. R. 1906 dist.

Where payment was according to the contract to be made in one place but was made in another to the plaintiff's own default, advantage cannot be taken of that fact to give him a choice of jurisdiction.

The High Court has power to interfere with interlocutory orders in exceptional cases and the present case is one in which interference is demanded as, if the case proceeds at Ludhiana, there will be irreparable waste not only of time and money of the defendants but also the time of the Punjab Courts. (*Leslie Jones, J.J.*) *FIRM OF DAMRI SHAH THAKUR RAM v. FIRM OF RULIA MAL DAGOR MAL.*

2 Lah. L. J. 556.

—S. 20—*Residence meaning of—Suit for restitution of Conjugal rights—Place of suing—Demand of restitution of conjugal rights in proper form. See (1919) Dig. Col. 139. EZRA v. EZRA.* 54 I. C. 65.

—S. 20—*Suit on promissory note—Forum.*

A suit on a promissory note is properly instituted in the place where payment is to be made. (*Jwala Prasad and Adami, JJ.*) *MAHANTH DAMODAR DAS v. BENARES BANK, LTD.* 5 P. L. J. 536 : 1 Pat. L. T. 691: 58 I. C. 265.

—S. 20 (c)—*Cause of action—C. I. F. Contract for sale of goods—Breach—claim for damages—Forum—Place of offer—What is. See (1919) Dig. Col. 140. MYLAPPA CHETTIAR v. AGA MIRZA MAHOMED SHIRAZEE.*

54 I. C. 550.

—S. 20 (c)—*Contract—Cause of action—Consigning of goods for sale on commission—Price to be remitted by hundi—Forum.*

S. a merchant at Negapatam consigned goods to M. at Penang for sale on commission,

C.P. CODE (1908), S. 20.

the arrangement being that M should remit the proceeds by sending to S at Negapatam. Hundials drawn on some firm in the Madras Presidency. On M not having made payment as aforesaid S. brought a suit against M in the Court at Negapatam.

Held, that M undertook to account for the sale proceeds by making payments through the agency of some person or persons in Negapatam and other places in the Madras Presidency on whom the Hundials were to be drawn and that the Court at Negapatam had jurisdiction to entertain the suit, as a part of the cause of action arose there 1898 A.C., 524. Dist. 30 Bom. 167; 33. Bom 364; 4 All 423. Ref. (*Abdur Rahim and Phillips, JJJ NAINA MARACAYAR v. SOMASUNDARAM CHETTIAR.* 11 L.W. 593: 56 I.C. 604.

—S. 20 (c)—*Forum—Cause of action where accrues—Suit for restitution of conjugal rights.*

In a suit by a husband against his wife for restitution of conjugal rights, the cause of action arises from the wife absenting herself from the husband's residence. Therefore the court within the local limits of whose jurisdiction such residence is situate is competent to try such suit. (*Ryres, J.*) *CHITTAR v. HARJU* 54 I.C. 120.

—S. 20 (c)—*Forum—Contract for delivery of goods—Breach—Goods despatched by value payable post—Ownership during custody of Post Office.*

The plaintiffs, residents of Kasganj, ordered by letter certain goods from the defendants, merchants of Delhi; it was understood by both parties that the goods were to be despatched to Kasganj by value payable parcel post. The plaintiffs alleged that on paying for and taking delivery of the value payable parcel they found it to contain clay instead of the goods ordered, and they filed a suit for damages at Kasganj. *Held*, that as the performance of the contract was to be completed by delivery of the goods at Kasganj and the payment by the plaintiff was to be made at Kasganj a part at least of the cause of action accrued at Kasganj and the Kasganj Court had jurisdiction to entertain the suit. When the goods were handed over to the Post Office at Delhi for despatch per value payable parcel post they remained the defendants' property and did not become the property of the plaintiffs unless and until the goods were, on payment of the value by the plaintiff delivered to them at Kasganj by the Post Office. For the purpose of receiving the price from the plaintiff and then delivering the goods to them at Kasganj the Post Office was the agent of the defendants or at least the common agent of both parties. 18 I.C. 130 Ref. 34 All. 49; 12 O.C. 17 dist. (*Ryres and Gokul Prasad, JJ.*) *RAM LAL v. BHABA NATH.*

18 A.L.J. 749.

C P CODE (1908), S. 21.

—S. 20 (c)—*Forum—Contract for Purchase of goods at one place to be delivered at another—Cause of action:*

Under a Contract for the Sale of Goods payment for, and delivery of the goods was to be made and to take at a place other than the place where the purchase was effected.

Held, that a suit arising out of the transaction on account of non-delivery of a portion of the goods may be brought in a Court exercising jurisdiction in the place where delivery and payment were to be made (*Banerjee, J.*) *ABDUL RASHID v. THE SINGING MATERIAL CO., LTD.* 42 ALL. 480: 18 A.L.J. 566: 56 I.C. 192

—S. 20 (c)—*Jurisdiction—Cause of action—Suit for accounts against agent.*

The cause of action in a suit for accounts against an agent arises at the place where the contract of agency was made or where it was to be performed and where the refusal to account took place (*Maung Kin, J.*) J.M.V. ROWTHER v. K. M. M. ROWTHER.

12 Bur. L.T. 198. 55 I.C. 266.

—S. 20 (c)—*Jurisdiction—Suit on contract—Cause of action—Place of offer—If a proper forum See (1919) Dig. Col. 111. KUTHIRA VATTAM APPU THAMBAN v FOULKES.*

54 I.C. 260.

—Ss. 21 and 37—*Applicability of Want of territorial Jurisdiction—Execution proceedings—Prosecution in wrong Court—Jurisdiction of court passing the decree—Objection—Omission—Mortgage—Final decree*

Subsequent to the passing of a decree under S. 88 of the Transfer of Property Act by the Sub Court of Madura West, that Court was abolished and by virtue of S. 37 C.P.C. the suit was transferred to the newly constituted District Court of Ramnad as the mortgaged property was situated within its jurisdiction. The plaintiff however, applied for a decree for sale under O. 34, R. 5, C.P.C. to the newly constituted Sub-Court of Ramnad which had no jurisdiction over the suit and obtained a decree without objection taken by the defendants. An execution petition presented to the District Court of Ramnad was returned for presentation to the Sub-Court of Ramnad, was filed in that Court and was transferred by that Court to the District Court of Ramnad. On objection taken by the defendant's to the jurisdiction of the Sub-Court of Ramnad to pass the final decree, the following questions were referred for the opinion of the Full Bench:—

(1) Whether S. 21 C.P.C. governed cases of want of territorial jurisdiction;

(2) Where S. 21 applied to execution proceedings; and

(3) Whether a party who did not raise objection to jurisdiction when a decree was made absolute was not entitled to plead in execution that the order was passed without jurisdiction.

Held, (1) that the provisions of S. 21 applied to all objections based on the alleged want of

C. P. CODE (1908), S. 21.

ment of the provisions of Ss. 16 to 18 C. P. C. as regards the institution of suits relating to immoveable property. (1918) L.R. 46 I. A. 151 distinguished.

(2) that an appellate court or revisional court being precluded by S. 21 from allowing an objection as to the place of suing unless it was taken in the original court and even then unless there was a consequent failure of justice, a court executing a decree could not do so.

(3) that even assuming that S. 21, C. P. C. did not apply the decree could not still be questioned in executing because it was not for the executing court to go into questions of the jurisdiction of the court which passed the decree, at any rate when that was an ordinary court in British India governed by the Code

Per The Chief Justice

Quaer: whether S. 21 deals only with the original institution of a suit and not with the prosecution of the suit in a wrong court after the abolition of the court in which it had been properly instituted. (*Sir John Wallis, C. J., Ayling and Coutts Trotter, J.J.*) ZEMINDAR OF ETTIYAPURAM v. CHIDAMBARAM CHETTY.

43 Mad. 675 : 39 M. L. J. 203 :
28 M. L. T. 75 : (1920) M. W. N. 460 :
12 L. W. 217 : 58 I. C. 871 (F. B.)

—Ss. 22 and 23—Application for transfer—Jurisdiction of trying Court—Question as to, if can be raised.

In an application for transfer under Ss. 22 and 23, C. P. Code the question of want of jurisdiction of the trying court could not be raised. 34 I. C. 707 ; 48 I. C. 105 foll.

An application to a High Court to transfer a suit pending in a Subordinate Court to another High Court falls under S. 23, (3) of the Code. S. 24 does not lay down any provision for the transfer of suits from and to courts subordinate to different High Courts.

The High Court can, however determine as to whether the suit shall proceed and which order shall be final, and it will not be open to another High Court to refuse the suit being tried in the Court subordinate to it, having jurisdiction to try it.

40 I. C. 393 dss.

A suit can be transferred only upon two grounds, viz., (a) that there will not be an impartial trial by the trying court or (b) that there is a manifest preponderance of convenience to the petitioner if the suit is transferred to the other court.

The convenience of the plffs. and their witnesses has also to be considered particularly as they have in the first instance, the right to choose the revenue in which they would prosecute their suit. (*Jwala Prasad, J.J. FIRM OF RAM KUMAR SHEOCHAND RAI v. TULA RAM-NATHU RAM*) 1 P. L. T. 277 : (1920) Pat. 235 : 56 I. C. 920.

—S. 22—Transfer of case to suit, convenience of defendant. See (1912) Dig. Col. 143. SHIV PRASAD v. KANHAYA. 54 I. C. 935.

C. P. CODE (1908), S. 24.

—S. 23—Transfer of civil suit from mofussil to original side of Calcutta High Court—Beng. Gen. Cl. Act, S. 3 (24)

The plaintiff has the right to choose the forum of trial, and a case can be transferred from one court to another, only when the court is satisfied that the proceedings in the trying court constitute an abuse of the process of the court.

Quaere:—Whether under S. 23 (3) C. P. Code a case can be transferred from the Court at Purnea to the Original side of the Calcutta High Court. 12 C. W. N. 446 Ref. (*Das, J.J., SRIMATI JAWAHIR KUMARI DEBI v. NARESH CHANDRA BOSE.*) 1 P. L. T. 389 : 57 I. C. 649.

—S. 24—Transfer—Power if can be delegated—Senior Sub-Judge if can transfer case to junior sub-Judge—Court becoming seized of case in irregular manner—Failure to object—Waiver—Acquiescence See (1919) Dig. Col. 143, KISHEN LAL v. JAI LAL.

1 Lah. 158.

—Ss. 24 and 115—Transfer of suit on application of party—No notice to opposite party—Revision

Where a District Judge acting on the application of one of the parties and without giving notice and a hearing to the other parties transferred a suit from one subordinate court to another, it was held that he acted without jurisdiction and the order of transfer was set aside in revision (*Banerji, J.*) FATEMA BEGAM v. IMDAD ALI. 18 A. L. J. 351 : 58 I. C. 560.

—S. 24 (1)—Competent court—Transfer to—Valuation of suit—Power of Dt. Judge.

The transfer of a suit valued at between Rs. 1,000 and Rs. 2,000 which was originally instituted by the Plaintiff in the Court of a Subordinate Judge at Patna for recovery of some land situated within the local limits of the Barh Munsif, to the Court of a Munsif at Patna who was specially empowered by the Local Government to try suits up to the value of Rs. 2,000 within the local limits of the Patna Munsif, illegal and without jurisdiction.

(*Per Dawson Miller, C.J.*)—A Court is not “competent” to try a suit unless it has jurisdiction to do so. The jurisdiction of a Court depends not merely upon the nature of subject-matter of the suit but also in the case of most subordinate courts upon the pecuniary value of the suit and in the case of all upon the local limits of their jurisdiction. (*Dawson Miller, C. J. and Das, J.*) SHEIKH JANNAT HUSSAIN v. SHEIKH GULAM KUTUBUDDIN AHMAD 120 Pat. 274 : 5 Pat. L. J. 588 : 1 Pat. L. T. 637 : 57 I. C. 522.

—S. 24 (4)—Small cause suit transferred to Honorary Munsif—Decision of Act (II of 1896) S. (2) proviso.

C. P. CODE (1908), S. 32.

Where an Honorary Munsif acting under the U. P. Honorary Munsif's Act decides a suit transferred to him from a court of Small Causes he cannot be deemed to be a Court of Small Causes and his decree is therefore appealable (*Tudball, J.*) SYED IKHLAQ ALI v. LALA BUDHSEN. 54 I C 435.

—**Ss. 32, 115 and 611, Rr. 12, 14, 15, 16 and 21—Discovery—Production and inspection of documents—Finality of affidavit.**

S. 32 of the C. P. Code applies only to the case of a person who has failed to comply w th | a summons to attend court issued under S 30 and has no application to the case of a party who fails to produce documents wh'c he has been ordered to produce.

An appeal lies to the High Court from an order under O. 11, R. 21.

In proceedings in execution of a decree, the judgment debtor had been ordered to produce certain account books so that it could be ascertained what, if anything, was due to the decreeholders. He failed to do so, stating that the books were not in his possession. The Court, had thereupon ordered that the judgment debtor should not be allowed to cross-examine the decree holder's witnesses. Held, that there had not been any failure by the judgment-debtor to comply w th | an order for discovery or inspection of documents within the meaning of O. 11, R. 21, inasmuch as there had been no order for discovery or inspection within the meaning of the earlier rules of the same order, and that the court had no right to deprive the judgment debtor of his right to cross-examine, and that the High Court had power to interfere with the order in exercise of its powers of superintendence.

The penalty provided by R 21 should only be used in extreme cases and as a last resort, and should in no case be imposed unless there is a clear failure to comply with the obligation laid down in the rule.

It is a good cause for non production of a document within the meaning of R. 1 that the document is not in the possession or power of the person called upon to produce it,

The affidavit of documents required from a party under Rr 12 or 13 is in ordinary circumstances to be taken as conclusive on the question of whether the documents are in his possession or power unless and until the other party makes an application under R. 18 (2) supported by an affidavit for inspection of documents not mentioned in the pleadings of affidavits of his opponent.

An affidavit accompanying an application under R. 18 (2) does not immediately entitle the applicant to an order for inspection, and if the party from whom discovery is sought swears to an affidavit that the documents are not in his possession or power, the Court will regard this as final and conclusive. 23 Cal. 117, 24 Q. B. D. 537 Appr.

C. P. CODE (1908), S. 35.

No order will be made under R. 14 against a party unless he has directly or indirectly admitted the document to be in his possession or power. R. 21 has no application to an order for accounts (*Miller, C. J. and Mullick, J.*) KUMAR RAMASWAR NARAYAN SINGH v. RANI RIKHNATH KOENI. 5 P. L. J. 550 : 1 Pat. L. T. 668 : 58 I C. 281.

—**S. 33—Judgment delivered—Preparation of decree postponed pending production of Succession Certificate—Legality of.** See SUCCESSION CERTIFICATE ACT, S. 4.

57 I C 650.

—**S. 33 and O. 20, R. 1—Transfer of case—Judgment without hearing arguments—Legality of**

Where a case in which evidence has been taken is transferred to another Court and the latter Court inspected the place and pronounced judgment without giving an opportunity to the parties to address any arguments ;

Held, that the failure of the Munsif to give the parties an opportunity to prove their case before him vitiated his judgment altogether and it was liable to be set aside. 91 P. R. 1904; 101. (*Abdul Raoof, J.*) MAHMUD KHAN v. GHAZANFER ALI. 57 I C 34.

—**S. 34—Interest—Prior to institution of suit—No power to grant unless provided for by Contract.** See INTEREST.

32 C. L. J. 289.

—**S. 34—Interest—Suit for rent against under proprietor—Failure, interest if can be awarded—Oudh Rent Act, S. 141.** See (1919) Dig. Col. I46. RAJ KUMAR LAL v. DARSHAN SINGH. 22 O. C. 287.

—**S. 35 and O. 22, R. 3 (2)—Abatement of suit—Causes of action not surviving—Power of Court to award costs to deft. out of estate of deceased plff.** See (1919) Dig. Col. I46. DONTU PEDDA CHENCHAYYA v. MALLAM BALAYYA.

43 Mad. 284 : 54 I. C. 118.

—**S. 35—Costs—Disallowance of—Grounds for—Suit for damages—Excessive claim—Effect of.**

Per Sanderson, C. J.—The costs are in the discretion of the Judge. Such discretion must of course be a judicial discretion to be exercised on legal principles, not by chance, nor merely by caprice nor in temper.

Huxley v. West London Ex. Ry. Company 17 Q. B. D. 373 approved.

The trial Judge should not have taken into consideration matters which must involve speculation on his part as to the attitude of the respective parties.

Principles on which a successful litigant should be deprived of his costs discussed.

Everything which increases the litigation and the costs and which places on the Defendant a burden which he ought not to bear in the litigation is a perfectly good cause for depriving the Plaintiff of costs.

C. P. CODE (1908), S. 35.

Woodroffe, J. The conduct of the Plaintiff's next friend can in no way affect the damages to be paid to his infant son for actual injury and suffering.

There is nothing wrong in itself in claiming exemplary damages for Courts themselves award such damages. The ordinary rule is that costs do follow the event. The Court may however direct otherwise but if it does so it must state its reason in writing. This provision was enacted both to secure a proper exercise of discretion and in order that the Court of Appeal may be in a position to control the order and see whether there is good cause for departing from the general rule. It is not sufficient answer to say in such case in an appeal from the judgment that the costs are in the discretion of the Court. The Appellate Court must itself decide whether the order should be sustained, that is whether the reasons required to be stated are good reasons founded on the facts of the case. There are certain well-known principles on which a successful party may be deprived of his general costs. But where the Court purports to act on these principles it is open to the Appellate Court to enquire whether on the facts these principles have been rightly applied.

The mere fact that plaintiff claims more than he gets is no ground for depriving him of costs, unless it is proved that the costs of the action have been increased by his claim. (*Sanderson, C. J. and Woodroffe, J.*) *JUSTAIN HULL v. ARTHUR FRANCIS PAUL.*

24 C. W. N. 352 : 58 I. C. 421.

—S. 35—Costs—Disallowance of Second appeal.

There is no reason why when the findings on the issue are in favour of the defendant she should not get her costs, which have been disallowed arbitrarily.

A second appeal on a question of costs is maintainable. 12 C. 197; 12 C. 271; 45 I. C. 948; 53 P. W. R. 1919, 51 I. C. 622 foll. 62 P. R. 1915 comd. (*Martineau, J.*) *KARAM KUAR v. KIRPA SINGH.*

2 Lah L J 310.

—S. 35—Costs—Partition—Suit—Order for costs—Practice. See COSTS.

11 L. W. 5.

—Ss. 37 and 38—Execution of decree—Court passing decree—Loss of territorial jurisdiction of—Application to court passing decree for execution—“Proper Court” Lim. Act Art. 182 (5). See (1919) Dig. Col. 147. *SEENI NADAN v. MUTHU SWAMI PILLAI.*

11 L. W. 63.

—Ss. 37, 38 and 150—Mortgage Suit—Value of Rs. 2,000—Preliminary decree by Munsif—Final decree by Sub-Judge—Execution by Munsif if competent.

In a mortgage suit preliminary decree for nearly Rs. 2,000 was made by a Munsif with power to try suits up to the value of Rs. 2,000.

C. P. CODE (1908), S. 41.

The Munsif being transferred and his successor not being vested with the same power the final decree was made by the Subordinate Judge. Execution was however taken out in the Court of the Munsif who meanwhile had been empowered to try suits up to Rs. 2,000.

Held, that the Munsif's Court had jurisdiction to execute the decree under S. 150, C. P. C., though not under Ss 37 and 38 of the Code. (*Chatterjee and Panton, JJ.*) *AMIN-UDDIN MULLICK v. ATARMANI DASI.*

24 C. W. N. 899 : 57 I. C. 879.

—Ss 39, 42 and O. 21, R. 15—Transfer of decree for execution—Application by legal representatives for substitution—Forum

A court to which a decree is transferred for execution has no jurisdiction to entertain an application for bringing on the record the legal representative of a deceased decree-holder. The application must be made to the Court which passed the decree.

Obiter:—The execution of a decree so transferred need not necessarily be stopped because the application for substitution has to go to the Court which passed the decree (*Prideaux, A. J. C.*) *SHIRRAM v. DUNGAPRASAD.*

55 I. C. 156.

—S. 39 and O. 21, Rr 5 and 10—Transfer of decree from one Sub-Court to another Sub-Court in another Dt decree transferred directly—Procedure illegal—Subsequent transfer through proper channel—Limitation—Lim. Act Art. 182 (5)

Where the sub-Judge of Hazaribagh passed a decree on 3—1—15 which was drawn up on 23—1—15 and the decree holder having applied for transfer of decree under S. 39, C. P. Code for execution by the sub-Judge of Degarh the former Court transferred the decree direct to the latter Court on 6—1—16 and the High Court quashed the proceedings directing its transmission through the District Judge of Santhal Parganas and the execution proceedings were taken up at Deogarh on 14—11—18 and the Judgment-debtor pleaded limitation.

Held, that the application for transfer of the decree for execution made by the decreee-holder was an application “in accordance with Law” under Art. 182 (5) Lim. Act, the decreee-holder being not responsible for the mistake committed by the Sub-Judge of Hazaribagh. (*Coutts, and Adami, JJ.*) *KUNJBEHARI SINGH v. TARAPADA MITTER.* 1 P.L.T. 386 : 58 I.C. 220.

—S. 41—Transfer of decree—Execution application dismissed as barred by limitation—Reversal on appeal—Power of executing Court.

A decree of Court A was transferred for execution to Court B and the judgment-debtor took an objection that the application was barred by time. The objection was disallowed by the executing court and the application for execution dismissed as being infructuous and the papers sent back to the A court with the certificate required by S. 41 C. P. C. Subse-

C. P. CODE (1908), S 42.

quently, the High Court set aside the order, allowing the objection of the judgment-debtor. The decree-holder, thereupon, made an application to the B Court to proceed with the execution. The Court sent for the record from the A Court and proceeded with the execution: *Held*, that the effect of the order of the High Court was to put the parties in the position in which they were before the papers were returned to the A court and that, therefore, the B Court was entitled to proceed from the stage at which the proceedings in execution had been stopped by the order of the Court of Appeal, the position being as if no certificate of the manner of execution had been sent under S. 41 of the Civil Procedure Code to the A Court. (*Coutts and Sultan Ahmed, JJ.*) **UDAIBHAN PARTAB SINGH v SHEORAMJI, 58 I.C. 987.**

S. 42, and O. 21, R 15—Transfer of decree for execution—Death of decree holder—Application by representatives for substitution to be made to the court passing the decree See C. P. Code, Ss. 39, 42 and O. 21, R. 15. **55 I. C. 156.**

S. 47 and O. 21, Rr. 97 and 103—Appeal—Decree holder auction purchaser—Application under O. 21, R. 97.

Where a decree holder auction purchaser put in an application under O. 21, R. 97 of the C. P. Code for the removal of obstruction by the judgment debtor and the court refused to remove it the order is appealable as a decree under S. 47 read along with Ss 2 (2) and 95 (1). O. 21, R. 103 cannot be read as providing expressly against any right of appeal which would otherwise be available. (*Oldfield and Seshagiri Aiyar, JJ.*) **CHOCKALINGAM CHETTY v. CHIDAMBARAM CHETTY, 39 M. L. J. 603 : 12 L. W. 273 : (1920) M. W. N. 562**

S. 47—Appeal—Execution sale—Setting aside—Application by decree holder—Opposition by auction purchaser—Second appeal.

A decree holder took every proceeding under the Code to give effective power to the Court to sell certain property. On the day fixed for sale he asked the Court to dismiss his execution case. This application was rejected and the property sold. The decree holder appealed to the District Judge and the order of the execution Court was set aside.

Held, that even if the order of the first Court was wrong, it was not appealable and that the only court that could set it aside was the High Court, and that the lower appellate court having assumed jurisdiction in the matter, a second appeal was competent to the High Court.

That order of the lower appellate court must be set aside as having been passed without jurisdiction. (*Das, J.*) **MAHESH KANTA CHOWDHURY v. RAM PRASAD ROY**

57 I. C. 396.

C. P CODE (1908), S. 47.

S. 47—Appeal Execution—Stay of.
No appeal lies from an order granting stay of execution of a decree. (*Macleod, C. J. and Fawcett, J.*) **JANARDAN v. MARTAND, 22 Bom. L. R. 1212.**

S. 47 and O. 21, R. 90—Appeal—Non-transferable occupancy holding—Objection to attachment by tenant.

Where R brought a suit for money against B on 1—5—15 and attachment before Judgment was effected and the suit was decreed on 30—11—15 and B mortgaged a part of the holding to S. on 6—7—16 and on 11—7—16 R executed the decree and attachment was again made on 16—7—16 and notices where served on 4—8—16 and the holding was sold on 30—11—16 and purchased by R whereupon both B and S objected under S. 47 and O 21, R. 90 on the ground of non-transferability of the holding attached and sold, and irregularity and fraud in respect of the sale and the lower courts overruled their objections and second appeals were filed in the High Court by B and S.

Held, that no second appeal lay from an order under O. 21, R. 90, C. P. Code.

The objections as to non-transferability of the holding came under S. 47 and a second appeal lay in respect thereof.

There being no suppression of the notices the tenant was bound to object as to the non-transferability of the holding at the earliest possible opportunity and when he does not do so, he cannot be heard after the sale has taken place.

The mortgagee being a transferee *pendente lite* was bound by all the equities enforceable against the tenant Judgment-debtor and he could not raise objections which the latter was incompetent to do. (*Mullick and Thornhill, JJ.*) **SRIKIRISHNA RAI v. RAMSARAN RAI, 1 P. L. T. 267 : 56 I. C. 646.**

Ss. 47 and 145—Appeal—Order requiring surety of receiver to pay up money.

An order by a Court requiring a surety for a receiver to pay up any money due under S. 145 of the Code of Civil Procedure be executed against surety against the surety in the manner provided for the execution of decrees, and an appeal lies from such order under S. 47 of the Code. (*Twomey, C. J. and Robinson, J.*) **MAUNG Po THEIN v. MA WAING, 13 B. L. T. 91.**

S. 47—Appeal—Question relating to execution—Dismissal of application for decree-holder's default Order restoring application—Appeal.

Although against an ordinary interlocutory order in the course of an execution proceeding an appeal does not lie under S. 47 of the C. P. Code yet an appeal lies where the order is one which in substance determines a question relating to execution between the decree-holder and the judgment-debtor, e.g., where it has the effect of reviving an application for

C. P. CODE (1908), S. 47.

execution which was dismissed for default of the decree-holder especially where a fresh application by the decree-holder would be barred by limitation. (*Teuon and Newbold, JJ.*) MOHIM CHANDRA DE v. MOHENDRA KUMAR DE SARKAR. 57 I. C. 905.

—Ss. 47, 104 (h) and O. 21, R. 40—Appeal Question relating to execution—Order dismissing application of decree-holder for arrest of judgment debtor. See (1919) *Dig. Col. 150.* MUSSAMMAT RAJ KARNI v. KARAM ELAHI. 1 Lah. 77 : 22 P. L. R. 1920.

—S. 47—Appeal—Question relating to execution—Order Staying execution not appealable.

Orders staying or, refusing to stay execution of a decree are not orders determining questions relating to the execution of the decree within S. 47 C. P. C. and are, therefore not appealable (*Teuon and Beachcroft, JJ.*) RAJENDRA KISHORE v. MOTHURA MOHAN. 55 I. C. 228

—S. 47—Appeal—Question relating to execution—Order when appealable—Test of.

It is not every order made in execution which is a decree, and an order granting or refusing a process for the examination of witnesses, or an order merely determining a point of law arising incidentally or otherwise in the course of a proceeding and not refusing or granting relief, is not appealable.

But held, that in the present case the Court of execution finally negatived the right of the decree-holders to proceed against the land of the judgment-debtor and an appeal lay from such an order. (*Shadilal and Broadway, J. J.*) SARDARNI DATAR KAVAR v. RAM RATTAN. 2 Lah. L. J. 398 : 58 I. C. 603.

—Ss. 47 and 51 (d)—Appeal—Receiver—Appointment of, in execution of decree against waqf property—Appeal if maintainable. See. (1919) *Dig. Col. 150.* SYED ASAD RAZA v. WAHIDUNNissa BEGAM. 57 I. C. 70

—S. 47 and O. 21, Rr. 66 and 90—Appeal—Sale proclamation—Settlement of without notice to judgment-debtor—Objection within S. 47—Appealability of order. See (1919) *Dig. Col. 150.* THEKKEDATH NEELU NETHIAR v. SUBRAMANIA MOOTHAN. 11 L. W. 59.

—S. 47—Bar of suit—Benamidar for mortgagee decree-holder—Purchase in auction—Suit for possession by benamidar of property purchased—Whether barred. See.

22 Bom. L. R. 296.

—S. 47—Claim for recovery of interest—Court fee payable. See (1919) *Dig. Col. 153.* TARAPADA MITRA v. RANI JAGDAMBA KUMARI. 5 P. L. J. 235.

—S. 47—Decree by fraud—Suit to set aside.

A regular suit lies to set aside an *ex parte* decree obtained by fraud. (*Scott Smith and*

C. P. CODE (1908), S. 47.

Wilberforce, J.J.) GODAR RAM v. AHMAD YAR KHAN. 55 I. C. 412.

—S. 47 Execution barred by Limitation—Fresh suit if maintainable.

On 28th April 1905, the piffs. had obtained a decree for pre-emption against the defts awarding possession to them on condition of their paying a certain sum within a specified time. The piffs. paid the money within time but did not obtain possession, either by putting the decree in execution or privately. On 25—4—1917, long after the execution of the decree had become barred by time, the piffs instituted a fresh suit against the defts. for recovery of possession of the property which had been decreed to them. Held, that in view of S. 47 of the C. P. Code a second suit on the basis of the former decree was not maintainable. 14 A. L. J. 102 overruled. (*Sulaiman and Gokul Prasad, J.J.*) RAMANAND v. JAI RAM. 18 A. L. J. 1001.

—S. 47 and O. 21, R. 92—Execution Sale—Application to set aside—Collector Duty to forward to Civil Court.

In execution proceedings held before a Collector, when once an application is made, within the time limited by law to the Collector to set aside the sale, the Collector is bound to refer the application to the court under Civil Circulars.

As soon as the application is so made to the Collector all his powers of confirming the sale are suspended until the application has been disposed of.

If the Collector, notwithstanding the reference of the application to Civil Court, proceeds to confirm the sale, it is open to the judgment-debtor to file a suit to set aside the sale, when the auction purchaser is a third party. (*Macleod, C. J. and Heaton, J.*) BALGAUDA v. MALAPPAA. 44 Bom. 551 : 22 Bom. L. R. 759 : 57 I. C. 440.

—S. 47 and O. 21, R. 90—Execution Sale—Non-transferability of holding—Application to set aside sale—Lim. Act, Art. 166 if applies.

O. 21, R. 90, C. P. C. deals only with irregularity and fraud in publishing and conducting a sale and a sale by the Court of a property which is in fact not saleable on the ground of non-transferability is not a material irregularity in conducting the sale.

It is doubtful if an application to set aside a sale on the ground of non-transferability can be made under S. 47 C. P. C.

Even if such application comes within the scope of S. 47 it is an application under the Civil Procedure Code to set aside a sale in execution of a decree and as such it comes within Art. 166 of the Limitation Act and is barred if not presented within 30 days from the date of the sale. (*Coutts and Adami, J.J.*) SAKHI RAI v. RAM AUTAR RAI. 1920 Pat. 221: 1 P. L. T. 742 : 57 I. C. 261.

C. P. CODE (1908), S. 47.

—**S. 47**—Execution sale—Setting aside—Sale in contravention of O. 34, R. 14, C. P. C.—Stranger auction purchaser—Rights of. See C. P. Code, O. 34, R. 14.

22 Bom. L. R. 670

—**S. 47**—Parties and Representatives—Meaning of—Auction purchaser if a representative of the decree-holder—Mortgage decree—Money decree—Application for delivery of possession—Question relating to execution See (1919) Dig. Col. 154. VEYINDRA-MUTHU PILLAI v. MAYA NADAN.

43 M. 107 : 38 M. L. J. 32 : 54 I. C. 209

—**S. 47—Parties and representatives—Purchaser from judgment debtor—Simple money decree.**

Where a person prior to the passing of a simple money decree, purchased from a discharged defendant property against which the decree was sought to be executed though not affected by the decree itself he is not a representative of that defendant within S. 47 C. P. C. (Prideaux, J.) KASHI RAO v. MOHAMAD ALI. **56 I. C. 809.**

—**S. 47—Parties and representatives—Right to appeal—Person claiming property under assignment.**

A person, who claims the property sought to be attached by virtue of an assignment and against whom the prohibitory order is issued is a necessary party and has right of appeal (Jwala Prasad and Adami, JJ.) BALMAKUND KANUNGO v. MADAN CHOTRA.

1 P. L. T. 75 : 55 I. C. 175

—**Ss. 47 and 145**—Parties and representatives—Third party furnishing security on behalf of judgment-debtor—Suit by surety to cancel the security bond on the ground of fraud—Maintainability of—C. P. Code, S. 47, not a bar. See C. P. Code. S. 145. **38 M. L. J. 65.**

—**S. 47—Partition—Suit for accounts—Decree—Defendant—Right—Fresh suit if maintainable.**

Where in a suit for partition and accounts between co-sharers, the liability of some of the debts is determined and a decree is passed, against them not only in favour of the plff. but also in favour of one of the defts in that suit, a fresh suit cannot be maintained by that deft for enforcing his claim under that decree. The remedy of the deft is by way of execution of the decree and not by another suit. (N. R. Chatterjee and Ncwbold, JJ.) KRISTO DAS. ROY v BEHARI LAL SIKDAR. **57 I. C. 900.**

—**S. 47—Question relating to execution—Adjustment record of—Minor Judgment-debtors—Sanction of Court not obtained—Order not without Jurisdiction—Remedy of minor—Review. See C. P. Code, O. 32, R. 7.**

5 P. L. J. 379.**C. P. CODE (1908), S. 47.**

—**S. 47—Question relating to execution—Application for refund of money received in excess in execution—Application in execution—Separate Suit—Whether competent—Application to the executing court—Limitation Act S. 14—Sufficient cause—Delay in seeking execution.**

A decree passed by the Jhansi Court was sent for execution to the Ahmednagar Court. In execution a sum in excess was recovered from the defendant on the 29th November 1910. The defendant filed a suit to recover back the amount on the 14th November, 1913; but it was dismissed on the 31st March, 1915 on the ground that no suit could lie and the proper remedy was to file an application under S. 47 of the Code of Civil Procedure. Before the execution proceedings could be sent back by the Ahmednagar Court to the Jhansi Court, the defendant applied to the Ahmednagar Court on the 19th May 1915 to obtain refund of the money recovered in excess from him.—

Held, (1) that the question raised was one which related to the execution of the decree and was properly entertained under S. 47 Civil Procedure Code by the Ahmednagar Court which was the Court executing the decree.

(2) that in counting the period of the limitation for the application the time taken up by the defendant in prosecuting the suit ought to be deducted under S. 14 of the Indian Limitation Act. (Shah and Hayward, JJ.) GANPAT-RAO v. ANANDRAO. **44 Bom. 97 : 22 Bom. L. R. 238 : 55 I. C. 967.**

—**S. 47—Question relating to execution—Application to be brought on record as representative of judgment-debtor—Forum.**

Where a person applies to be brought on the record of the representative of the Judgment-debtor so that he may raise a question to be decided by the executing Court under S. 47 C. P. C. the proper Court to entertain the application is the Court executing the decree. (Abdur Rahim and Oldfiled, JJ.) RAGHAVA-CHARI v. PARAMASWAMI PILLAI. **11 L. W. 173 : 55. I. C. 812.**

—**S. 47 and O. 12, R. 2—Question relating to execution Arrangement prior to decree to treat it as inexecutable in part—Not a bar to execution.**

Where the parties to a suit enter into an agreement to treat the decree that might be passed in the suit as partly inexecutable the agreement cannot be recognised by the executing Court as a bar to the execution of the decree 40 M. 233 : 32 M. L. J. 13 (F. B.) dist. (Oldfiled and Seshaigiri Aiyar, JJ.) ARUMUGAM PILLAI v. KRISHNASWAMI NAIDU. **43 Mad. 725 : 39 M. L. J. 222 : 12 L. W. 41 : 56 I. C. 976.**

—**Ss. 47 and 115—Question relating to execution—Attachment of property in execution of decree—Custodian—Release of attachment—Remedy of judgment debtor.**

C. P. CODE (1908), S. 47.

against custodian for non restoration—Suit and application.

In execution of a decree the judgment debtor's crops were attached and placed in charge of one Kallu Khan. The Judgment-debtor paid up a part of the decretal amount and obtained time to pay off the balance. The Court ordered the attached crops to be released and the execution case was struck off. Subsequently the Judgment-debtor made an application to the Court complaining that the crops had not been delivered back to him. The Court instituted certain proceedings examined witnesses and passed an order directing Kallu Khan to deliver the crops to the Judgment-debtor or pay him Rs. 106 as the price. Held that the order passed in these proceedings was without jurisdiction and that the Judgment-debtor's remedy against Kallu Khan was a suit for recovery of the crops or their value (*Bancerji, J.J.*) **KALLU KHAN v. ABDULAH KHAN.** 42 All 394:

18 A. L. J. 357. 58 I. C. 448

Ss. 47—Question relating to execution—Decree-holders purchasing property at auction sale—Suit to recover possession from judgment-debtor and another who claimed the property—Maintainability.

In execution of a decree which he had obtained against defendant No. 1 the plaintiff purchased the property at an auction sale with leave of the Court. To recover possession of the property from defendant No. 1 and also from defendant No. 2, who claimed to have an independent interest in the property, the plaintiff filed a suit. It was contended that the suit was barred by S. 47 of the C.P. Code:—

Held, that although the plaintiff remained a party to the suit against defendant No. 1 yet defendant No. 2 not being a party to the suit, the plaintiff's proper remedy in order to get possession of the property purchased at the Court-sale was by filing a suit against both defendants.

Held also, that though the plaintiff, by purchasing the property did not cease to be party to the suit, yet he filed quite a different capacity as auction-purchaser; and it was more correct to say that as auction purchaser he acquired a different set of rights which entitled him to come to the Court for protection by filing a suit, instead of proceeding in execution. 35 Bom. 452 Dist. and doubted 31 All 82 (F. B.) App (*MacLeod, C. J. and Heaton, J.*) **GOBA NATHU v. SAKHARAM.** 22. Bom. L. R. 1101.

S. 47—Question relating to execution—Decree ordering sale of property of judgment debtor—Question of ownership whether could be decided by execution court.

A decree for sale on a mortgage was passed against one R who died and the respondents were brought on the record as her legal representatives and a decree absolute was passed

C. P. CODE (1908), S. 47.

against them. An application for setting aside the decree was made by the respondents and rejected but the Subordinate Judge amended it by ordering that it could be executed only against the property of R. The parties submitted to the order. On an application for execution being made by the decree-holder. Held, that the amended decree operated so as to throw upon the decree-holder the burden of proving in the execution department that the property sought to be sold was the property of R, and was in the hands of the respondents as her legal representatives and consequently the respondents could raise the question in the execution court. (*Piggot and Walsh, J.J.*) **GAJADHAR SINGH v. BASANTI LAL.**

18 A. L. J. 131 : 55 I. C. 83.

S. 47—Question relating to execution—Existing extinguishment of decree pro tanto—power of executing court to recognise.

On the 2nd of January 1918, K obtained against T a final decree for sale on a mortgage. On the 20th of March 1918, M purchased part of the mortgaged property at an auction sale in execution of a simple money decree against T. on the 7th April, 1918, M purchased from K the mortgage decree, and then proceeded to execute it, seeking to realize the whole of the decretal amount by sale of the residue of the mortgaged property remaining in the hands of T.

Held, that in consequence of the vesting of the mortgagee's right in a person who had acquired a part of the equity of redemption the decree was extinguished *pro tanto* and could be executed only for the balance of the amount against the residue of the mortgaged property, 22 All 284 F. B.; 10 All. 570; Ref. (*Tudball and Sulaiman, J.J.*) **SARJU KUMAR MUKERJI v. THAKUR PRASAD.** 42 All. 544:

18 A. L. J. 690 : 58 I. C. 743.

S. 47—Question relating to execution—Jurisdiction and power of executing court to sell in execution.

A question as to the legality of an execution Court's procedure or as to its jurisdiction or power to order a sale is a question falling under S. 47, Civil Procedure Code. **BALDEO DAS v. THE BOMBAY MERCANTILE BANK.** 54 I. C. 364.

S. 47 and O. 21, Rr. 16 and 22—Question relating to execution—Non-compliance with provisions of Rule 16—Separate suit for declaring execution proceedings void—Not maintainable.

The omission to comply with the provisions of O. 21, R. 16 C. P. C. makes all subsequent proceedings void.

The question of the irregularity or illegality of the notice issued under O. 21, R. 16 and its effect is one arising between the parties to the suit and could have only been properly determined under S. 47 C.P.C. A separate suit to declare that certain execution proceedings

C. P. CODE (1908), S. 47.

are void for non-compliance with O 21, R 16 C.P.C. is not maintainable (*Wilberforce, J.J.*) **GUL MUHAMMAD v. BANDU**

56 I. C. 461.

—**S 47.—Question relating to execution—Persons impleaded as debtors but not contesting suit—Plaint converted into application—Lim Act, Arts 165 and 181**

Plaintiffs brought a suit to recover possession of the land from which they were ousted in execution of a decree. The decree-holders applied for execution, and a warrant for possession was issued. The present plaintiffs filed an objection and applied for the amendment of the warrant pointing out that possession was to be taken of the land belonging to defendants 10 to 13 only. This application was granted and the warrant was amended accordingly. Nevertheless possession of land held by the present plaintiffs was ultimately given to the decree-holders. Defendants 1—9, who were the decree-holders resisted the suit alleging *inter alia* that the suit was barred under S 47, C.P.C. In the suit which resulted in the aforesaid decree, the present plaintiffs, who were said to be in possession of the property, were impleaded as defendants. They, however, took no interest in the suit and neither put in a written statement nor appeared at any stage of the litigation.

Held, that though the present plaintiff took no interest in the litigation, they were certainly parties to it; that they were impleaded as defendants because they were said to be in possession of the property; and if they were wrongly ousted, their proper remedy was by way of an application to the executing Court asking it to restore possession to them; that the question whether the then decree holders were entitled to recover 7½ biswas out of the land in possession of the present plaintiffs was one relating to the execution of the decree and that consequently S. 47 barred the suit, and that the Subordinate Judge was right in treating the suit as an application under that section.

Article 165 was not intended to apply to an application by a Judgment-debtor.

An application for restoration of possession is governed by three years' rule as laid down in Article 181, 38 A. 339 foll 21 M 494 and 25 A. 343, dissentient from.

A person, who is not a party to the decree is not bound to make an application to the Court executing the decree; and may, if so advised institute a regular suit, and even if he applies and fails he can still bring a regular suit within one year to establish his right to the property. On the other hand a party to a decree is precluded from filing a separate suit and must apply to the Court of execution for redress. The application of the rule of thirty days may in such a case result in great hardship because the party concerned may not come to know of the delivery of possession to

C. P. CODE (1908), S 48.

the decree-holder until after the expiry of 20 days as actually happened in the present case. This hardship should so far as possible be avoided (*Shadi Lal and Dundas, J.J.*) **SHARFU v. MIR KHAN**. **1 Lah L J 230.**

—**S 47—Question Relating to execution or satisfaction of the decree—Setting aside order entering satisfaction of decree—Suit—Application—Remedy**

An application by a decree-holder to set aside an order entering satisfaction of the decree on the ground of fraud of the judgment-debtor is maintainable S. 47 C.P.C. bars a regular suit M (N. R. Chatterjee and Panton, J.J.) **UZIZ GAZI v. MAHIER NASKAR**.

57 I. C 898.

—**S 47 (3)—Application to come on record as judgment debtor's representative—Executing court if competent to entertain**

The proper court for entertaining an application to bring the petitioner on record as the representative of the judgment-debtor in order that he may raise a question covered by S 47 C.P.C. is the executing court and not the court which passed the decree. (*Abdur Rahim and Oldfield, J.J.*) **RAGHAVACHARI v. PARAMASAMI PILLAI**.

11 L. W 713;
55 I. C 812

—**S. 43 and O. 20, R. 11—Application for execution—Subsequent order under S. 48 (b)—Lim. Act., Art 175.**

Where a decree was passed on the 23rd March 1906 and the application for execution was filed on the 21st May 1918 and on objection by the Judgment-debtor that it was barred under S. 48, C.P.C. it was contended that inasmuch as during a former application for execution the decree-holders and the Judgment-debtor filed a petition of adjustment and it was ordered by the executing Court on the 27th July, 1912 that the claim be adjusted and the balance of the amount be paid by certain instalments, therefore the said adjustment order was substantially an order under O. 20, R. 11 and it saved limitation.

Held, that O. 20, R 11 clearly refers to an order passed by the Court which passed the decree. "The subsequent order directing payment in S. 43 ci (b) means a subsequent order made by the Court which passed the decree and not an order of a Court executing a decree." 40 All. 198 foll. Even if the order were one under O. 20, R. 11 C.P.C. the application for execution was barred under Art. 175 of the Limitation Act, 14 Cal 348 Ret. 11 Cal. 143 dist. (*Coutts and Adami, J.J.*) **GOBARDHAN PRASAD v. BISHUNATH PRASAD**.

(1920) **Pat. 229 : 58 I. C. 393.**

—**S. 48—Execution of decree—Limitation—Deduction of time during which execution stayed—Lim. Act. S. 15,**

C. P. CODE (1908), S. 48.

S. 48 C. P. C does not contemplate a deduction of any particular period from the prescribed period of twelve years. Where however force or fraud is proved, that gives a fresh starting point of limitation under S. 48 (2) (a) of the section.

The period during which execution proceedings have been stayed cannot be deducted from the period of twelve years prescribed by S 48, C. P. Code. (*Mitra, A. J. C.*) **GOVINDA v. UMRAOSINGH.** 54 I. C. 279.

S. 48—Limitation—Mortgage decree—Execution—Personal decree.

In 1896 plff. obtained a mortgage decree, which directed the sale of the mortgaged property and provided for satisfaction of any sum remaining due thereafter from the other properties of the judgment-debtor. In 1910 plff applied for and obtained a personal decree against the judgment-debtor without objection. In 1913 and 1915 plff. obtained orders for execution of the decree of 1910 without objection by the judgment debtor. In 1918 plff. again applied for execution, when the judgment debtor objected that a period of 12 years having elapsed since the date of the original mortgage decree the application for execution was barred by limitation.

Held, that the personal decree obtained in 1910 not having been set aside in appeal or otherwise, was valid and binding on the parties thereto. No objection having been taken to the previous applications to execute that decree, the present application which was within 12 years of the date of that decree was not barred by limitation. (*Chatterjee and Panton, JJ.*) **MURALIDHAR ROY CHOWDHURY v. KATHERINE STEPHEN.** 57 I. C. 507.

S. 48—Mortgage decree—Retrospective effect—Period of 12 years—Computation.

S. 48 of the Civil Procedure Code of 1908, has a retrospective effect, and governs an application for the execution of a mortgage decree passed before that Code came into force. Hence, such an application, if presented twelve years after the date of the decree, is barred. (*Macleod, C. J., and Farwett, J.*) **GOPALADAS GANPATDAS v. TRIBHOVAN JETHARAM.** 22 Bom. L. R. 1420

S. 48—Period of 12 years—Computation of—Decree not capable of execution initially—Effect of.

Where a decree absolute in a suit for foreclosure is incapable of execution owing to the absence of a formal order for delivery of possession the rule of 12 years contained in the Code applies from the date the decree becomes capable of execution, that is, from the date of the formal order for delivery of possession. (*Mitra, A. J. C.*) **AMIR ALI v. GOPALDAS.** 54 I. C. 924.

C. P. CODE (1908), S. 53.

S. 48 (2)—Fraud—Evasion of arrest in execution.

Wilful evasion of arrest under warrants taken out by the judgment-creditor is fraudulent prevention of the execution of the decree within the meaning of S. 48 (2) C. P. C so as to give a fresh starting period of limitation. (*Abdur Rahim and Odgers, JJ.*) **AYYAVU v. ARU SOMASUNDARAM CHETTIAR.**

(1920) M. W. N. 788: 12 L. W. 710.

S. 50—Decree against dead person—Not enforceable against legal representatives.

A person who dies *pendente lite* before a decree passed against him is not a Judgment-debtor and consequently the decree cannot be enforced against his legal representatives under S 50 C. P. C. as that section applies only where a Judgment-debtor dies subsequently to the passing of the decree. (*Kotwal, A. J. C.*) **BHANJISINGH v. BHAGWATI PRASAD.**

16 N. L. R. 138: 55 I. C. 449.

S. 50 and O. 22, R. 12—Execution of decree—Abatement—Heirs of Judgment-debtor brought on record—Effect.

When a Judgment-debtor dies during the pendency of execution proceedings it is not compulsory upon the decree-holder to have the heirs brought upon the record on penalty of the decree abating. It is open to him to apply under S. 50 C. P. C. for execution of his decree as against the heirs. But there is nothing in the Code of Civil Procedure which lays it down that the court cannot on the decree-holder's application bring the heirs of a judgment-debtor upon the record in execution proceedings and continue with them; nor is there anything in the law which lays it down that on the death of the Judgment-debtor any pending execution proceedings shall abate.

12 All. 440, (F. B.) 3 Bom. 221 Ref. (*Tudball and Sulaiman, JJ.*) **BAHGWIN DAS v. JUGAL KISHORE.** 42 All 570:

18 A. L. J. 735: 57 I. C. 610.

S. 52—Legal representative—Assets—Enquiry into.

In a suit against the legal representative of a debtor the plaintiff is entitled to a decree if he proves that any assets belonging to the deceased debtor exist. He is not bound to prove the extent of such assets. (*Macnair, A. J. C.*) **SETH SHEOLAL v. CHINDHU.**

56 I. C. 962.

S. 53—Suit on debt—Decree against sons, without enquiry as to existence and binding character.

Where a Court finds that a debt the subject-matter of a suit does not exist, it is illegal to pass a decree for recovery of the same in favour of the plaintiff. Where in such a case the defendant is a Hindu father, neither his sons

C. P. CODE (1908), S. 55.

nor the joint property is liable for the debt. (*Tubball and Sulaiman, JJ.*) **JHAMMAN LAL v. KOMAL SINGH.** 57 I. C. 36

—**Ss. 55 and 145—Liability of surety—Execution case struck off—Subsequent execution.**

Where a surety had executed a bond which did not restrict his liability to the execution case then pending, but indicated a perfectly general liability to pay the decretal money, the decree holder can under S. 145 of the Code enforce the decree as against the surety, even though the execution case had been struck off 22 C. W. N. 919 ref.

Obiter: Under S. 55 of the new C. P. Code a failure to produce the judgment debtor during the pendency of execution proceeding would be enforceable, even after the dismissal of the execution case. 14 Cal 757 ref. (*Mullick and Jwala Prasad, J.J.*) **DUDHRAJ v. MAHA-BIR PRASAD.** 1 P. L. T. 604.

—**S. 60—Agriculturist—Consent to sale of non transferable holding in execution—Judgment debtor if can oppose decree holder's application for attachment.**

In a suit for recovery of money certain non-transferable occupancy holdings and other properties which were the dwelling house of the defendant who was an agriculturist were attached before judgement and a decree was passed by consent under which on default by the defendant to pay the decretal money in certain instalments the plaintiff would be entitled to realise the same from the properties and person of the defendant and that the properties attached would remain charged for the decretal amount.

Held, that upon a proper construction of the decree the properties attached before judgment were liable for the satisfaction of the amount and the defendant could not in execution proceedings object to the attachment and sale of the properties in execution of the decree. (*Chatterjee and Panton, JJ.*) **UZIR BISWAS v. HARADEB DAS AGARWALLA.** 24 C. W. N. 575 : 57 I. C. 249.

—**S. 60—Agriculturist—Transfer of land on lease or mortgage—Property if attachable.**

A person does not cease to be an agriculturist merely because he transfers his land by lease or mortgage. He still continues to be an agriculturist and his property is protected from attachment. (*Kotwal, A. J. C.*) **AMOLAK-SAO v. EKNATH.** 16 N. L. R. 89 : 55 I. C. 481.

—**S. 60—Liability to Attachment—Khei, (offering to the deity) nature of.**

If the Khei be in the nature of a future perquisite on account of the offering or bhog to the deity it will be an uncertain and indefinite income which cannot be attached, a priestly

C. P. CODE (1908), S. 64.

office with emoluments attached to it being inalienable 29 C. 470; 1 C. W. N. 493 ; 1 M. 135; 23 M. 27; 4 A. 81 foll (*Jwala Prasad and Adami, JJ.*) **BALMAKUND KANUNGO v. MADAN CHOTRA.** 1 P. L. T. 75 : 55 I. C. 175.

—**S. 60 (b)—Cattle of agriculturist—When exempt from attachment.**

In an application for attachment of the cattle of an agriculturist the Court has to see whether the cattle are or not necessary to enable an agriculturist to earn his livelihood and this is the function of the executing Court (*Kincaid and Raymond, A. J. C.*) **GUL MAHOMED v. FAIZ MAHOMED.**

13 S. L. R. 210 : 56 I. C. 69.

—**Ss. 64 and 65—Attachment before judgment—Effect—Subsequent sale of attached property in execution of another decree—Subsequent application by person who attached before judgment for sale of property in execution application by prior execution purchaser for dismissal of application—Maintainability.**

The appellant and the respondent attached the property of the same before judgment in their respective suits against him. Both obtained decrees for money, one in the Court of the District Munsif of Tanjore and the other of Valangiman and both applied in the Court of the District Munsif of Valangiman for execution of their respective decrees. The first application of the respondent was however dismissed whilst the appellant's application resulted in a Court sale in which he purchased the attached property. When the respondent again applied for a sale of the same property in execution of his decree the appellant applied in that proceeding for an order dismissing the respondent's application on the ground that the appellant had become owner of the property.

Held, that the ownership of the property passed at the moment that the sale was knocked down to him and the judgment debtor retained no interest in it which could be attached or sold, that as representative of the judgment debtor, appellant was competent to make the application he did and that respondent should not be permitted to proceed to the sale of the property unless or until the sale to the appellant was set aside by an order or decree of Court. (*Spencer and Bakewell, JJ.*) **VENKATASAMI NAIDU v. GURUSAMI IYER.** 38 M. L. J. 441 : 11 L. W. 349 : 55 I. C. 626.

—**S. 64—Attachment—Execution sale of property in pursuance of subsequent attachment—Validity of.**

Once property is sold in execution of a decree it cannot be sold again at the instance of another decree holder who may have attached it before the attachment effected by the decree-holder under whose decree it is actually sold.

C. P. CODE (1903), S. 64.

When a judicial sale takes place, all previous attachments effected on the property fall to the ground (*Coutts, J.*) ABDUL HAKIM v. KULSUM. 55 I. C. 558

—S. 64, and O. 21, R. 54—Attachment—Mortgage subsequent to—Rights of purchasers.

If after a complete and valid attachment is made by an order passed under O. 21, R. 55 C. P. C. mortgage is effected on the properties in dispute by the judgment-debtor, the mortgage cannot prevail over the rights acquired by purchasers at the sale of such property effected in pursuance of the attachment as S. 64 C. P. C. renders void all rights acquired subsequent to the attachment. (*Stuart and Kanhaiya Lal, A. J. C.*) BISHAMBHAR NATA v. GIRDHARI LAL 23 O. C. 18 : 55 I. C. 481

—S. 64—Attachment—Setting aside of by mistake—Restoration of attachment effect of—Sale during interval. See (1919) *Dig. Col.* 163. GOPAL PRASAD v. KASHINATH.

42 All. 39

—S. 64—Attachment—Temporary discontinuance—Alienation during—Validity of—Purchase by decree-holder

The decree holder's rights are not affected by the temporary discontinuance of the attachment. 31 A. 167; 23 C. 829; 80 P. R. 1903 Relied on; 14 C. L. J. 476 Ref.

S. 64 affects the legality of a transfer as against claims enforceable under an attachment. 7 C. 107 P. C. toll.

The decree-holder not having secured his title from the Court, having no longer any claim enforceable under the attachment cannot obtain any benefit from the provisions of S. 64 (*Wilberforce, J.*) BUDHU v. BARKAT RAM 2 Lah. L. J. 99

—S. 66, O. 21, R. 84 and 94—Agreement by purchaser at court sale before the deposit or balance to share property with other—Latter's remedy—Specific performance—Applicability of S. 66 proviso—Certificate of sale to whom to be granted. See (1919) *Dig. Col.* 164. BABU RAM MANDOL v. DAKHINA SUNDARI NAMA SUNDARI. 54 I. C. 726.

—S. 66—Applicability of—Benami Purchases.

For a suit to be barred by S. 66 C. P. Code, plaintiff must be one who claims to be a beneficial owner or his representative and the deft. must be the certified purchaser or some one claiming through him. The section has to be construed strictly and not extended beyond its express terms.

The law that where a purchase is made in the names of children it should be presumed that any payment made by the real owner was made by way of advancement is not applicable in India. (*Shadi Lal and Broadway, JJ.*) ABDUL HAMID AND MUHAMMAD SHAFIE.

2 Lah. L. J. 353.**C. P. CODE (1903), S. 66.**

—S. 66—Applicability of—Successor-in-title of purchaser suit for declaration.

S. 66 C. P. C. applies to the successor in title of the certified purchaser. 31 Bom. 61; 35 Bom. 343 Rel.

A suit is barred under S. 66 C. P. C. although one for a declaration only. 23 Cal. 699. 23 All. 175 toll

If the plaintiff was in adverse possession against the certified purchaser for over 12 years his claim for a declaratory decree was not liable to be rejected on the ground that he was a trespasser. (*Kotwal, A. J. C.*) LAXMAN v. GOVIND 16 N. L. R. 87.

—S. 66—Benamidar—Certified purchaser—Possession with real purchaser—Effect of

The general language of S. 66, C. P. Code is not restricted to benami purchases made by or on behalf of judgment-debtors 20 C. W. N. (1915) followed.

12 B. L. R. 317 (P. C.) 22 C. L. J. 408 (P. C.) referred to.

The failure of the alleged benamidar of the certified purchaser to assert his rights against the real purchaser during the latter's possession after the auction purchaser cannot be regarded as a waiver or transfer of the rights.

11 Mad. 234 (1885) disapp.

23 All. 175 (1901) toll

The title of the certified purchaser is extinguished by three years' possession of the landlord, the alleged real purchaser under the 3rd Schedule of the Bengal Tenancy Act, and the latter acquires a title by adverse possession (*Teuon and Newbold, JJ.*) HARISH CH. GUHA v. NEIPENDRA KUMAR CHUCKERBUTTY. 24 C. W. N. 1024.

—S. 66—C. P. Code (1882) S. 317—Difference between—Title of purchaser under old code—Not affected by new code.

The rule embodied in S. 66 of the C. P. Code 1908, is not applicable to an execution purchaser whose title was perfected when S. 317 C. P. C. (1882) was in force. Hence a real purchaser at an auction sale held in 1903 can bring a suit for a declaration of his title by purchase at a time when the Code of 1908 is in force, against an assignee of a certified purchaser, though not against the certified purchaser himself, 20 Cal. 950.

Both S. 317 of the Code of 1882 and S. 66 of the Code of 1908 operate to place a limitation upon the title of the purchaser, with this difference that the effect of S. 66 is to widen the tetter placed upon the title of the purchaser by S. 317.

The effect of S. 66 of the Code of 1908 is to improve the position of the certified purchaser, and, in effect, to confer upon him a power of alienation he would not otherwise enjoy. If the certified purchaser alienated the property, the result notwithstanding S. 317 of the Code of 1882, would be that the title of the alienee could be forthwith defeated by the real owner.

C. P. CODE (1908), S. 66.

Under S. 66 of the Code of 1908, the certified purchaser is enabled to confer a good title on the transferee because the real owner is debarred from impeaching the title, not only of the certified purchaser but also of the person who has derived title from him.

The wider-restriction embodied in S. 66 of the Code of 1908 is not applicable to cases, where the title accrued under the Code of 1882.

Of things that do not appear and things that do not exist, the reckoning in a court of law is the same; a title which cannot be proved against an opponent in the eye of law, has in point of fact no existence in relation to that individual.

Under S. 317 of the Code of 1882, the auction purchaser had a title enforceable against the whole world except the certified purchaser. Under S. 66 of the Code of 1908 the title of the real owner cannot be enforced against persons who claim title derived from the certified purchaser. (*Mookerjee, Fletcher and Richardson, JJ*) PROMOTHA NATH PAL CHOWDHURY v. MOHINI MOHAN PAL CHOWDHURY. 24 C. W. N. 1011. 31 C. L. J. 463: 58 I. C. 327.

S. 66—Money decree—Attachment of judgment debtor's property mortgaged by judgment debtor—Sale in execution—Suit by mortgagee against the judgment-debtor as owner and execution purchaser as person in possession for his own benefit whether barred. See (1919) *Dig. Col. 165*. MONGOLA SWAJI v. VISVANATHA SANTASO. 54 I. C. 967.

S. 66—Purchaser of Share—Applicability of section.

S. 66 C. P. Code applies whether ostensible purchaser at an auction sale is the real purchaser to the extent of the entire or only a fraction of the property sold. (*Macnair, A. J. C.*) GOVINDSINGH v. MUNGUJI. 57 I. C. 684.

S. 66—Scope of—Agreement by purchaser at court auction to convey property purchased—Enforceability of

The object of S. 66 C. P. C. (Act V of 1908) was to put an end to purchases by one person in the name of another. An agreement subsequent to a purchase is not affected by that section and is enforceable. 42 Mad. 616 appr.

Quare whether a purchase coupled with an undertaking to convey to another at the price of the purchase comes within the Section (*Viscount Cave.*) RAMATHAI VADIVELU MUDALIAR v. PERIA MANICKA MUDALIAR. 43 Mad. 643: 39 M. L. J. 11: 18 A. L. J. 584: 28 M. L. T. 13: 12 L. W. 1: 24 C. W. N. 699: (1920) M. W. N. 389: 56 I. C. 395: 47 I. A. 108 (E. C.)

S. 66—Suit by beneficiary against the benami certificated purchaser at court sale

C. P. CODE (1908), S. 73.

when lies See (1979) *Dig. Col. 166*. MAHOMED EMARTULLA SIRCAR v. MAHOMED DIDAR BUX SIRCAR. 54 I. C. 127.

S. 70 (c)—Rules made under by local Govt.—Finality of order confirming sale

Where ancestral property is involved the Local Government has power under S. 70 C. P. Code to confer upon the Collector all or any of the powers which a Civil Court might exercise in the execution of a decree if its execution is not transferred to the Collector's Court.

Where the local Government makes such rules which give finality to an order of Revenue Court and the Revenue Court confirms the sale of ancestral property sold in execution of a decree *hold that a suit to set aside the sale is not maintainable.* (*Tudball and Rafiq, JJ*) FARHAT-UN-NISSA v. SUNDARI PRASAD. 42 All. 275: 18 A. L. J. 124: 54 I. C. 801.

S. 72—Action of collector under Administrative.

The collector when acting under S. 72 of the C. P. C. does not perform any judicial function ; if he makes any representation under the section he does so as an officer of the Court and it is within the discretion of the Court to accept or decline to accept such representation. 9 Cal. 290 F. B and 25 P. R. 1894 followed. (*Shadi Lal and Le Rossignol and Broadway, JJ*) SARDARNI DATAR KAUR v. RAM RATTAN. 1. Lah. 192: 2 Lah. L. J. 333.

Ss. 72 and 73—Execution sale—Rateable distribution of proceeds among decreeholders—Application—Execution by Collector—Effect of.

An application by a judgment debtor to obtain a rateable distribution of assets realized in execution of a decree and held by a Court must be made, under S. 73 (1) of the C. P. Code, before the receipt of such assets. Where an execution sale is held by the Collector such an application must be made before that officer receives the sale proceeds. (*Macleod, C. J. and Heaton, J. J*) DATTATRAYA v. PUNDLIK. 22 Bom. L. R. 1001: 58 I. C. 992.

S. 73—Application under whether a suit—order of rejection whether appealable under S. 47. See C. P. Code Ss. 47 and 73.

1 P. L. T. 296.

Ss. 73 and O. 21, R. 52—Fund in Court—Attachment—Rival claims—Propriety—Rateable distribution—Madras Civil Rules of Practice, Rr. 179 and 180.

Where a fund in the custody of one Court to the credit of a person is attached by another Court in execution of a decree against him it is the duty of the custody court to hold the fund subject to the directions of the executing Court and, if there are no prior attachments or paramount claims, to transfer the fund to the executing Court. The fund as soon as it is

C. P. CODE (1908), S. 73.

transferred to the executing Court becomes 'assets held' by that Court within the meaning of S. 73 of the C. P. Code and all decree holders who have applied for execution to the executing Court before the receipt of such assets are entitled to rateable distribution. The custody court has no power to determine whether the rival decree holders seeking execution are entitled to be paid rateably or according to the priority of their attachment. The matter is one for adjudication by the execution court only.

Where the executing Court and the custody Court are the same the fund becomes the assets within the meaning of S. 73 of the C. P. Code by an order of attachment coupled with a formal order of transfer of the fund to the credit of the suit in which execution is sought.

Per *Sadasiva Aiyar, J.—Rr. 179 and 180* of the Civil Rules of practice, Madras are *ultra vires*. (*Wallis, C. J., Ayling, Sadasiva Aiyar, Napier and Krishnan, J. J.*) *VISVANATHAN CHETTY v. ARUNACHELLAM CHETTY.*

39 M. L. J. 608 :
12 L. W. 744 (F. B.)

—**S. 73 — Rateable distribution—Money paid to Sheriff in execution of a decree—Assets—Costs of previous execution.**

Where a decree-holder applied for execution, money was paid by the judgment-debtor to the Sheriff who paid it into Court. Two other creditors who had previously applied for execution asked for rateable distribution of the assets :—

Held, that the money so paid into Court was assets available for rateable distribution.

Held, further that the right to rateable distribution is limited to the amount due under the decree and does not apply to costs of a previous application for execution.

(1911) I. L. R. 36 Bom. 156 diss,

(1919) I. L. R. 40 Cal. 619 referred to.
(*Rankin, J.*) *NOOR MAHOMED DAWOOD v. BILASIRAM THAKURSIDASS.* 47 Cal. 515.

—**S. 73—Right to rateable distribution—Rival decree-holders—Attachment in execution of one decree only—Effect of.**

Where money is not paid into court in execution of a decree, the proceeds of execution are not liable to rateable distribution. A decree holder who has not applied for execution before the receipt of assets in court is not entitled to rateable distribution. (*Rattigan, C. J.*) *JADU RAI v. MISRI.* 11 P. L. R. 1920 : 54 I. C. 41.

—**S. 73 and O. 21, R. 72—Rival decree-holders—Auction sale of judgment-debtor's properties—Application by one decree-holder to bid at the auction and to set off his decree-debt—Right if subject to other decree-holders.**

The permission given by the Court to a decree-holder to bid at an auction and to set off the judgment debt against his decree

C. P. CODE (1908), S. 80.

amount is subject to the right of a rival decree-holder to enable distribution under S. 73 of the C. P. Code. (*Seshagiri Aiyar, J.*) *ARUNACHELLAM CHETTY v. SOMASUNDARAM CHETTY.*

12 L. W. 328.

—**S 73—Rival—Decree-holders—Rateable distribution—Claim for—Right of one decree holder to impeach decree of rival decree-holder for fraud and collusion—Suit for declaration and injunction before actual distribution of assets—Maintainability of.**

In the absence of extrinsic fraud and collusion it is not open to one decree-holder of a judgment-debtor to attack the decree obtained by another-holder against the same judgment debtor seeking rateable distribution as not creating a valid debt and entitling the decree holder to share in the distribution of the assets under S. 73 C. P. C.

The action of the court under S. 73 is materially different from that of a Court in insolvency proceedings.

A rival decree-holder need not wait for the distribution of the assets before bringing a suit for a declaration that the decree of one of the decree-holders A was obtained by fraud and collusion and that A, was not entitled to share in the rateable distribution.

The mere fact that the decree was obtained by perjured evidence would not be fraud. (*Sadasiva Aiyar and Burn, J. J.*) *VENKATARAMA AIYAR v. THE SOUTH INDIAN BANK LTD.* 43 Mad. 381 : 38 M. L. J. 108 : 27 M. L. T. 66 : (1920) M. W. N. 92 : 11 L. W. 81 : 55 I. C. 452.

—**S. 80—Letter—Accompaniments to Ownership of.**

The plaintiff sent to the defendant a notice of suit under S. 80-C. P. C. accompanied by a private copy of their Sanad and a certified copy of an extract from city Survey Records. The plaintiff having claimed to recover the accompaniments from the defendant:—

Held, dismissing the claim, that when the plaintiffs wrote to the defendant enclosing the copies they did not retain any property in them unless they expressly asked in their letter that the copies should be returned to them. (*Macleod, C. J. and Heaton, J.*) *BALUBHAI v. THE SECRETARY OF STATE FOR INDIA.*

22 Bom. L. R. 785 : 57 I. C. 538.

—**S. 80—Manager of the Court of Wards—Not a public servant—Notice of suit not necessary. See. (C. P. Code Ss. 2, 17 and 80.**

55 I. C. 515.

—**S. 80—Notice of suit—Public officer—Irreparable damage—Apprehension of—Injunction.**

The notice prescribed by S. 80 of the Civil Procedure Code is essential in all suits against the Secretary of State or against a public officer in respect of any act purported to be done by the said public officer in his official capacity, even though the relief claimed is an

C. P. CODE (1908), S. 80.

injunction and irreparable injury is likely to be caused if a rule *nisi* for an injunction is not at once granted and though the act complained of is a threat to do a future injurious Act provided the threat is conveyed through the performance of an act such as speech writing sending a notice or message, etc., 37 Mad. 113 F. B. followed. (*Sadasiva Aiyar and Spencer, JJ. v. THE SUPERINTENDING ENGINEER v. RAMAKRISHNA IYER.*)

39 M. L. J. 151 : 28 M. L. T. 163 : 12 L. W. 193 : (1920)

M. W. N. 495 : 58 I. C. 835

—S. 80—Receiver—Public Officer—Notice of Suit—Receiver appointed under the Prov. Ins. Act. See C. P. Code, Ss. 2 (17) AND 80.

22 Bom. L. R. 987.

—S. 83—Alien enemy—Who is—Residence in hostile country—Effect of—Firm—Alien enemy partner—Right to sue.

Nationality is not the test for determining whether a person is an "alien enemy" within the meaning of S. 85 of the Civil Procedure Code. A British subject voluntarily residing or carrying on business in enemy country will be treated as an alien enemy (1915) 1 K. B. 857; foll.

Residence need not amount to what is called domicile, namely permanent residence *sine animo revertendi*. A much less permanent residence is sufficient to make a man an alien enemy provided it is not of a temporary character.

If a person resides in a hostile country for a substantial period of time, he acquires the desirability attaching to an enemy during that period unless such residence is with the consent of the Crown.

(1916) 2 A. C. 338 rel. on.

If one of the partners in a firm is an alien enemy as defined above neither he nor his partner, who does not bear any enemy character can recover money owing to the firm in the Courts of British India and the plffs. were therefore rightly non-suited by the Lower Court (1919) A. C. 59 dist. (*Shadi Lal and Martineau, JJ. v. FIRM HAJI ALI JAN v. ABDUL JALIL KHAN.*) 1 Lah. 276 : 2 Lah. L. J. 275 : 55 I. C. 324

—S. 86—Suit against ruling chief—Consent of Governor General.

Plaintiff held certain lands of the defendant, a ruling chief, for which he paid no rent. Defendant applied for resumption of the land and the Court assessed rent against the plaintiff. Plaintiff thereupon brought the present suit for a declaration that he held a heritable right to remain in possession of the land without payment of rent. The plaintiff had not obtained the consent of the Governor-General in Council under S. 86 C. P. C. to sue the defendant. It was contended that plaintiff was suing as a tenant of immoveable property and the suit was maintainable under the fifth

C. P. CODE (1908), S. 92.

proviso to S. 86 without the consent of the Governor General.

Held, that the suit was not by plaintiff as a tenant of immoveable property, and had been rightly dismissed. (*Kaihaiya Lal, and Stuart, A. J. C. v. RAJGAN MAHARAJAH JAGAT JIT SINGH.*)

58 I. C. 912,

—Ss. 89 and 104 (1) (f)—Arbitration without intervention of Court—Application to file the award—Not compulsory—Suit to enforce the award—Maintainability of—Not *res judicata*—No innovation in the new code. See C. P. Code Sch. II, Paras 20 AND 21.

18 A. L. J. 960.

—S. 92—Mahomedan Law *waqf*—Dharmasala—Declaration that property is *waqf*.

Where in a suit all that the plaintiff claimed was that the character of the *waqf* property should be retained and that they should get a declaration from the court to that effect. *Held*, that the suit was not of the nature contemplated by S. 92 C. P. C. 66 P. R. 1892 foll.

41 C 749 ; 33 C. 789 ; 25 A. 631 ; 33 A. 760 ; 7 A. 178 ; 31 I. C. 236 ; 89 P. R. 1901 ; 110 P. R. 1907 11 M. 148 ; 21 B. 257 ; 39 B. 510 Ref. (*Abdul Raoof, J. v. NIHAL SHAH v. MILAN.*)

2 Lah. L. J. 457.

—S. 92—Mahomedan Law — Waqf—Power of court to remove mutwali and appoint a stranger as such

The founder of a *waqf* appointed his sister and brother and the male descendants of the latter mutwalis in succession after himself. On his death the sister who was the then mutwali mismanaged the *waqf* affairs and in a suit brought under S. 92, C. P. C., the District Judge removed the sister from the office of mutwali and no one of the founder's family being available appointed a stranger.

Held, that the appointment of the plff. as mutwali was entirely within the discretion of the District Judge as Kazi and in the circumstances of the case it was not without jurisdiction although the Plaintiff was a stranger. (*Richardson Shamsul Huda, JJ. v. NARAIN DAS v. KAZI ABDUR RAHIM.*)

24 C. W. N. 690 : 58 I. C. 705.

—S. 92 and O. 1, R. 10—Parties—Addition of plff.—Power of Court—Suit by worshippers with consent of Advocate General—Addition of Advocate General as plff. Questions to be determined in scheme suit.

In a suit for the protection of a trust under S. 92 C. P. C. the most important questions to be settled are those which relate to the administration of the trust and the court has power under O. 1, R. 10 to add parties for the effectual adjudication of those questions.

The words, "as between the parties to the suit" ought not to be read after the words "question involved in the suit" in O. 1, R. 11.

C. P. CODE (1908), S. 92.

Under S. 92 a suit may be brought by the Advocate-General himself or by two worshippers to whom he has given his consent in writing to sue or by the Advocate General in conjunction with those persons. The right of each to sue in his own name is not exclusive of the right of the other. (*Spencer and Krishnan, JJ.*) AMBALAVANA PANDARA SANNADH v. THE ADVOCATE-GENERAL OF MADRAS

43 Mad. 707:

38 M. L. J. 201 : 27 M. L. T. 100 :
25 C. W. N. 1 :

11 L. W. 219 : 55 I.C. 546.

—S. 92—*Parties—Suit bad for want of requisite interest on the part of one of the pliffs—Subsequent addition of other persons having requisite interest—Effect of*

Where in a suit instituted under S. 92 C. P. C., one of the plaintiffs was found to have no interest such as that required by the section and thereupon two other men who had the requisite interest applied to the Collector and obtained sanction to institute the same suit and were then added as 3rd and 4th plaintiffs, held, that the suit was not liable to be dismissed on the ground that it was bad as laid and that the requirements of S. 92 were satisfied by adding 3rd and 4th plaintiffs in the same suit (*Abdur Rahim and Phillips, JJ.*) JAKKAM REDDI SESADRI REDDY v. SUBRAMANIA AIYAR.

43 Mad. 720:
38 M. L. J. 504 : 11 L. W. 536.
56 I. C. 450

—S. 92—*Persons interested—Addition of—Sanction of Advocate-General, if required*

Whether in suit under S. 92 C. P. C. the addition of a party requires a fresh sanction of the Advocate-General depends upon the question whether the scope of the suit has been really enlarged by such addition.

The interest required under S. 92 to enable plaintiffs to sue is something substantial and not merely sentimental or remote.

In respect of a chattram charity, persons living in the neighbourhood of the institution, and being a member of the Brahmin community and as such entitled to make use of the charity was held to possess a substantial interest. 36 M. L. J. 396 (F. B.) applied (*Sadasiva Aiyar and Spencer, JJ.*) GOPALA KRISHNIER v. GANAPATHY AIYAR.

1920 M. W. N. 478 :
12 L. W. 772 : 58 I. C. 124

—S. 92—*Public trust—Release—Management—Wishes of donor.*

S. 92 C. P. Code applies in respect of a breach of any express or implied trust created for public purposes of a charitable or religious nature.

Where there is no express declaration in the deed the intention of the grantor can be gathered from the surrounding circumstances, and if they indicate that the beneficial interest is vested in the public and not in one or more individuals, although the control and manage-

C. P. CODE (1908), S. 92.

ment vested in the members of the family the Court is entitled to hold that the trust was for public purposes. 19 C. W. N. 305 applied.

S. 92 only contemplates suits brought in a representative capacity for the benefit of the public and to enforce public rights in respect of an express or constructive trust, claiming one or other of the reliefs mentioned in that section. Suits brought not to establish a public right but to remedy a particular infringement of an individual right are not within the section. 33 Cal. 789 followed.

Where in the deed there is no provision for joint management by two or more members of the family the Court cannot grant a relief counter to the intentions of the founder. (*Coutts and Sultan Ahmad, JJ.*) RAJESWAR SINGH v. BASUDEO NARAIN.

1 P. L. T. 428 : 57 I. C. 270

—S. 92—*Reliefs claimed in suit—Grant of relief not allowed by the section. See (1919) Dig. Col. 171. NIZAM-UL-HAQ v. MAHOMED ISHAQ.* 1 Lah. L. J. 74.

—S. 92—*Scheme—Appointment of trustees from plff's community on the ground that the trust had largely benefitted by its endowment—Propriety of. See (1919) Dig. Col. 172. ANNASWAMI AIYENGAR v. NARAYANAN CHETTIAR.* 54 I. C. 263

—S. 92—*Scope of—Right to sue—Persons interested who are—Heirs of founder—Interest in the trust—Right to sue for removal of trustee and proper management. See (1919) Dig. Col. 174. MANOHAR MUKERJEE v. PEARY MOHAN MUKERJEE.* 54 I. C. 6.

—S. 92—*Scope of—Suit by worshipper to set aside alienation of property by trustee, not within the section. See (1919) Dig. Col. 175. MUSSAMMAT AFIMAN v. HAMIDUDDIN HUSSAIN.* 1 Lah. L. J. 55.

—S. 92 (h)—*Power of court to direct delivery of trust property—Trust—Creation by will—Validity—Vagueness, when bad for—Power given to trustees to manage as they chose—Public Trust—Test. See (1919) Dig. Col. 175. JAI NARAIN v. BANKEY LAL.* 58 I. C. 566.

—S. 92 (2)—*Applicability of Application by mutawalli to Dt. Judge for sanction to a lease—Sanction under S. 92 not requisite. See MAHOMEDAN LAW, WAQE.* 24 C. W. N. 339.

—S. 92 (2)—*Civil court—Jurisdiction.* In deciding whether the jurisdiction of a Civil Court is barred under proviso 2 to S. 92 of the Code the Court must take into account the true position of the defendant, as disclosed by all the pleadings, if the defendant takes up a position for the purpose of taking advantage of the bar created by the 2nd proviso to S. 92, the Court must determine whether that proviso has any application. (*Kotwal, A. J. C.*) KHAJA MIRJA v. VITHOBH.

58 I. C. 963

C.P. CODE, (1908) S. 92.

—S. 92—Proviso 5—Entry in bahi—Oral agreement to pay interest—Admissibility of. See (1919) *Dig. Col.* 537. BHAN SINGH GOKAL CHAND. 1 Lah. 83.

—S. 94 (c) and (e)—Injunction—Proceedings under S. 40 B. T. Act—Power to restrain—Civil Court—Jurisdiction, See (1919) *Dig. Col.* 176. BHAJAN AHIR v. GANGESHWAR KUAR. 5 Pat. L. J. 76.

—S. 96 (3)—Consent order—Not appealable—Compromise in excess of authority of pleader. See (1919) *Dig. Col.* 177 SYED ASAD RAZA v. WAHIDUNNissa BEGAM. 57 I. C. 70.

—S. 97—Consent decree—Consent of pleaders—Intimidation of court—Effect of. A judgment obtained by consent of counsel acting in court in a matter within their authority cannot form the subject of appeal. When consent of the counsel was accorded when the Judge intimated that he would otherwise decline to entertain the motion, it is not free and fair but constrained and involuntary acquiescence in a court of trial which the Court has decided to adopt (*Mookerjee and Fletcher, JJ.*) RADHA KISSEN KHETRY v. LUKHMI CHAND JHAWAR.

24 C. W. N. 454 : 31 C. L. J. 283 : 56 I. C. 541.

—S. 99 and O. 1, R. 3—Suit for declaration that alienations by father in favour of several alienees is not binding on the family—Not bad for misjoinder—Dismissal of suit—Interference in appeal.

In a suit by plaintiffs for a declaration that alienations of family lands made by their father in favour of several alienees was without consideration and necessity and did not affect their reversionary rights, on a preliminary objection that the suit was bad for misjoinder of parties and the trial court upheld the objection and dismissed the suit.

On appeal the District Judge held that there was no misjoinder of parties or causes of action and reversed the decree of the first Court.

Held, that the suit was not bad for misjoinder of parties and the plaintiffs were competent to bring one suit against the vendees and the prior mortgagees and that the District judge was justified in reversing the decree and remanding the case for trial, (*Shadi Lal and Wilberforce, JJ.*) RALLA RAM v. MULK RAJ.

1 Lah. 295 : 17 P. L. R. 1920 : 54 I. C. 512.

—S. 99 and O. 21, R. 66—Technical defect—Sale—Verification—Defect in—Effect of.

The verification required under O. 21, R. 66 (3) of the C. P. Code by the karbazdar of the decree-holder is valid, when the court is satisfied that he was acquainted with the facts of the case.

An objection as to defect in signature on the petition cannot be allowed to be raised for the

C.P. CODE, (1908) S. 100.

first time in appeal, as it could have been cured by amendment under O. 6, R. 17 of the new C. P. Code of 1908. Moreover, the mere fact that a plaint is not duly signed does not make it void, 2 C. L. J. 11 doubted. 22 All. 55 ; 34 All. 348 and 17 Cal. 580 rel.

Under S. 99 of the C. P. Code, an appellate court will not reverse a decision merely on the ground of a defect of signature (*Jwala Prasad and Adami, JJ.*) RAJA BRAJA SUNDAR DEB v. SIVARANJAN. 1 P. L. T. 647

—S. 100—Costs—Second appeal.

A second appeal on a question of costs is maintainable. (*Martineau, J.*) KARAM KAUR v. KIRPA SINGH. 2 Lah. L. J. 310.

—S. 100—Custom—Proof of—Question of law.

The question whether the facts proved and found satisfy the requirements of law to establish a custom is a question of law and one which the High Court can and must consider in second appeal (*Spencer and Krishnan, JJ.*) OLLAPPAMANANNA NANAKAL SECRETARY OF STATE. 55 I. C. 770.

—S. 100—Error of law—Presumption—Ignoring of.

Where the lower appellate court comes to a conclusion without taking into account the presumption arising from the habits of the people, it commits an error in law and a second appeal is competent (*Broadway, JJ.*) DIWAN v. JAGTA. 1 Lah. 206 : 56 I. C. 72S.

—S. 100—Error of procedure—Omissions to consider material evidence.

The failure by an Appellate Court to determine the critical question between the parties to a suit and to consider the oral evidence adduced on behalf of the debt amounts to a substantial error of procedure (*Das, J.*) BHIKHAN QASSAB v. MARDANALI. 56 I. C. 40.

—S. 100—Misconstruction of document, when a ground.

A second appeal is not maintainable merely on the ground that the Courts below have misconstrued certain documents which are neither documents of title, nor embody a contract, nor are the foundation of the suit. (*Das and Adami, JJ.*) KULDIP NARAYAN RAI v. BANWARI RAI. 5 P. L. J. 251 : 1 P. L. T. 126 : 55 I. C. 179.

—S. 100—Question of law—When can be raised—Change of case.

A pure question of law arising out of the findings of the Courts below and one which is patent on the record can be raised for the first time in second appeal. 51 I. C. 588 foll.

The nature of a suit cannot be changed in second appeal so as to make the suit for arrears of maintenance one for contribution (*Broadway, J.*) DIWAN CHAND v. BISHEN DAS.

2 Lah. L. J. 255.

C. P. CODE, (1908) S. 102.

—S. 102—Decree in suit of small cause nature—Order in execution—Not open to second appeal.

No second appeal lies against an order passed in execution proceedings arising out of a suit of the nature cognisable by a Court of Small Causes and of value below Rs 500 (*Newbould and Cuming, JJ*) KUNJA BEJARI ROY v PANCHANON SIKDAR. 54 I C 429

—S. 102—Rent—Malik Makbuza tenure—Small cause nature—No second appeal. See C. P. TEN ACT, S. 81. 56 I C 845.

—S. 102 and O. 21, R. 71—Second appeal—Resale on purchaser's default—Recovery of deficiency on resale—Second appeal.

No second appeal lies from an order passed on an application made by the decree-holder, under O. 21, R. 71 of the Civil Procedure Code 1908, to recover deficiency of price from a defaulting purchaser, when the decree is for a money claim less than Rs. 500. Macleod, C. J. and Fawcett, J.) RAJACHARYA CLEMANNA. 22 Bom L. R. 1193

—S. 102—Small cause nature—Suit for recovery of grazing fee—Second appeal.

No second appeal lies under S. 102, C. P. Code for recovery of less than five hundred rupees claimed as grazing fee.

There can be no claim for rent unless there is a tenancy and there can be no tenancy unless a right to the land has been given to the grantee: 20 C. L. J. 227. Rel. (*Mookerjee, C. J. and Fletcher, J.*) JATINDRA MOHAN LAHIRY v ABDUL AZIZ MIA. 32 C. L. J. 83.

—S. 102—Small Cause suit tried as a regular suit—Effect of

In a suit filed in the Small Cause Court for the recovery of certain *Mahabrahmani* offerings the plaintiff was returned to be presented on the regular side as the defendant denied the right of the plaintiff to receive the funeral offerings in dispute. The suit was tried as a regular suit and there was also an appeal before the District Judge. Held, that the suit remained a suit of the nature cognizable by a Court of Small Causes and that under S. 102 no second appeal lay. 20 C. d. 276. Ref. (*Stuart, J.*) BACHCHI v DEBI PRASAD. 23 O C 117. 57 I C 557

—S. 102 and O. 43, R. 1. (a)—Suit of small cause nature—Remand by appellate court—No appeal from order of remand.

There is no second appeal in a suit of a small cause nature of the value below Rs 500 An order of remand therefore in such a suit is not open to appeal. (*Tudball and Ryves, JJ*) AMBA PRASAD v. MUSHTAQ HUSAIN.

42 All. 200 : 18 A. L. J. 167 : 54 I. C. 432.

—S. 102—Suit of Small cause nature—Suit to recover money forcibly taken.

A suit to recover a sum of money forcibly taken out of the possession of the plaintiff by

C. P. CODE, (1908) S. 105.

defendant is cognisable by a Court of Small Causes, and where the amount involved is less than Rs 500 there is no second appeal. (*Ryves and Jwala Prasad, JJ*) CHOCKEY BHARTI v. BALDEO GIR. 57 I. C. 505.

—S. 103—High Court—Power to determine question of fact

The High Court can determine a question of fact in second appeal when all the evidence is before it and when the lower appellate court has not given any finding thereon (*Sir Lawrence Jenkins*) SETURATNAM IYER v. VENKATACHELA GOUNDAN. 43 Mad. 567 : 38 M. L. J. 476 : 18 A. L. J. 707 : 27 M. L. T. 102 : 11 L. W. 399 : 22 Bom. L. R. 578. (1920) M. W. N. 61 : 55 I. C. 117 : 47 I. A. 76 (P. C.)

—S. 103—Second Appeal—Appropriate issue not framed in trial Court or first appeal—May be decided in second appeal if evidence sufficient. See (1919) Dig. Col. 180. DAMUSA v. ABDUL SAMAD.

47 Cal. 107 (P. C.)

—S. 104 and O. 43, R. 1—Appeal from Order—Order granting leave to sue a receiver for damages caused by his negligence—Appeal.

No appeal lies from an order granting leave to sue a Receiver for damage caused by his negligence, laches etc. (*Macleod, C. J. and Heaton, J.*) SHRINIWAS v. M. C. WAS.

22 Bom. L. R. 1126.

—S. 104 (f) Sch. II paras. 20 and 22—Appeal—Order filing or refusing to file an award—Private reference—Decree on award—Effect of.

An appeal lies against an order filing or refusing to file an award in an arbitration made without the intervention of Court. The fact that a decree has been drawn up after the passing of the order cannot take away the right of appeal against the order. (*Lindsay, J.*) LACHMI NARAIN v. SHEO NATH PANDEY.

42 All. 185 : 18 A. L. J. 78 : 54 I. C. 443.

—Ss. 104 (2) 47 and O. 43 (1) J—Appeal from order—Second appeal.

No second appeal lies from an order passed under O. 21, R. 19 of the Civil Procedure Code 1908 even if the auction purchaser is the decree holder himself. (*Shah and Crump, JJ*) KACHU RAVJI MINDHE VANJARI v. TRIMBAK KHEMCHAND GUJARATHI.

44 Bom. 472 : 22 Bom. L. R. 383 : 56 I. C. 597.

—S. 105—Order of Court returning plaint for amendment—Not appealable.

An order of the Court returning a plaint for amendment is not appealable under S. 105 C. P. C but the plff. could challenge the correctness of the order in his appeal from the decree notwithstanding that he had complied with the

C. P. CODE, (1908) S. 105.

order and that he could have allowed his suit to be rejected and appealed from the rejection (*Bevan Petman, J.*) **SHAH JAHAN v. INAYAT SHAH.** 1 Lah 54

S. 105 (2) and O. 41, R. 23— Disposal of suit on a preliminary point, what constitutes—Decision on the whole case—Dismissal of suit as not maintainable—Effect of. See (1910) *Dig. Col.* 181. **BHADAI SAHU v. MANOWAR ALI.** (1920) *Pat.* 91.

S. 105 (2)—Remand—Order not appealed against—Finality of.

An order of remand if not appealed against is final and cannot be questioned by the Lower Court. (*Scott Smith, J.*) **KARM NARAIN v. SALAMAT RAI.** 57 I. C. 52.

S. 107—Appellate court—Leave to withdraw suit with liberty to sue again—Power to grant. See *C. P. Code O. 23, R. 1.*

22 Bom. L. R. 1183

Ss. 109 and 110—Consent decree—Appeal to Privy Council incompetent.

An appeal does not lie to the Privy Council from a consent decree even where such decree reverses the decree of the first court and where the value of the subject-matter of the appeal is above Rs. 10,000. (*Dawson Miller, C. J. and Mullick, J.*) **LACHMI NARAIN MARWARI v. BALMAKUND MARWARI.** 5 P. L. J. 383. 1 Pat. L. T. 599 : 57 I. C. 245.

S. 109—Final decree or order—Meaning—Decision that suit is not barred by res judicata—Appeal to Privy Council.

Appeals on matters interlocutory in their nature should be allowed to be preferred to his Majesty in Council only when their decision will put an end to the litigation and finally decide the rights of parties.

When therefore a suit was dismissed by the Subordinate Judge as barred by *res judicata* but his decision was reversed by the High Court who remanded the case held that leave to appeal to Privy Council should not be given. (*Mears, C. J. and Banerji, J.*) *M. SAJJAD ALI KHAN v. M. ISHAQ KHAN.*

42 All. 174 : 18 A. L. J. 83 : 54 I. C. 504.

S. 109 and O. 45, R. 3—“Otherwise fit” for appeal—Question as to whether fraud of mortgagor alone vitiates registration—Order of remand—Privy Council appeal—Leave when to be granted

A mortgage was registered at B. The bulk of the properties mortgaged was within the jurisdiction of registration Dt of D. A small part of the properties mortgaged was situated in the jurisdiction of the Dt. of B. In a suit for sale upon the mortgage, the Court found that the B. property did not belong to the mortgagor at the date of the mortgage but it was recorded in his name.

The first Court held that this was fraudulent and dismissed the suit. The High Court

C. P. CODE, (1908) S. 109.

remanded the suit to the Court below on the finding that the mortgagees did not participate in the fraud. The debt applied for leave to appeal to the Privy Council. Held that the decision of the High Court was not a final order within S. 100 C. P. C. and an appeal did not lie to the Privy Council from that decision. But the question whether the fraud of the mortgagor would vitiate registration and disentitle the mortgagee to enforce his mortgage was a substantial question of law and therefore the case was fit for appeal to the Privy Council. (*Mears, C. J. and Banerji, J.*) *DIRGPAL SINGH v. PAHLADI LAL.*

42 All. 176 : 18 A. L. J. 137 : 54 I. C. 528.

S. 109—Suit involving mere question of law—Whether leave can be granted.

It is well settled that the mere fact that the appeal involves questions of law does not bring the case under S. 109 (c) it must involve decision of matters of public or private importance.

The question whether a suit is maintainable to set aside an ex parte decree obtained by perjured evidence has been now settled by recent decisions of the several High Courts, which concur in holding that where the plaintiff had an opportunity to contest the previous suit, and he himself was guilty of laches, his application under O. 9 R. 13 having been dismissed he is debarred from re-opening the controversy, as there must be some finality to litigation. (*Dawson Miller, C. J. and Adam, J.*) *KRIPASINDHU PANIGRAHI v. NANDI CHARAN PANIGRAHI.* 1 P. L. T. 239 : (1920) *Pat.* 209 : 56 I. C. 615.

S. 109—Valuation below Rs. 10,000—Application of evidence—Not a question of general importance.

In a case where the subject matter is less than Rs. 10,000 in value and the sole question upon which the decision of the case rests is one of evidence the point is not one of general interest and importance to justify the grant of a certificate that the case is a fit one for appeal to the Privy Council. (*Grimwood Mears, C. J., and P. C. Banerji, JJ.*) *MU. ZAFFAR ALI v. MUHAMMAD JAWAD.* 54 I. C. 463.

Ss. 109 and 110—Valuation of suit above Rs. 10,000—Appeal valued at less than 10,000 Rs.—Leave if can be granted—Question of law—Misjoinder

The original valuation of a suit exceeded Rs. 10,000, but on appeal by one of the debtors to the High Court the contest was for a sum less than Rs. 10,000. Held, that the case for the purpose of leave to appeal to his Majesty in Council did not come within S. 110 C. P. C.

The question whether the omission to so implead one of the plaintiffs as party in an appeal to the High Court, is fatal to the appeal is not a question of law to justify a certificate that the case is otherwise a fit one for appeal to his

C. P. CODE, (1908) S. 109.

Majesty in Council. (*Grimwood Mears, C. J. and Banerjee, J. J.*) SHEIKH MUHAMMAD HASHIM v. RAM SAHAI. **54 I. C. 450.**

—**S. 109 (a)—Final order—Meaning of—Order refusing to Stay proceedings under S. 19 of the Arbitration Act—Not appealable**

In suits for damages under contracts which contained an arbitration clause appellants applied to the Court under S. 19 of the Indian Arbitration Act (Act IX of 1899) to stay the proceedings with a view to the issues being referred to arbitration under the clause. The appellate Court refused a stay but granted leave to appeal to His Majesty in Council holding that their order refusing a stay was a 'final order', within S. 109 (a) C. P. C.

Held, that an order is final only if it finally disposes of the rights of the parties and that the order refusing a stay did not finally dispose of those rights, but left them to be determined by the courts in the ordinary way. The appeals to the Board was therefore incompetent. (1891) 1 Q. B. 734. (C. A.) and (1903) 1 K. B. 547. (C. A.) approved. (*Viscount Cave*) FIRM OF RAMACHAND MANJIMAL v. FIRM OF GOVERN-DHANDAS VISHNINDAS RATAN CHAND.

39 M. L. J. 27 : 12 L. W. 15 : 24 C. W. N. 721 : 18 A. L. J. 591 : 22 Bom. L. R. 606 : 28 M. L. T. 87 : 56 I. C. 302 : 47 I. A. 124. P. C.

—**S. 109 (a)—Final order—Probate application—Decision as to locus standi of applicant.**

An order is final within the meaning of S. 109 of the Code of Civil Procedure, if it finally disposes of the rights of the parties. Where, on application of the Benares Hindu University for probate of the will of a testator, the Judicial Commissioner's Court held in appeal that the University was a juridical person legally competent to act as executor and to apply for probate and remanded the case for trial on the merits, *held*, that the question whether, being competent to apply, the University is entitled to grant of probate still remains outstanding and the order of the Judicial Commissioner's Court was not a final order within the meaning of S. 109 of the Code of Civil Procedure. 18 A. L. J. 591 foll. 6 L. J. 70 ref. (*Zindsay and Wazir Hasan, A. J.*) SRI KRISHNA DAS v. THE BENARES HINDU UNIVERSITY. **23 O. C. 324.**

—**S. 109. (C)—Privy Council—Leave to appeal—Question of fact "Decree or order" meaning of—Judges coming to different conclusions on vital matters—Effect of—**

Under S. 109 (C) C.P.C. a High Court can if persuaded that a case is a fit one for appeal to the Privy Council grant leave to appeal in any case even upon a question of fact.

The words "any decree or order" in S. 109 (c) C. P. C. do not mean any decree or order other than a decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction.

C. P. CODE, (1908) S. 110.

Where two judges have arrived at diametrically opposite conclusions on the vital question on which the suit should be decided the case is a fit one for appeal to his Majesty in Council. (*Stuart and Lyle, A. J. C. J.*) SHEO BAHADUR SINGH v. BENI BAHADUR SINGH. **54 I. C. 828.**

—**Ss. 110 and 149—Confirming judgment—Dismissal for insufficiency of court fee—Leave to appeal—Substantial question of law.**

A decree of the High Court dismissing an appeal on account of insufficiency of Court-fee is one affirming the decree of the first Court within S. 110 C. P. C.

A refusal by the High Court to show any indulgence under S. 149 C. P. C. is not a question of law. (*Scott-Smith and Wilberforce, J. J.*) MUSAMMAT SATTO v. AMAR SINGH. **1 Lah. 220 : I. P. L. R. 1920 : 1 Lah. L. J. 69 : 54 I. C. 400.**

—**S. 110—Consent decree—Not appealable.**

No appeal lies against a consent decree to His Majesty in Council and leave to appeal cannot be granted. (*Dawson-Miller, C. J. and Mullick, J.*) LACHMI NARAYAN MARWARI v. BAL MAKUND MARWARI.

5 Pat. L. J. 383 : 1 Pat. L. T. 599 : (1920) Pat. 349 : 57 I. C. 245.

—**S. 110—Privy Council—Leave to appeal to—Decree of lower court confirmed on appeal—New case, on application for leave.**

The value of the subject-matter in a suit exceeded Rs. 10,000, and the decision of the first Court was affirmed on appeal by the High Court. The appellant applied for leave to apply to His Majesty in Council, taking up a position that was not taken up in the argument of the appeal in the High Court; *Held*, that the case was not a fit one for the grant of a certificate for leave to appeal to His Majesty in Council. (*Grimwood Mears C. J. and Tudball, J.*) MAINA BIBI v. WASI AHMAD. **58 I. C. 179.**

—**S. 110—Question of general importance—Interpretation of a Privy Council decision.**

Where there is a conflict of Judicial opinion as to what was intended to be laid down in a decision of the Privy Council and as to the effect of the decision the question is one of general importance to justify the grant of a certificate under S. 110 C. P. C. for leave to appeal to His Majesty in Council. (*Mears, C. J. and Banerji, J.*) BRIJ NARAIN RAI v. MANGLA PRASAD RAI. **56 I. C. 526.**

—**S. 110—Valuation—Addition of interest.**

In calculating the value of the subject-matter of a suit for the purpose of an appeal to the Privy Council the appellant is not entitled to add the interest to the decretal amount in order

C. P. CODE, (1908) S 110

to bring the value up to Rs 10,000 (*Sir Grimwood Mears, C. J. and Rafique, J.*) **SAHU RAM KUMAR v. MOHAMMAD YAKUB.** 42 ALL 445 : 55 I C 976.

—**S 110—Valuation of subject-matter—Decree upheld in part—Privy Council.**

Plaintiff sued for recovery of Rs 8,740 being the balance of monies advanced for the purchase of sleepers and not accounted for and also claimed Rs 7,789—15—6 as damages for breach of contract. Plff. obtained a decree for Rs 4,783 on account of the advance and Rs 11,908—4—0 as damages. The High Court on appeal upheld the decree for Rs 4,783 but the claim for damages was dismissed. Plaintiff applied for a certificate under S. 110 of the Civil Procedure Code to appeal to His Majesty in Council.

Held, that the decree for Rs. 4,783 having been upheld, that sum could not be questioned on appeal. As the subject-matter in dispute on appeal to the Privy Council was not more than Rs. 7,789—15—6 amount he claimed on account of damages the proposed appeal did not satisfy the conditions laid down by S. 110 of the Civil Procedure Code. (*Tudball and Rafique, JJ.*) **SHEIKH MUHAMMAD HABIBULLAH v. UMAR DARAZALI** 57 I. C. 40.

—**S. 110—Value of claim—Value at the date of the High Court's decree.**

For the purposes of appeal to His Majesty in Council under S. 110 of the Civil Procedure Code the value of the share which the appellant claims and not the value of the entire family property is the test. Such value ought to be taken as at the date of the decree of the High Court under appeal (*Shah and Hayward, JJ.*) **RAOJI BHIKAJI KONDKAR v. LAXMIBAI ANANT KONDKAR** 44 Bom. 104 : 22 Bom. L. R. 243 : 55 I. C. 972.

—**S. 115 and O. 34, R. 5 (2)—Application for decree absolute—Objection—Declining to entertain—Revision.**

Where in a mortgage suit plff. applied for a decree absolute under O. 34, R. 5 (2) C. P. C. and the deft. filed objections, held, that an application in revision did not lie to the High Court against an order declining to entertain the objections and making the decrees absolute. (*Das and Adami, JJ.*) **KUMAR GANGANAND SINGH v. RAI PIRTHI CHAND BAHADUR.** 5 Pat. L. J. 342.

—**S. 115—Arbitration—Award—Coercion—Use of threat by Court—Award liable to be set aside in revision. See ARBITRATION, AWARD.** 18 A. L. J. 952.

—**S. 115—Arbitration—Award—Revision—Grounds for interference.**

The High Court is reluctant to interfere on revision in arbitration cases unless it is compelled to do so in circumstances of gross and material irregularities.

The Judgment of the Lower Appellate Court being entirely based on inaccuracies or

C. P. CODE, (1908) S. 115.

m'sunderstandings is vitiated thereby and cannot be upheld. (*Wilberforce, J.*) **FIRM OF KESAR MAL SHANKAR DAS v. HUKAM CHAND BADRI NATH.** 2 Lah. L. J. 681.

—**S. 115 and Sch. II, para 16—Award—Decree without allowing time for objections—No appeal—Revision. See C. P. CODE, SCH. II, PARA 16**

22 Bom. L. R. 1454.

—**S. 115—“Case decided”—Interlocutory order—Staying suit under S. 10, C.P.C.—Revision.**

An application under S. 10 C. P. C for the stay of a suit is not a “case” and an order for stay passed on that application is not the decision of a “case” within S. 115 of the Code, and no revision lies from such an order.

The word “case” in S. 115 not confined to a suit, but it cannot be construed to mean an interlocutory order in a suit although the order may be of such a nature that it cannot be interfered with even under S. 105 of the Code when an appeal is preferred from the final decree in the suit. 32 ALL 623 appl; 17 A. L. J. R. 718. (*Banerji, J.*) **SULTANAT JAHAN BEGAM v. SUNDAR LAL.** 42 ALL 409 : 18 A. L. J. 431 : 58 I. C. 90.

—**S. 115 and O. 9. R. 8—Commissioner—Appointment of in suit—Dismissal of suit before Commissioner's report is made—Revision—Interference—Govt. of India Act S. 107.**

A Court is not competent to dismiss in default a suit in which a Commissioner is appointed and has not made his report as such suit cannot be heard until the commissioner has finished work.

No appeal lies against such order of dismissal but the High Court can set it aside under S. 115 C. P. C or under S. 107 of the Government of India Act. (*Chatterjea and Duval, JJ.*) **SATINDRA NATH BANERJEE v. BANWARI MUKUNDA DASS.** 54 I. C. 568.

—**S. 115—Costs—Order as to if open to revision.**

The High Court will not interfere under S. 115. C. P. Code with an order awarding costs of an adjournment necessitated by the party affected not complying with a provision of the law, when the amount awarded is neither excessive nor unreasonable. (*Kotwal, A. J. C.*) **NANDLAL v. GOVINDLAL.** 57 I. C. 508.

—**S. 115—Cr. P. Code S. 476—Sanction to prosecute by Revenue Court—Interference.**

The High Court has no power, either under S. 115 of the Civil Procedure Code or under S. 439, Criminal Procedure Code, to revise an order passed by a Revenue Court under S. 476, Criminal Procedure Code, directing the trial of a person for an offence. The fact that the order is described as having been passed “in a miscellaneous criminal case” does not make it one passed by a Magistrate, if it is

C. P. CODE, (1908) S. 115.

signed by the officer making it as a Revenue officer. (*Kotwal, A. J. C.*) **MANKLAL v. EMPEROR.**

58 I. C. 913.

—**S. 115—Error of law—Limitation**
—*Not a ground for revision.*

The High Court will not interfere by way of revision of a non-appealable order on the ground that the Court below has wrongly decided the question of limitation raised in the suit. (*Banerji, J.*) **HASHMAT ALI v. MOHAN**

55 I. C. 871.

—**S. 115—Error of law—No ground for revision.**

Where there is no question of jurisdiction or of the court having acted illegally in the exercise of its jurisdiction an application on revision is not maintainable even though the court below had committed an error of law (*Banerji, J.*) **HAR SAHAI MAL v. BRIJ LAL.**

18 A. L. J. 373 : 58 I. C. 182

—**S. 115—Error of law—No revision.**
The High Court will not interfere under S. 115 C. P. C. with a mere error of Law.

The dismissal of a suit for rent on the ground that the holding of which rent is claimed consisted of two plots but only one was described in the plaint is an error of Law. (*Newbould, J.*) **ABINASH CHANDRA CHOUDHURY v. OSMAN BISWAS.**

54 I. C. 757.

—**S. 115 and O. 41, R. 27—Error of law—Reception of additional evidence by appellate court—No revision**

A mistake in law on the part of the appellate court in directing evidence to be tendered which it is not competent to receive is not reviewable by the High Court. (*Mullick and Sultan Ahmed, JJ.*) **GAYA SINGH v. NAME SINGH.**

5 Pat. L. J. 263 : 56 I. C. 983

—**Ss 115 and O. 9, R. 13—Ex parte decree—Setting aside grounds for, not sustainable—revision—Interference by High Court. See C. P. Code, O. 9, R. 13.** **1 Pat. L. T. 69**

—**S. 115—Interference in revision—Ground for.**

If the record were not before a High Court but sufficient materials were before it to induce it to send for the record to correct a gross error apparent on the face of the record the High Court should accede to the application in the exercise of the powers conferred upon it not under S. 115 C. P. C. but under the wider and larger power conferred upon it under S. 107 of the Govt. of India Act. (*Atkinson and Adami, JJ.*) **BRINDABAN CHANDER CHOUBE v. GOUR CHANDRA RAY.** (1920) **Pat. 56 :**

1 Pat. L. T. 467 : 56 I. C. 155.

—**Ss. 115 and O. 41, R. 27—Interlocutory order—Additional evidence—Admission by appellate Court.**

Where an appellate Court ordered the taking of additional evidence *viz.* examining an attesting witness to prove the mortgage bond

C. P. CODE, (1908) S. 115.

in suit, which had not been duly proved in the Trial Court, and the defendant moved the High Court in revision.

Held,—(1) that the High Court could not revise the order under S. 115, there being no question of jurisdiction but only an error of law—jurisdiction must be distinguished from power.

And (2) that *prima facie* the appellate court is not competent to take evidence, under O. 41, R. 27, which the party, if he had been diligent, might have produced in the Trial Court. (*Mullick and Sultan Ahmed, JJ.*) **GANGA SINGH v. NEMO SINGH.**

1 Pat. L. T. 701.

—**S. 115—Interlocutory order—Arbitrary and unjustified—Revision—Order requiring defendant in suit under O. 21, R. 63 to deposit decree amount,**

In execution of M's decree against B for sale on a mortgage the mortgaged property was sold by auction and was purchased by L. Thereupon R. brought a suit against M, B and L for a declaration that the property belonged to him and was not saleable in execution of the said decree. In the course of the suit L applied that M be ordered to deposit the decretal amount which he had realised by the auction sale; as otherwise, in case of R's suit being decreed, L would be unable to get back his purchase money from M who was alleged to be a man of no means. The court made an order accordingly. *Held*, in revision, (1) that the order was arbitrary and unwarranted by law; (2) that a revision lay inasmuch as the order was one which in the event of the plaintiff's getting a decree, the applicant could not assail in appeal therefrom, as the order did not affect in any way the merits of the plaintiff's case, and so the rule against entertaining revisions from interlocutory orders, which could be contested in appeal did not apply. **4 All. 592 dist. (Rafiq, J.) MURTAZA KHAN v. LALTA SINGH.** **18 A. L. J. 486 : 58 I. C. 729.**

—**S. 115—Interlocutory order—Court fee—Revision.**

The High Court will not revise an interlocutory order demanding *ad valorem* Court fee on a plaint as the order of rejection of the plaint under O. 7, R. 11 is appealable. The general practice of the High Court is not to interfere under S. 115 of the C. P. Code when another remedy is available to the petitioner. (*Coutts and Adami, JJ.*) **MUSSAMAT LACHMIBATI KUMARI v. NANDKUMAR SINGH.**

5 Pat. L. J. 400 : 1 P. L. T. 268 : 56 I. C. 649.

—**S. 115—Interlocutory order—Decision on issue as to jurisdiction of Court—Interference by High Court in revision—Punjab Courts Act, S. 44.**

A High Court has power to interfere in revision with an interlocutory order. **40 Ind. Cas. 65 ; 26 P. R. 1917** followed.

C. P. CODE, (1908) S. 115.

Interference on the revision side, however is only permissible when an interlocutory order is so unjust and is likely to put things into so inconvenient a position that irreparable harm would be done to the applicant for revision.

A High Court will interfere with an interlocutory order passed by a subordinate Court, if the question involved is not one of the exercise of discretion but of want of jurisdiction and manifest injustice might otherwise be done.

When a Court comes to an erroneous decision that it has jurisdiction to try a suit the High Court will interfere in revision so as to put matters right at the earliest possible stage (*Broadway, J.*) **SAWAN SINGH v. RAHMAN**

55 I.C. 739

—**S. 115—Interlocutory order—Decision on preliminary issues—No revision**

An application for revision is not entertainable from an order deciding preliminary issues in a suit where such order would be appealable when the suit is finally decided. (*Rafique, and Piggot, JJ.*) **AIDAL SINGH v. PEAKY LAL.**

56 I.C. 248.

—**S. 115—Interlocutory order—Direction to pay advalorem Court-fee—No interference—Other remedy open on appeal from order rejecting plaint under O. 7, R. 11.**

Where the Lower Court decided the issue about Court fees and called upon plaintiff to pay deficit court fee calculating it *ad valorem*.

Held, that the High Court will not interfere under S. 115 as there was another course open and no irremediable harm was suffered by the interlocutory order there being the right of appeal against the order rejecting the plaint. (*Rao and Jwala Prasad, JJ.*) **BHUBANESHWARI PRASAD v. MOHAN LAL.**

1 P.L.T. 5 : 55 I.C. 786.

—**S. 115—Interlocutory orders—Joinder of parties.**

An order allowing joinder of persons claiming adversely to each other is illegal and of a kind which falls within the purview of S. 115 of the C. P. Code. (*Stanyon, A.J.C.*) **AMBADAS v. PANDU.**

57 I.C. 784.

—**S. 115—Interlocutory order—No interference in revision.**

The High Court has no power, under S. 115 of the Civil Procedure Code of 1908, to call for the record of any case which is under trial by a Court subordinate to it. In other words it will not interfere with interlocutory orders passed by such Court in the course of a pending suit. (*Macleod, C.J. and Heaton, J.*) **BAI RAMI v. JAGA DULLABH.**

44 B. 619 : 22 Bom. L.R. 801 : 57 I.C. 556.

—**S. 115—Interlocutory order—Preliminary decree—Order after—Revision.**

In a suit for possession by partition a preliminary decree was passed, on the 4th April 1919, directing partition of the house and declaring that the plaintiffs respondents were

C. P. CODE, (1908) S. 115.

entitled to one moiety. A local commissioner was then appointed to carry out the partition who reported the house was imparable. On the 11th June 1919 the Munsif passed an order to the effect that the plaintiff could choose whether they would take the lower storey of the house for themselves and pay Rs. 200 to the defendant or would allow the defendant, to take the lower storey and be paid Rs. 200 by him. Against this order the plaintiffs respondents preferred an appeal to the District Judge who accepted the appeal and remanded the case. Against this decision of the District Judge defendant preferred an appeal to the High Court. While this appeal was pending in the High Court the Munsif proceeded to pass a final decree.

Held, that the order of the Munsif dated the 11th June, 1919 was an interlocutory one and that no appeal lay to the District Judge, and that no second appeal was competent. 24 C. 725 foll. Inasmuch as there was in existence a final decree which had not been appealed against and which was therefore absolutely final, it would only be equitable to interfere with the decision if there had been a miscarriage of justice. 36 C. 762; 32 A. 225; 18 C. L. J. 321 folio. 89 P. R. 1891 F. B. dist.

Inasmuch as the District Judge entertained an appeal from an interlocutory order, he exercised a jurisdiction not vested in him by law and therefore his order is bad, but the High Court is not bound to interfere on the revision side even when there is a defect of jurisdiction unless failure of justice has directly resulted from such a defect. 36 P. R. 1902 F. B. foll. (*Broadway, J.*) **GANDA MAL v. SUNDAR LAL.**

2 Lah. L.J. 678.

—**S. 115—Interlocutory order—Revision—Power of High Court to interfere so as to avoid waste of time and litigation. See C.P. CODE, S. 20.**

2 Lah. L.J. 555.

—**S. 115—Jurisdiction—Appeal erroneously entertained by lower court—Revision—Interference.**

Where an appeal has been erroneously entertained by the lower court's decree the High Court has jurisdiction under S. 115 C. P. C. to set aside the order of the Appellate Court. (*Beachcroft, J.*) **JOGAI DIDHUR FAKIR v. BARADA KANTA BOSE.**

55 I.C. 653.

—**S. 115—Jurisdiction—Failure to exercise—Omission to consider plea—Revision.**

The failure of a District judge to decide a plea amounts to a refusal to exercise jurisdiction and his decision is liable to be set aside in revision. (*Jwala Prasad, J.*) **MATHURA SINGH v. RATAN SINGH.**

54 I.C. 662.

—**S. 115—Jurisdiction—Failure to exercise—Order returning plaint under S. 23 of the Prov. Sm. C. C. Act. See PROV. Sm. C. C. ACT, S. 23.**

57 I.C. 602.

C. P. CODE, (1908) S. 115.

—S. 115 — Jurisdiction—Revision—Power of High Court. See (1919) *Dig. Col.* 189 *ABDUL AZIZ v. SEKHAR CHAND.*

42 ALL. 18

—S 115 and O 45, R 13—Jurisdiction—Stay of execution conditional on furnishing security within period fixed by Appellate Court—No power to first court to extend time Revision—Interference if justifiable. See C. P. CODE, O. 45, R 13. 24 C. W. N 265

—S' 115—*Jurisdiction—Suit cognizable by Revenue Court—Civil Court taking cognizance of.*

The High Court has jurisdiction to interfere in revision where a Civil Court has wrongly entertained a suit cognizable by a Revenue Court. (*Knox, J*) *TAJAMMAL HUSSAIN v. ALI BAHDUR KHAN.*

23 O. C 281 :
56 I C 946

—S. 115 and O. 38, R. 10—*Material irregularity—Attachment before Judgment—Another decree-holder attaching and carrying away money—Right to sue.*

Pending a suit the plaintiff obtained attachment before judgment. The property attached being of a perishable nature was sold and the sale proceeds set to the credit of the suit. The suit ended in a decree on the 10th April 1916. Before the plaintiff could execute the decree, the defendant who had already obtained, a decree against the judgment-debtor in another suit, attached the amount and took away the money in execution of his decree. The plaintiff having sued to recover the amount that would have been paid to him and the sum attached been rateably distributed, the Court dismissed the suit on application:—

Held, rejecting the application, that there was no material irregularity in the proceedings of the lower court in dismissing the suit, since the plaintiff omitted to confirm the previous attachment, by speedily applying to execute the decree. (*Macleod, C. J. and Fawcett, J.*) *VISHNU v. RAMPRATAP.*

22 Bom. L. R. 1407.

—S. 115—*Material Irregularity—Failure to give opportunity to amend Revision.*

Where a court dismisses a suit refusing an opportunity to amend the plaint if necessary, the High Court is justified in interfering under S. 115 C. P. C.; an error of procedure resulting in a failure of justice is a material irregularity in the exercise of jurisdiction. (*Das, J.*) *MAHARAJA SIR RAMESHWAR SINGH BAHDUR v. SADANAND JHA.* 1 Pat. L. T. 188 : 55 I. C. 445

—S. 115—*Material irregularity—Finding not based on evidence.*

It is the duty of a Court to found its decision upon a consideration of the evidence adduced before it. Where it omits to do so but founds its decision on a consideration that has no basis, it acts in the exercise of its jurisdiction

C. P. CODE, (1908) S. 115.

with material irregularity and its decision is liable to be set aside under S. 115 of the Civil Procedure Code. (*Das, J.*) *JANARDAN MISSIR v. BRIJNANDAN SINGH.* 56 I. C 982.

—S 115—*Material irregularity and illegality—No question of jurisdiction.*

S 115 of the C. P. Code is very limited in scope and its provisions must be construed strictly

A material irregularity or illegality is not in itself sufficient for revision but there must have been at the same time a wrong or irregular exercise of jurisdiction (*Pratt, J C*) *MA E KO v. MA PWA HMI.* 54 I. C 501.

—S. 115—*Material irregularity—Omission to decide real issue—Interference in revision.*

Where there has been no adjudication on a question of law but a distinct burking of the issue and a refusal on the part of the Court to follow a Statute of the Legislature the High Court will in revision, interfere. (*Broadway, J*) *BANO MAL v. BANO MAL.* 55 I. C. 55.

—Ss. 115 and 24—*Material irregularity—Transfer on suit on application of party without notice to opposite side—Revision—Interference.* See C. P. CODE, Ss. 24 and 115. 18 A. L. J 351.

—S. 115—*Order under S. 479 Cr. P Code—Interference in revision under S. 115 C. P. C. See Cr. P. CODE, Ss. 139 and 476* 16 N. L. R. 23.

—S. 115—*Other remedy open—Maintainability* See. C. P. CODE, S. 2 (2). 1 Pat. L. T. 296

—S. 115 and O. 11, R. 2—*Other remedy open—Order disallowing interrogatories—No interference in revision—Remedy by appeal from decree.* See C. P. CODE, Ss. 2(2) 96 AND 115. 58 I. C. 721.

—S. 115—*Probate—Caveat—Rejection of, on the ground that Caveator had no locus standi—Order not appealable—Revision—Interference by High Court.* See PROB AND ADMIN. ACT, Ss. 70 AND 86. 24 C. W. N 318.

—S. 115—*Proceedings under the Legal Practitioners Act—No power to revise.*

The High Court in its revisional jurisdiction has no power to interfere under S. 115 with an order under S. 36 of the Legal Practitioners Act.

The enquiry under the Legal Practitioners Act is more in the nature of a departmental inquiry and it is enough if it is conducted in such a way that the officer inquiring acts with substantial justice and gives the person against whom proceedings are being taken an opportunity to show cause. (*Kennedy and Raymond, A. J. C.*) *IN RE THE LEGAL PRACTITIONER'S ACT (XVIII OF 1879).* 13 S. L. R. 212.

C. P. CODE, (1908) S. 115.

—**S. 115**—Religious Endowments Act S. 5—Order of Dt. Judge under—Revision. See REL. ENDOWMENTS ACT, Ss

18 A. L J. 897.

—**S. 115**—Right to apply—Intervenor in proceedings under S. 138 of the Oudh Rent Act.

An intervenor in a rent suit under S. 138 of the Oudh Rent Act is not entitled to question the order of the Rent Court by means of an application for revision under S. 115 of the C. P. Code (*Stuart and Kanhaiya Lal, A. J. C.*) MUSSAMMAT KANIZ FIZZAH BIBI v. TIRLOKI NATH. **57 I C. 480**

—**S. 115**—Summary proceedings—Remedy by suit open—Collector's decision under S. 23 of the Mamlatdar's Courts Act.

The High Court will be slow to exercise its powers of revision under S. 115 of the Civil Procedure Code, unless the party applying to the Court has no other remedy, it will not exercise these powers where the proceedings which are sought to be revised are purely summary proceedings which do not finally decide the dispute between the parties. (*Macleod, C. J. and Heaton, J.*) IRBASAPPA v. BASANGOWDA.

44 Bom. 595 : 22 Bom. L. R. 746 : 57 I.C. 432.

—**S. 135 and O. 38, Rr. 2 and 3**—Surety for appearance of defendant—Initiation of proceedings under O. 38, R. 3 when defendant appears to defend his case—Compromise decree in suit—Surety if discharged from liability—Contract Act, S. 135. See (1919) DIG COL. 194. ODAYAMANGALATH APPUNNI NAIR v. ISACK MACKADAN. **43 Mad. 272**

—**S. 141 O. 9, R. 18**—Dismissal for default of application to set aside *ex parte* decree—Restoration—Procedure—Limitation.

On the 4th July 1919 debts appl'd to set aside an *ex parte* decree passed on 13th January 1919 but the application was dismissed for default on the 16th October. On the 25th November debts made a fresh application.

Held, that the application of the 25th November should be treated as one for the restoration of the application of the 4th July and as such was entitleable the procedure laid down in O 9, R. 13, C. P. C. being applicable to it by the operation of S. 141 of the Code; and (2) that the application was governed by Art. 181 of the Lim. Act and was within time. (*Martineau, J.*) MAULA BAKHSH v. RAMDAS. **2 Lah. L. T. 627 : 56 I. C. 25.**

—**S. 141 and O. 9, R. 8**—Dismissal of suit for default—Application for restoration dismissed for default—Restoration.

The Plaintiff's suit was dismissed on the 9th October 1918 by the senior Subordinate Judge, under O. 9, R. 8, C. P. C. owing to the absence of the plaintiff and his pleader. An application for restoration of suit was made the same day.

On the 22nd November this application was consigned to the Record Room in default of

C. P. CODE, (1908) S. 144

plaintiff's appearance. On the 19th December the plaintiff made another application asking for the restoration of the suit which he wrongly described as one for review of the order of 22nd November. This last application was dismissed by the successor in office of the previous judge on the ground that he had no jurisdiction to entertain the review.

Held, that S. 141 C. P. C would cover such a case 10 I. C. 765 foll.

Justice should not be denied on some technical objection with regard to the introduction of the word "review" when as a matter of fact the application itself showed that it was an application for restoration of the suit.

It is not necessary in every case to have the support of a Section of the C. P. Code, to empower a Court to pass an order not expressly, or impliedly forbidden and which is essential in the interest of justice, inasmuch as the provisions of the Civil Procedure Code are by no means exhaustive. 33 C. 927 at p. 932 followed. (*Petman, J.J.*) ABDUL RAHMAN SHAH v. SHAHANA.

1 Lah. 339 : 1 Lah. L. J. 188 : 58 I. C. 748.

—**S. 141 and O. 32**—probate proceedings—Minor—Service of citation on—Provisions of O. 32, C.P.C. how far applicable. See PROBATE. **24 C. W. N. 541.**

—**S. 141**—Proceedings under the Companies Act—Applicability of the provisions of the C. P. Code. See COMPANIES ACT, Ss 110 & 169. **55 I C 820.**

—**S. 144**—Decree awarding costs—Realisation of costs—Reversal of decree—Restitution—Duty of court.

A party realising costs awarded to him under a decree must refund the amount on reversal of the decree, quite apart from the fact that property in the suit was given to a charity or applied to any other purpose. Under S. 144 C. P. C. the court is bound to restore the parties to the position which they would have occupied but for the decree which was subsequently reversed. (*Knox, J.*) LALA ISHRI MAL v. UMRAO SINGH. **54 I C 816.**

—**Ss. 144 and 47**—*Ex parte* decree—Execution—*Ex parte* decree set aside—Restitution of property—Court which passed the decree.

The plaintiff obtained, on 27-11-1915 an *ex parte* decree in the Poona Court which the defendant applied to have set aside on 25-3-1916. On the 17th April 1916, the plaintiff recovered possession of the property in execution of the decree. The *ex parte* decree was set aside on the 1st July 1916 and the suit transferred to the Haveli Court for trial. The defendant applied to the Poona Court for restoration of the property but the Court dismissed the application on the ground that the application should have been made to the

C. P. CODE, (1908) S 144.

Haveli Court, as the Poona Court had no jurisdiction to entertain it. Held, (1) that the defendant, who applied for restitution, was entitled to have the property restored to him when the decree under which the plaintiff got possession had been set aside; and

(2) that the Poona Court which originally passed the decree, had jurisdiction to entertain the application. (*Shah and Crump, JJ.*) M. K. SAWMI RAO v. J. J. VALENTINE

44 Bom. 702 : 22 Bom. L. R. 403 :
57 I. C. 125.

Ss. 144, 151 and O. 2, R. 2—Inherent power—C. P. Code O. 2, R. 2—Not applicable

A Court has inherent power to order restitution in a case not covered by S. 144 C. P. C for the obvious reason that where a Court by a temporary injunction deprives a person of what he is legally entitled to, it should *ex-dibitem iustitiae* restore that which he has thus lost and also compensate him for the profits which he has been precluded thereby from earning.

O. 2, R. 2 C.P.C has no application to a case to which S. 144 applies. A suit therefore for mesne profits following on an application for restitution to possession is not precluded. (*Drake Brockman, J. C.*) RADHA v. SAKHU.

54 I. C. 664

Ss. 144 and 151—Inherent power—Stay of execution on security being furnished for mesne profits—Dismissal of appeal—Divorce-holder entitled to mesne profits

The Judgment-debtors pending the hearing of their appeal applied for stay of execution and execution was stayed upon one N. D. giving security for mesne profits of the land decreed. The Judgment-debtor's appeal was dismissed and thereafter the decree holders applied for execution and asked for mesne profits to be allowed to them from the Judgment debtors and N. D., surety. The executing court held that the decree-holders should bring a separate suit for mesne profits and could not recover them in execution proceedings.

Held, that there can be no doubt that the decree-holders are entitled to recover mesne profits in execution proceedings at all events against the Judgment-debtors.

Held, also that the Court had inherent powers to order restitution in a case of this sort.

61 P. R. 1917 foll

The decree-holders by the order of stay of execution passed by the Chief Court were kept out of the enjoyment of the land in suit, and as the appeal of the Judgment-debtors was eventually dismissed the decree-holders are entitled to ask to be put in the same position as they would have been in had the execution of the decree not been stayed. (*Scott-Smith, J.*) KHAIR DIN v. AHMAD.

2 Lah. L. J. 207

C. P. CODE, (1908) S 145

S. 144—Evidence to be taken to ascertain status quo ante.

The object of S. 144 C. P. C. is to restore the status quo ante, which might be done after taking evidence if necessary.

The statement made by a partition Commissioner appointed in a suit in his report as to prior possession is not conclusive. (*Turon and Beachcroft, JJ.*) ALIOR RAHAMAN v. ABDUL SOBAN.

55 I. C. 356.

S. 144—Possession obtained but not in execution of decree—Restoration—Power of Court.

Under S. 144 C. P. Code where a decree-holder gets possession of the property decreed to him otherwise than by executing the decree but under colour thereof, and that decree is set aside on appeal the opposite party is clearly entitled to be replaced in possession.

J. brought a suit for partition of a house, alleging that he and B. jointly owned it. He obtained a preliminary decree for a half share. The defendant appealed. Pending the appeal a final decree for partition was drawn up, under which the lower storey was allotted to J. and J. took exclusive possession thereof without execution. The Appellate Court decided that J. had no title whatever, and dismissed the suit. B.'s son and heir then applied for restitution in respect of the lower storey of the house. Held, that S. 144 applied and that the applicant was entitled to the restitution prayed for. 29 All. 348 foll.

It having been decided by the appellate Court that J. had no title or right to any sort of possession he could not claim, in reply to the application under S. 144 to be placed back in joint possession of the house as before the suit. (*Tudball and Sulaiman, JJ.*) SURYA DATT v. JAMNA DATT.

42 All. 568 :

18 A. L. J. 729 : 57 I. C. 148.

S. 145—Applicability—Surety bound giving charge on property and creating no personal liability—Liability under—Method of enforcing. See (1919) Dig. Col. 197. RAJ RAGHUBAR SINGH v. THAKURJAI INDRA BAHADUR SINGH.

42 All. 158 :

38 M. L. J. 302 : 18 A. L. J. 263 :
22 Bom. L. R. 521 : 55 I. C. 550.

S. 145 and O. 21, R. 43—Attachment of moveable property—Entrustment by aman to a villager—Surety bond—Liability.

Where an attaching officer acting under O. 21, R. 43 of the C. P. Code entrusted the property for safe custody and for production in court to a villager and took a bond with two sureties it is not open to the decree-holder to enforce in execution the bond so taken against the sureties on failure to have the property produced in accordance with his terms. (*Abdur Rahim and Napier, JJ.*) RAJAH OF VENKATAGIRI v. SURAKRISHNA REDDI.

39 M. L. J. 472 : 12 L. W. 329:

(1920) M. W. N. 784

C. P. CODE, (1908) S 145.

Ss. 145 and 55—Liability of surety—Judgment-debtor's failure to file insolvency petition—Effect of

Where a surety undertook to pay the decadal amount to the decree-holder if the Judgment-debtor did not file an insolvency petition in the proper court or if the insolvency petition was rejected and the surety failed to produce the Judgment-debtor, on the failure of the Judgment-debtor to file an insolvency petition the surety is liable to be proceeded against in the same manner as if a decree for the amount decreed against the Judgment-debtor has been passed against himself. No question arises as to whether he had failed to produce the Judgment-debtor upon being called upon to do so. *Held*, on a construction of the bond that the surety's liability was a general one and that the mere fact that the execution proceedings against the judgment-debtor had been dismissed did not bar the decree-holder's application to proceed against the surety.

22 C. W. N. 919 appr.

Obiter : Under the Code of Civil Procedure 1908 if the surety fails to produce the Judgment-debtor during the pendency of execution proceedings the surety is liable even after the dismissal of such proceedings against the Judgment-debtor 14 C. 757 Ref. (*Mullick and Jwala Prasad, JJ.*) DEDHRAJ v. MAHABIR PRASAD.

5 P. L. J. 417:
1 P. L. T. 604 : 57 I. C. 303

S. 145—Scope of—Third party furnishing security on behalf of the judgment-debtor—Suit by surety to cancel the security bond on the ground of fraud if maintainable—C. P. Code S. 47—Applicability of.

A third party who has given security on behalf of a judgment debtor for the due performance of a decree has no independent right of application under S. 47 C. P. C. and cannot therefore apply to the execution court to cancel the security bond on the ground that it was obtained by fraud. His remedy is only by way of suit.

The effect of S. 145 C. P. C. is that the surety may be made a party to the execution proceedings against the principal debtor and an order against the surety is in effect a decree upon his separate contract against him for the payment of money.

The surety is not a party to the suit or to the decree made therein nor does he become a party to the execution proceedings until application is made for an order against him. S. 145 only makes him a party for a limited purpose, namely, for appeal (*Bakewell and Moore, JJ.*) RAMANATHAN PILLAI v. DORAI SWAMI AVYANAK.

40 Mad 325 : 38 M. L. J. 65 :
11 L. W. 45 : (1920) M. W. N. 114 :
27 M. L. T. 207 : 55 I. C. 363.

C. P CODE, (1908) S. 148.

S. 145 and O 21, R. 2—Surety for appearance of judgment-debtor—Money realised from—Satisfaction of decree.

A judgment debtor arrested and imprisoned in execution of a money decree was released on furnishing a security for a sum of Rs. 500, the surety undertaking to produce the judgment-debtor in Court in the event of his not applying to be adjudicated an insolvent within a month. The judgment-debtor failed to apply for adjudication as an insolvent and the surety to produce him :

Held—That the payment of Rs. 500 made by the surety was to be credited against the decree and was not to be made available to the decree holder over and above his decadal amount, 15 Cal. 171 (*Teuon and Newbould, JJ.*) SURENDRA NATH GHOSH v. KESHAB LAL GHOSH.

25 C. W. N. 36

S. 148—Applicability of—Deposit under S. 17 or the Prov. Sm. C. C. Act—Extension of time not permissible. See, PROV. Sm. C. C. ACT, S. 17 (1920) Pat. 203.

S. 148—Applicability of—Prov. Sm. C. C. Act, S. 17—Extension of time for security.

S. 148 of the C. P. Code does not authorise the Court to grant extension of time for filing the security bond, which is an act required by the Prov. Sm. C. C. Act and not by the C. P. Code. (*Das, J.*) RAMCHARITAR RAM v. HASHIM KHAN.

1 P. L. T. 323 : 56 I. C. 810.

S. 148—Extension of time—Pre-emption decree—Purchase money.

S. 148, C. P. C. does not authorise a court to extend the time fixed by a pre-emption decree for payment of the purchase money.

The law will excuse a man from doing that which he could not possibly perform—*Impotensia excusat legem*. In acting on this principle the court will not, however, take into account any situation which has rendered the performance of the condition impossible and which the man has brought about by his own acts and omission with complete knowledge of the consequence that will ensue. (*Wazir Hasan, A. J. C.*) JANGA SINGH v LACHMI NARAIN.

23 O. C. 254 : 57 I. C. 488.

Ss. 148 and 151—Suit for possession—Decree conditional on payment of certain sum—Extension of time—Order without jurisdiction.

In a suit for possession of property by setting aside alienations thereof a decree was passed awarding possession on condition of the plaintiff depositing Rs. 600 within one month. Four days before the expiry of the period the Court upon application by the plaintiff that she could not procure the Rs. 600 without a certified copy of the decree passed an order directing that the time allowed for payment be one month from the date of delivery of a certified copy of the decree to the plaintiff. The Court

C. P. CODE, (1908) S. 149.

also altered its judgment and decree accordingly. Held, in revision that the order extending the time originally fixed by the decree was without jurisdiction and that neither S. 148 nor S. 151 nor O. 34, R. 8 nor O. 47, C. P. C. could justify it. 35 All. 582 (F. B.) followed. 43 Mad. 357 dist. (*Rytes and Gokul Prasad, JJ.*) KANDHAYA SINGH v. MUSAMMAT KUNDAN

42 All 639 : 18 A. L. J. 826 :
57 I. C. 16.

—S. 149—Court-fee—Extension of time for.

A Court would not in its discretion under S. 149 of the C. P. Code grant time for a deficiency in Court-fee to be made up, unless it is satisfied that some grounds exist for the exercise of its discretion; and the principal ground would ordinarily be that a *bona fide* mistake has been made.

Where, however, there is no *bona fide* mistake but a deliberate attempt either to avoid payment of sufficient court fee or to defer the day of payment as long as possible, extension of time will not be granted. (*Scott Smith and Wilberforce, JJ.*) LEKH RAM v. RAMJI DAS. 1 Lah. 234 : 57 I. C. 215

—S. 149—Court-fee—Revision converted into appeal—Limitation

An appeal must be taken to be filed on the date on which the memorandum of appeal is properly stamped.

An appeal was decided by a District Judge in March 1915. A petition for revision against that decision was filed in June 1915. In 1916 after hearing both parties, the Judge in Chambers held that an appeal lay in the case and gave time to the appellants to make up the deficiency in Court-fees on the memorandum of appeal. At the hearing of the appeal before a Division Bench the respondent objected that the appeal was barred by time.

Held, that the order of the Judge in Chambers must be taken to have been made subject to all just exceptions; that the memorandum of appeal must be taken to have been filed on the date on which the deficiency in Court fees was made up and was, consequently, barred by time and that S. 149 of the C. P. C. was inapplicable to the case. (*Scott-Smith and Leslie, JJ.*) UMED ALI v. THE MUNICIPAL COMMITTEE JHANG MAHIANA. 2 Lah. L. J. 486 : 56 I. C. 148.

—S. 149—Order under—Propriety of, not to be questioned on appeal.

An Appellate Court cannot question the propriety of an order under S. 149 of the C. P. C. for the payment of deficit Court-fee if the order is not objected to when it is made, or in the Court which made it. (*Sultan Ahmed, J.*) SURAJ PAL PANDEY v. UTIM PANDEY.

56 I. C. 47.

—S. 149. and O. 7, R. 11 (c)—Plaint—Deficit court-fee—Extension of time.

A suit is not barred by limitation, if the

C. P. CODE, (1908) S. 151.

plaint is filed within time and the deficit Court-fee called for by the Court is paid up even after the time allowed by the Court when the Court accepts the plaint and registers it. No express order extending the time for paying up the deficit Court-fee is necessary. (*Das and Adarni, JJ.*) PAWAN KUMAR CHAND v. DULARI KAUR. 5 P. L. J. 544 : 1 Pat. L. T. 544 : 58 I. C. 216.

—S. 151 and O. 44, R. 1—Appeal to be continued in forma pauperis—Discretion of Court. See (1919) Dig. Col. 200. SOLAYAPPA CHETTY v. LAKSHMANAN CHETTY.

38 M. L. J. 146 : 54 I. C. 761.

—S. 151—Duty of Court to decide case submitted by parties—Inherent power to rescind order.

It is the duty of a Judge to try the causes set down for trial before him and the failure of the Court to decide a case after submission cannot be permitted to defeat the substantial rights of a litigant.

The Court has inherent power to vacate its own order so as to enable it to discharge the duty of determining the controversy between the parties when the prior order proceeded on a mistaken basis. (*Mookerji, J.*) KALYAN SINGH v. RAMGOLAM SINGH. 31 C. L. J. 48 : 56 I. C. 4.

—S. 151—Hearing of appeal after death of respondent—Judgment if a nullity—Application to set aside—Procedure.

S. 151 C. P. C. has no application to a case where an appellate court is asked to set aside the proceedings in an appeal on the ground that on the date of hearing of the appeal the respondent was not living. The correct procedure is to apply within the period of limitation, for a review of the judgment passed in the appeal. (*Pridgeaux, A. J. C.*) GANGADHAR v. JAGANNATH. 54 I. C. 284.

—S. 151—Inherent power—Appellate court—Power to rectify order made by lower court under a misapprehension of fact

On the 23rd May 1919 the High court passed a decree on its original side in favour of the plaintiff. On the 12th May 1919 a receiver was appointed by a District Court of plaintiff's property. The receiver did not know of the suit until after the decree and the Judge of the High Court did not know of the appointment of a receiver when he made the decree. An application was made by the receiver for substitution and for setting aside the order of dismissal of the suit and of the decree dated the 23rd May. It however appeared that there was no order of dismissal of the suit. The learned judge on the application thought that in as much as the suit was dismissed he should exercise his discretion and refuse the application.

Held, that the appellate Court should exercise its inherent power under S. 151, C. P. C.

C. P. CODE, (1908) S. 151.

to make such orders as might be necessary for the ends of justice. (*Fletcher, J.J. NILKANTA GHOSE v. SWARNAMOYEE DASSI.*)

31 C. L. J. 130 : 56 I. C. 726.

—**S. 151—Injunction—Code not exhaustive.**

The C. P. Code is not exhaustive and the Court possesses inherent powers to act *ex-dictio iustitiae* in order to do that real and substantial justice for the administration of which alone it exists.

A person asking the Court to exercise its discretionary jurisdiction must make out a strong case and must show that there is no other remedy open to him by which he can protect himself from the consequences of the injury complained of. (*Shadi Lal and Martineau, JJ. THE FIRM OF MANDHAR LAL MABIR PERSHAD DELHI v. FIRM OF JAI NARAIN BABU LAL.*) **2 Lah. L. J. 283 : 55 I. C. 403.**

—**S 151—Limits to the exercise of, inherent power.**

S. 151 of the C. P. C. does not authorise the court to exercise its inherent powers so as to break the clear provisions of the Lim. Act. (*Chevins and Le Rossignol, JJ. BISSA MAL v. KESAR SINGH.*) **1 Lah. 363 : 2 Lah. L. J. 249 : 58 I. C. 789.**

—**S. 151—Rejection of plaint—Omission to rectify defect in plaint as presented. See C. P. CODE O. 7, R. 11.** **55 I. C. 445.**

—**S. 151 and O. 41, R. 23—Remand—Grounds for exercise of.**

An order under S. 151, C.P.C. must show on the face of it that it is necessary for the ends of justice or to prevent abuse of the process of the Court.

An Appellate Court has inherent power to remand a case, but it is a power which can only be exercised for the ends of justice.

The mere fact that there has not been a proper trial of the case apart from other circumstances in the case, is not sufficient to vest the Appellate Court with jurisdiction to remand the case in the exercise of its inherent power.

The rule is that if the trial has not been proper owing to some neglect on the part of Court the Appellate Court has power to remand the case. But where the neglect or default is on the part of a party to the litigation, the Appellate Court has no such power. (*Das, J. RAI BISHUN DUTT v. RAMJI PROSAD.*)

56 I. C. 834.

—**Ss. 151 and O. 41, Rr 23 and 25—Remand—Inherent power.**

Under its inherent powers in Appellate Court, may remand a case if it thinks that it is necessary for the ends of Justice to do so, even where the case does not come within O. 41 Rr 23 and 25, C.P.C. 44 C. 929; 4 P. L. W. 442 foll. 2 P. L. J. 61 not foll. (*Sultan Ahmed, J. BRIJ MOHAN PATHAK v. DEOBHAN JAN PATHAK.*)

5 P. L. J. 146 : 58 I. C. 664.

C. P. CODE, (1908) S 152.

—**S. 151 and O. 41, Rr. 23 and 25—Remand—Mahomedan Law—Dower—Administration suit.**

S 151, C. P. C recognises the inherent power of Courts to make such orders as are necessary for the interests of the justice and the inherent power extends to orders for remand outside the scope of O. 41 C. P. C.

Where in a suit by a Mahomedan widow against her husband's heirs for a portion of her dower debt, the lower appellate Court remanded the suit with a direction that the plaintiff should bring into hotchpot all the properties of her husband of which she was in possession and that an account should be taken as in an adm'n stration suit, it was held that the order was proper. 19 C. W. N. 502 followed. (*Mullick and Sultan Ahmed, JJ. BIBI AZIZ FATMA v. SYED SHAH KHAIKAT AHMAD.*) **1920 Pat. 222 : 58 I. C. 444.**

—**S 151—Remand Powers of appellate Court not confined to O. 41, Rr. 23 and 25. See C. P. CODE O. 41, RR. 23 AND 25.**

58 I. C. 664.

—**Ss. 151 and 144—Restitution—Inherent power in cases not coming within S. 144 C. P. C. See C. P. CODE Ss. 144 AND 161.**

54 I. C. 664.

—**S. 151—Scope of.**

S. 151 C. P. C. gives no new powers to the courts relating as it does merely to powers that are inherent in all courts. (*Broadway, J. BANO MAL v. BANO MAL.*) **55 I. C. 55.**

—**S. 151—Scope of—Limitation.**

S. 151, C. P. C. is not intended to override the distinct provisions of S. 3 of the Lim. Act. (*Chevins, J. MUSSAMMAT LAL DEVI v. AMAR NATH.*) **57 I. C. 15.**

—**Ss. 152 and 115—Accidental error in Judgment—Power of successor of judge to rectify—Omission—Revision.**

It is open to the successor in office of a judge to rectify an accidental error in the judgment of his predecessor. If the judge declines to do, the High Court might interfere in revision (*Tudball, J. AZIZUR RAHMAN KHAN v. ABDUL HAI KHAN.*) **18 A. L. J. 501 : 55 I. C. 963.**

—**S. 152—Appellate Court—Decree of first court—Proper Court.**

A suit was decreed in part. An appeal by plaintiff against that portion of the decree which dismissed the suit in part was dismissed. Held that an application by the plaintiff to amend the decree to bring it in conformity with the judgment should be made to the trial Court, inasmuch as it relates to a matter which was outside the scope of the appeal. (*Richardson and Shamsul Huda, JJ. KERAMATULLA MEAH v. KERAMATULLA MEAH.*) **57 I. C. 710.**

—**S. 152—Appellate decree—Power to amend—Appeal dismissed under O. 41, R. 11 C. P. C.**

C. P. CODE, (1908) S. 152.

Where a decree is confirmed upon appeal the decree of the original Court becomes merged in the decree of the Appellate Court, and the latter Court alone has jurisdiction to amend the decree even if the appeal had been dismissed under O 11, R 11 C. P. C. (*Prideaux, A. J. C.*) **MUSSAMMAT SILANBI v. MAHADU DANGAR.**

55 I. C. 305.

—**S 152 and O. 47, R. 1—Application for amendment of decree Judgment also attached—Review.**

Where, in a petition for amendment of the decree, the judgment is also attacked the petition is in effect a petition for review as well as a petition for the amendment of the decree. (*Mullick and Sultan Ahmed, JJ.*) **SHREE SAKTI NARAIN SINGH v. BIR SINGH.**

5 P. L. J. 253 : 1 P. L. T. 219 : 58 I. C. 510.

—**S 152—Costs—Omission to provide for—Effect of.**

An application to correct a decree in the matter of costs can be made under S. 152 C. P. C. (*Prideaux, A. J. C.*) **KRISHNA v. MAHADEO.**

54 I. C. 821.

—**S 152—Decree—Amendment—Costs.**

A court has ample powers under S. 152 of the C. P. Code to add an order as to costs in the judgment after it has been pronounced. (*Coutts and Das, JJ.*) **CHEUDHURY SADHO CHARAN SINGH v. GANGESWAR KUER.**

57 I. C. 739.

—**S 152—Order under not appealable**

There is no appeal from an amendment under S. 152 C. P. Code. (*Tuaball and Ryves, JJ.*) **RAJA SARDAR MAHESH PRASAD SINGH v. MUSAMMAT BUDHWANTI.**

54 I. C. 387

—**O. 1, Rr. 1, 8 and 10—Joinder of persons claiming adversely to each other—Effect of.**

The C. P. Code does not give sanction to the joinder as plffs. of rival claimants, each of whom denies the right to the relief of the other. It is essential that each co-plff. should be in harmony with the other.

O. 1, R. 10 of the Code does not empower a Court to add any person as plff. who could not have originally joined, as such, O. 1, R. 8 of the Code does not conflict with this view, (*Stanyon, A. J. C.*) **AMBADAS v. PANDU.**

57 I. C. 784

—**O. 1, R. 3—Suit for declaration that alienation in favour of several alienees is not binding on the revertors—Not bad for misjoinder. See C. P. CODE S. 99 and O. 1, R. 3.**

54 I. C. 512.

—**O. 1, R. 8—Caste property—Fluctuating body of persons—Right to own property—Suit under O. 1, R. 8 C. P. C. to recover property, if maintainable.**

Certain members of the Dhobi Community of Narainda, with the leave of the Court under

C. P. CODE, (1908) O. 1, R. 10.

O. 1, R. 8 C. P. C. sued on behalf of the community for a declaration of its title to an akhra alleged to have been established by the ancestors of the community and for recovery of possession thereof. It was found as a fact that the Dhobi Community of Narainda had been owning the akhra and its properties from time immemorial through panchayats.

Held, that the Dhobi Community of Narainda had the right to hold and manage the property and maintain suits with respect thereto through panchayats, and that the present suit which was properly constituted under O. 1, R. 8. C. P. C should succeed.

Ownership of property by a fluctuating body of persons is recognised in Hindu law, and though there is no case in which the right of a particular caste or community to hold property has been decided, there are observations tending to show that such a body of persons is capable of owning property. 28 Bom. 20 ref.

The fact found in the present case that the akhra and its property were enjoyed by the Dhobi Community of Narainda from time immemorial pointed to a legal origin, and any objection that a right cannot be acquired by a fluctuating body of persons by prescription was inapplicable to the case. L. R. 3 Exch. D 361 ret. (*Chatterjee and Panton; JJ.*) **PROBAAT CHANDRA SEN v. HARI MOHAN DHUPI.** 24 C. W. N. 206 : 54 I. C. 742.

—**O. 1, R. 8—Suit by worshippers—Alienation of temple property by trustee—Declaratory suit.**

It is open to the worshippers of a temple under O. 1, R. 8 C. P. C. to bring a suit for a declaration that a permanent lease of temple property is invalid 40 Mad. 212 (F. B.) 41 Mad. 124 toll. (*Abdur Rahim and Aylng, JJ.*) **VEERAMACHANENI RAMASWAMI v. SUMA PITCHAYYA.** 1920 M. W. N. 393 : 58 I. C. 585.

—**O. 1, R. 10—Addition of parties—Suit to obtain puttah—Rival transferees from original ryot—Duty of Revenue Court to try question of plaintiff's title—Addition of rival transferee as party. See MAD. EST. LAND ACT. Ss. 55 AND 146.**

39 M. L. J. 474.

—**O. 1, R. 10—At any stage of the proceeding—Partition suit—Withdrawal of plaintiff regarding moveables—Preliminary decree regarding immoveables—Petition for transposition of parties.**

Where in a partition suit the plaintiff withdraws his claim for moveables, after a preliminary decree by consent had been passed as regards the immoveable properties, and the Court subsequently allowed the transposition of some of the defendants, as plaintiffs and allowed the suit to proceed regarding the moveables.

Held, that the procedure adopted was correct and fell within the provisions of O. 1, R. 10

C. P. CODE, (1908) O. 1, R. 10.

of the Code. (*Odgers, J.*) **SURAMPALLI RAMAMURTHU v. SURAMPALLI REDDY.**

12 L. W. 563.

—**O. 1 R. 10—Person added as party on his own application—Decree against.**

A Court has no jurisdiction to pass a decree against a person against whom the plaintiff does not seek one, and who is joined as a defendant on his own application. The position of a person who is made a defendant on his own application and that of a person who is so made without any such application are very different in that the former has to make out a *prima facie* case before the plaintiff can be asked to meet it. (*Finalay, J.*) **RAMKRISHNA v. NARAIN.**

56 I. C. 845

—**O. 1, R. 10—Scheme suit—Addition of parties—Power of Court—Advocate general—Addition of, as party. See C. P. CODE S. 92.**

38 M. L. J. 201

—**O. 1, R. 10—Scope of—Suit by Official Liquidator—Bank assets sold—Locus Standi—Right of assignees to be added as co-plaintiffs.**

In a suit by an Official Liquidator to recover a sum of money due to the Bank it was objected by the defendants that the assets of the Bank had been sold and so the Official Liquidator had no right to sue. The assignees put in an application to be added as co-plaintiff but this was refused and the suit was dismissed on the ground that the Official Liquidator had no *locus standi*; the Bank's interest in the debt having been sold. The sale took place on 24th March 1918 and the suit was lodged the next day. According to the conditions of the sale the money was to be paid by certain instalments on 26th March and 1st, May, June and July 1918. Only Rs. 600 was paid in cash on the day of the sale. It was therefore a doubtful point whether the sale was complete on 24th March 1918, and whether the suit was instituted in the name of the wrong person.

Held, that O I, R 10 of C. P. C. was designed to meet this case and no injustice would have been done had the assignees been added as co-plaintiffs.

Even assuming that the sale was complete on the 24th March 1918 still the point was so doubtful that the institution by the liquidator should be regarded as genuine mistake.

The Official Liquidator has a right to appeal in such a case even after the completion of sale. (*Chevins, A. C. J.*) **THE DOABA BANK LTD. v. HIRA LAL.**

2 Lah. L. J. 402.

—**O. 1, R. 18 and O. 23, R. 1—Withdrawal or suit—Grant of leave—Power to convert deft. as plaintiff. See C. P. CODE S. 92.**

12 L. W. 21.

—**O. 2, R. 2—Cause of action—Dismissal of—suit on promissory note—Second suit an accounts—Bar.**

A suit for recovery of money due under a promissory note was filed in the Munsil's court

C P CODE, (1968) O. 2, R. 2.

but dismissed for default of appearance. Another suit was then filed to recover the same money but it was based on entries in the account books. Held that the cause of action was the same and the suit was not maintainable. (*Lindsay and Ryves, JJ.*) **MUNDAR BIBI v. BAIJ NATH PRASAD.**

42 All 193, 18 A. L. J. 81 : 54 I. C. 424.

—**O. 2, R. 2—Causes of action—Identity of—Right to sue for partition.**

The cardinal condition of the applicability of O 2, R. 2, C. P. C. is that the cause of action in both cases shall be identical. Moreover it is essential that the plaintiff should have been bound to sue in the earlier case for the relief for which he prays in the subsequent suit.

The right of an owner in joint property to sue for partition at any time so long as the property shall remain undivided is a continually recurring right. Once the immoveable property in suit has been declared to the common property the plaintiff has a right to come in at any time and ask for partition.

A prior suit for dissolution of partnership and accounts between the same parties was referred to arbitration and an award was passed subsequently. One of them sued for partition of the immoveables according to the share fixed by the award. Held, that though in the first case the plaintiff was bound to sue for partition of the immoveable property, he was not bound to sue for its partition by metes and bounds. The award and the decree passed in accordance therewith did in fact deal with the right of the parties in the immoveable property by declaring it as their property in common tenancy in equal shares.

The present suit was not one between partners for dissolution of partnership and for rendition of partnership accounts, but was one between tenants-in-common for *mesne profits* and partition of the common property. The first suit was no bar to the present suit because there was no identity of causes of action in the two suits. (*Chevins, C. J. and Martineau, J.*) **ZIA-UL-HAQ v. MUHAMMAD IBRAHIM.**

2 Lah. L. J. 528 : 56 I. C. 701.

—**O. 2, R. 2—Causes of action—Mortgage—Suit for possession—Subsequent suit for mortgage money.**

O. 2, R. 2, C. P. C. is directed against two evils, the splitting of claims and the splitting of remedies. If a man omits from his suit a portion of his claim, he shall not afterwards sue in respect of it; if he omits one of his remedies, he cannot afterwards pursue it. 25 B. 161 foll.

Plffs. sued defts. for recovery of mortgage money with interest alleging that the land of deft. No. 1 was originally mortgaged with possession to deft. No. 2 by three deeds but that these mortgages were transferred to their father by deft. No. 2. They also alleged that deft. No. 1 orally mortgaged this land to the father of plffs. for Rs. 1,000 and that mutation

C. P. CODE, (1908) O. 2, R. 2.

or the mortgage was effected but was set aside on appeal. It appeared that plaintiffs' father had sued debt. No 1 for the possession of the land alleged to have been orally mortgaged to him, but his suit was dismissed on the ground that the mortgage was not proved.

Held, that the plaintiffs ought to have sued for both the remedies the possession of the land or the return of the mortgage money in the alternative in one suit. Having omitted to sue for the mortgage money in the first suit, they were precluded from suing for it now by O. 2, R. 2, C.P.C. (*Scott Smith and Leslie Jones, JJ.*) HARNAM SINGH v. BHOLA SINGH.

56 I. C. 966

O. 2, R. 2—Cause of action—Relinquishment or omission to sue for portion of claim—Subsequent suit—Bar. See (1919) Dig Col. 206. KHARDAH COMPANY LTD v. DURGA CHARAN CHANDRA.

58 I. C. 636.

O. 2, R. 2—Declaration of title—Right of way.

Although in a title suit there may be a claim in the alternative for a right of way, it may also be left to a second suit. Therefore, the fact that right of way was not claimed in a previous title suit would not bar declaration of a right of way either by the rule of *res judicata* or by the provisions of O. 2, R. 2 of the C.P. Code. (*Tcunon and Huda, JJ.*) KALA CHAND MUKHOPADHYA v. JOTINDRA NATH CHAKER-BUTTY.

57 I. C. 852.

O. 2, R. 2—Decree—Satisfaction—Entering up satisfaction by decree holder—Admission of payment—Effect—Proof of payment by Judgment debtor not necessary. See (1919) Dig Col. 237. GAMEN SHAH v. JHANGI RAM.

54 I. C. 257.

O. 2, R. 2—Dekkhan Agriculturists' Relief Act (18 of 1878) and Ss. 12 and 13—Cause of action—Splitting of—Suit on one of two mortgages—Sale in execution of decree—Sale without reservation of other mortgage—Second Suit on another mortgage-bar

Out of the three mortgages which the defendant had executed in favour of the plaintiff as parts of the same transaction, the plaintiff sued only on one of them under the Dekkhan Agriculturists' Relief Act and obtained a decree. In execution of the decree the mortgaged property was sold, free of all incumbrances, and not subject to the other mortgage charges. The sale realized an amount which was in excess of that due under that decree. The plaintiff filed another suit on the two remaining mortgages and sought a decree against the balance of the sale proceeds of the mortgaged property.

Held, that the suit was barred under O. 2, R. 2, of the C. P. Code, coupled with the provisions of Ss. 12 and 13 of the Dekkhan Agriculturists' Relief Act; inasmuch as the plaintiff having omitted to sue on the two mortgage bonds when he sued on the first

C. P. CODE, (1908) O. 2, R. 2.

mortgage bond, he could not again ask the Court to pass a decree on the two mortgage bonds so as to be able to execute that decree against the balance of the sale proceeds of the property, which was sold in execution of the decree. (*Maccod, C. J. and Heaton, J.J.*) DALUCHAND BALARAM MARWADI v. APPI KHEMA SASTE. 22 Bom. L. R. 1093.

O. 2, R. 2—Defences to a suit—Not affected.

The provisions of O. 2, R. 2 of the C. P. Code do not apply to a plea raised in defence. (*Shadi Lal and Broadway, JJ.*) AKBAR HUSSAIN v. RAGNANDAN DAS.

57 I. C. 348.

O. 2, R. 2—Different Causes of action—No bar

O. 2 R. 2, C. P. C. is not a bar to the second suit, inasmuch as the former suit was one for an injunction and value of todder taken away, whereas the present suit is one for a refund of the money advanced and damages for breach of contract. 25 M. 669, foll. (*Broadway, JJ.*) MANI SINGH v. ALLAH DITTA.

2 Lah L. J. 304.

O. 2, R. 2—Mortgage—Stipulation for payment of interest—Default—Option to sue for interest or possession—First suit for interest—Second suit for possession on happening of subsequent default.

A mortgagee is not debarred by O. 2, R. 2, C. P. C. from suing for the possession of the mortgaged property on the strength of a stipulation conferring upon him the option to sue for interest or for possession in the event of the mortgagor's failure to pay interest at the stipulated time, because on the occurrence of a previous default the mortgagee sued only for interest and not for possession.

123 P. R. 1881; 18 M 257 approved 28 P. R. 1907; 79 P. R. 1886; 16 P. R. 1910; 88 P. R. 1918; 21 B. 267 Ref.

The object of the rule embodied in O. 2, R. 2 is to avoid the splitting of claims and to prevent further litigation and it is based upon solitary doctrine contained in the maxim *nemo debet bis vexari eadem causa*, but a person cannot complain of being twice vexed in respect of the cause, when he has himself given his adversary the option of making one claim or the other, has not conferred upon him the right to make both the claims at the same time.

The rule is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action of different causes of action even though they arise from the same transaction. (41 I. A. 142 foll. (*Shadi Lal, C. J. and Wilberforce, J.J.*) PARMESHRI DAS v. FAKIRIA.

1 Lah. 457 : 2 Lah. L. J. 468.

O. 2, R. 2—Relinquishment of portion of the claim—Contract—Several covenants—Interest on mortgage—Suit for—Subsequent suit for principal—Bar.

C. P. CODE (1908), O. 2, R. 2.

Where a contract contains a number of covenants which are to be performed at different times, the breach of every single covenant constitutes an independent cause of action on which a separate suit can be brought. When however a suit is brought after there has been a breach of several covenants the breach of them all is considered a single cause of action and the plaintiff suing for a breach of one is held to have waived his right of suit on the others.

A mortgage deed provided for payment of principal and interest on a certain day. On default in payment of interest for a certain year, plaintiff brought a suit for interest alone. On default in payment in a subsequent year plaintiff brought a suit for principal and interest.

Held, that the second suit was barred by O. 2, R. 2 of C. P. Code as both suits were based on the same cause of action. (*Maung Kin, J.*) SHWE HMAN v. MA E MYA.

12 Bur. L. T. 251 : 56 I. C. 653.

O 2, R 2—Restitution—Application for, in respect of property—No bar to suit for mesne profits. See C. P. CODE Ss 144, 151 etc. 54 I. C. 664

O 2, R 2—Separate contracts in one instrument—Separate suit—No bar.

When two separate contracts are contained in one instrument and the performance of each is secured in a different manner, then each gives rise to a separate cause of action. Although they may be joined in the same suit, O. 2, R. 2 of the C. P. Code would not prevent separate suits being instituted on them. 21 Bom. 267 foll (*Mittra, A. J. C.*) RAIBAHAN v. RAJUJI.

16 N. L. R. 136 : 58 I. C. 18

O. 2, R. 2 and S 47 Suit by auction purchaser to recover possession of property purchased—First suit to recover one portion of property—Another suit to recover some other portion from different debtors—whether lies. Sec. 22 Bom. L. R. 297

O 2, R. 2—Suit for damages for wrongful attachment—Prior suit for declaration of title—No bar.

A person whose property had been wrongly attached sued for a declaration that the property was not liable to attachment, and obtained a decree. Subsequently he sued to recover damages for wrongful attachment: *Held*, that the subsequent suit was not barred by O. 2, R. 2 C. P. C. as although he could have joined a claim for damages with his suit for a declaration he was not bound to do so. (*Stuart, J. C.*) MAIKULAL v. NAZIR AHMAD.

55 I. C. 657.

O. 2, R. 2—Suit for partition—Subsequent suit for profits pendente lite.

A tenancy held by debtors ceased at the date of the institution of a suit for partition and accounts in which there was a claim for rent payable by the debtors in respect of the tenancy up to the date of the institution of the suit. *Held*, a

C. P. CODE (1908), O. 3, R. 1.

claim in a subsequent suit for damages in respect of the subject matter of the same tenancy for the period during which the partition suit was pending in Court is not barred by O. 2, R. 2 C. P. Code (*N. R. Chatterjee and Newbold, JJ.*) KRISTO DAS ROY v. BEHARI LAL SIKDAR 57 I. C. 900

O. 2, R. 2—Suit for specific performance—Omission to ask for delivery of possession—Subsequent suit for possession—Bar See SPEC PERFORMANCE 5 P. L. J. 314.

O 2, R 2 (1)—Relinquishment of claim—Appellate Court—Jurisdiction of, not affected.

The relinquishment by a plaintiff of a portion of the claim under O. 2, R. 2 (1) C. P. C. applies primarily to relinquishment before institution of the suit. The rule has no application to any part of a dismissed claim abandoned in appeal. No such abandonment can affect the jurisdiction of the appellate court. (*Stanjon, J. C.*) SHEIKH NUR KHAN v. SHAIKH RAHIM

54 I. C. 655.

O. 2, R 3—Ejectment suit—Different tenants holding different parcels of land—Causes of action not to be joined—Irrregularity—Waiver of objection to.

It is not permissible for a plaintiff to unite in the same litigation several suits, against separate defendants. A single suit to eject different tenants holding different parcels of land is bad for misjoinder. Where, however, the plaintiff adopts the procedure he cannot be heard to object to the use of evidence to which the irregularity of his procedure has given relevance (*Sir Lawrence Jenkins*) SETURATNAM IYER v. VENKATACHALLA GOUDAN.

43 Mad. 567 : 38 M. L. J. 476 : 18 A. L. J. 707 : 27 M. L. T. 102 : 11 L. W. 399 : 22 Bom. L. R. 578 : (1920) M. W. N. 61 : 56 I. C. 117 : 47 I. A. 76 (P. C.)

O 3, Rr. 1 and 2 and O. 41, R 1—Appeal—Presentation by agent—Power of attorney not signed by party or his agent—Subsequent signing effect of.

An appeal was presented by a pleader whose power of attorney was not thumb marked or signed by the appellant or his agent till after limitation had expired.

Held, that the omission to sign the power of attorney was obviously an oversight and the subsequent signing cured the defect and consequently the appeal was properly presented. 22 A 55; 40 A 147 ; 36 A 46 P. C., J. C. S. O. C. J.) KHAIRA v. NATHU. 55 I. C. 990.

O 3, R 1 and O. 41, R 1—Appeal—Presentation of, by pleader without vakalat invalid.

The presentation of a memorandum of appeal by a vakil without any authority in the shape of a *Vakalatnam* is not valid

C. P. CODE (1908), O. 3, R. 1.

presentation. (*Roc and Coutts, J.J.*) SHEIKH PALAT v. SARWAN SAHU. 55 I. C. 271.

—O 3, R 1 and O. 16—*Party desiring to examine his opponent as a witness—Procedure*

Where one party desires the presence of the opposite party in court for the purpose of examining him as a witness the proper procedure to adopt is the one under O. 16 and not the one under the proviso to O 3, R I. C. P. C (*Krishnan, J.*) AYYA NADAN v. THENAMMAL

27 M. L. T. 171 : (1920) M. W. N 241 : 11 L. W. 289 : 55 I. C. 945

—O. 3, R. 4—*Vakalatnamah—Pleader's name—Omission of—Presentation by pleader, if valid.*

A party delivered a *vakalatnama* to a pleader duly signed by him but omitted the name of the pleader in the body of the *vakalatnama*: Held, that the pleader had implied authority to fill in the details and if the Pleader simultaneously accepted the *vakalatnama* and signed his name in token of acceptance, this was a sufficient compliance with the provisions of the Law.

If in such a case the Pleader presented an appeal the omission of his name in the body of the *vakalatnama* would not invalidate the presentation of the appeal. (*Sittiri, A. J. C.*) MUSSAMMAT MASUMBI v. DONGAR SINGH.

55 I. C. 415.

—O. 5, Rr. 12 and 20—*Pardanashin lady—Service of summonses.*

As it is not always practicable to effect personal service on a pardanashin lady, the affixing of a summons at the lady's residence may be taken to be sufficient service, (*Kanhaiya, Lal A. J. C.*) KHANAM v. MUSSAMMAT HUSNARA BEGAM. 57 I. C. 594.

—O. 5, Rr. 17 and 20—*Substituted service when effectual—Order of Court.*

In the absence of an order passed by the Court under O. 5, R. 20, C. P. C. for effecting substituted service, there is no legal service as contemplated by the C. P. Code. (*Shadilal and Wilberforce, J.J.*) BARKAT ULLAH v. FAZAL MAULA. 55 I. C. 824.

—O 6, R. 4—*Fraud—General allegations insufficient.*

O. 6, R. 4 C. P. C. clearly requires that a party relying upon fraud must state the particulars of the fraud in the pleadings. General objections, however strong, are insufficient and must be entirely disregarded. (*Jwala Prasad, J.*) MAHARANI JANKI KUER v. MAHABIR SINGH. 58 I. C. 317.

—O. 6, R. 5—*Pleadings—Averments in, not precise—omission to apply for particulars, effect of—Waiver. See (1979) Dig. Col. 211. PREM SUKH DASS v. RAMBHUIJHAWAN MAHTON.*

1 P. L. T. 34.

C. P CODE (1908), O. 6, R 17.

—O. 6, R. 7—*Picadings—Court entitled to ignore if in contravention of law—Remand*

Where the pleadings contravene O. 6, R. 7, C. P. C. the Court would be justified in ignoring them. The fact that it does so without recording any order of rejection, is not a sufficient ground for remanding the case for retrial, as it is immaterial whether the Court records an order rejecting the pleadings or not. (*Macnair, A. J. C.*) GOVIND SINGH v. MUNGALI. 57 I. C. 684.

—O. 6, R. 17—*Amendment of plaint—Appellate Court—Powers of.*

Plaintiff sued for pre-emption and possession of certain land transferred under an *adhlapi* tenure. The first Court found in favour of the plaintiff on all the issues, but dismissed the suit on the ground that plaintiff had not stated in the plaint that he was prepared to perform all the conditions attaching to the *adhlapi* tenure. An application for amendment of the plaint was rejected as having been made too late.

Held, that the Appellate Court had ample power to allow an amendment which did not offend against any provision of the law; and that the amendment allowed in the present by the Dt. Judge on appeal did not alter the nature of the suit and that it was a fit case in which the amendment ought to have been allowed. (*Abdul Raof, J.*) SADDA KHAN v. SULTAN KHAN. 58 I. C. 965.

—O 6, R. 17 and O. 21, R. 103—*Amendment of plaint—Defendant holding under a mortgage—Suit for possession—Redemption suit—Conversion into.*

The plaintiff who held a decree, was in seeking to recover possession of the property in execution of the decree, obstructed by the defendant who claimed to be a mortgagee in possession. Thereupon, the plaintiff filed a suit, under O. 21, R. 103 of the C. P. C. to establish his right to the present possession of the property alleging that the defendant's mortgage is sham. At the trial of the suit however, it was found that the mortgage in favour of the defendant was valid and subsisting, whereupon the plaintiff applied to convert his suit into one for redemption:—

Held, that the plaintiff could not be allowed to amend his plaint in the manner desired by him; for the suit was really one to get rid of the mortgage in favour of the defendant, and having failed to do that he wanted to turn round and to alter the nature of the suit to make it one based on the validity of the mortgage the only question being what amount should the plaintiff pay to redeem the mortgage. (*Macleod, C. J. and Heaton, J.*) LAXMISHANKAR v. HANJABHAI. 44 Bom. 515 : 22 Bom. L. R. 735 : 57 I. C. 426.

C. P. CODE (1908), O. 6, R. 17.

—**O. 6, R. 17—Amendment of plaint—Suit for declaration of title—Possession—Amendment.**

Where a plff during the pendency of a suit for declaration of title alleged he has lost possession he must be allowed to amend his plaint and ask for possession (*Chetis and Wilberforce, JJ.*) KARAM DAD v. HUSSAIN BAKHSHI.

56 I. C. 458.

—**O. 6, R. 17—Plaint—Amendment—Claim for relief against party exonerated in court below—Amendment not to be allowed in second appeal See B. T. ACT SCH III ART 3**

58 I. C. 581

—**O. 6, R. 17—Pleadings—Amendment—Late Stage of trial—New issue involving evidence—Custom against adoption.**

Where in a suit contesting an adoption, plaintiff applied after a considerable body of evidence had been taken to amend the plaint for the purpose of alleging that the ancestors of the adoptor were originally non-Hindus, who in course of time adopted certain customs in vogue amongst the Hindus, but that they did not recognise the custom of adoption. Held, that the plaintiff could not be allowed to amend the plaint at that stage; evidence however was admissible to show the origin of the community to which the plaintiff's ancestors belonged as there was nothing in the plaint as originally filed, which was irreconcilable with such evidence and the evidence was relevant to an issue which had been framed to determine whether the estate was governed by a custom which barred inheritance by adopted sons (*Chapman and Atkinson, JJ.*) SHAH DEO NARAIN DAS v. KUSUM KUMARI.

5 P. L J 164.

—**O. 6, R. 17—Pleadings—Amendment of—Power of Court to allow so as to defeat plea of limitation.**

A power of amendment should not as a rule be exercised where its effect is to take away from a defendant a legal right which has accrued to him by lapse of time but there are cases where such considerations are outweighed by the special circumstances of the case. (*Lord Buckmaster*) CHARANDAS v. AMIR KHAN.

39 M. L. J. 195.

28 M. L. T. 149 : 18 A. L. J. 1095 :

22 Bom. L. R. 1370 : 57 I. C. 606 ;

47 I. A. 255. (P.C.)

—**O. 6, R. 17—Pleading—Amendment of—Powers of Court.**

A suit was instituted as a suit for partition but the Court held that the Court-fee of Rs. 10 paid was insufficient as the plffs. were out of possession at the date of the suit. Advalorem Court-fees were thereupon paid but no amendment was made of the plaint and an application for the purpose filed at the hearing was rejected as the application did not contain all the elements necessary to convert the suit into a suit for recovery of possession.

C. P. CODE (1908), O. 7, R. 9.

Held, that O. 6, R. 17, C. P. C. gives ample power to the Court to give leave to the parties to amend the pleadings but such leave should not be given where the amendment would prejudice the opposite party. (*Charterjee and Duval, JJ.*) REBATI RAMAN BASAK v. HARISH CHANDRA BASAK

24 C. W. N. 749 58 I. C. 665.

—**O. 6, R. 17—Pleadings—Amendment—Principles regulating.**

The law relating to the amendment of pleadings, as contained in O. 6, R. 17 confers a plenary authority upon the court to allow a party to alter or amend his pleadings in such manner and upon such terms as may be just and the amendment may be allowed at any stage of the proceedings.

An amendment should always be allowed if thereby the real and substantial question can be raised between the parties and multiplicity of legal proceedings avoided. (*Shadi Lal and Broadway, JJ.*) DARBARI LAL v. WASU MALIK.

56 I. C. 115.

—**O. 6, R. 17—Suit for declaration—Consequential relief—Prayer for, essential—Opportunity to amend to be given to plff. See SPEC. REL. ACT 42.**

54 I. C. 883.

—**O. 7, R. 6—Applicability of—Suit prima facie barred by limitation. See (1919) Dig Col. 214. KHANDU LAL v. FAZAL.**

I Lah. 89.

—**O. 7, R. 6—Plaint filed after limitation—Time of vacation—Deduction of—Evidence Act, S. 57 (9).**

Though O. 7, R. 6 C. P. C. requires the plaint in a suit filed after expiry of the period of limitation to show on what ground exemption is claimed yet an omission to do so in respect of a suit filed on the day the Court re-opened after its summer vacation (the period of limitation for bringing which had expired during the vacation) would not entail dismissal of the suit. S. 57 (9) of the Evidence Act empowers the Court to take judicial notice of any public holidays notified in the Official Gazette and the plaintiff is entitled to presume that the Court would take such judicial notice. At any rate the Court should in such a case not dismiss the suit but require the plaint to be amended. (*Batten, J.*) TEKCHAND v. PATTO.

58 I. C. 926.

—**O. 7, R. 9 and 14 and O. 11, R. 15—Inspection of plff's documents before filing written statement—Right of deft.—Documents sued on and documents relied on as evidence.**

There is a distinction between documents sued upon and documents relied upon by plffs. Under O. 11 R. 15 C. P. C. a deft. is not entitled as of right to have inspection of the documents relied upon by plff. before filing his written

C. P. CODE (1908), O. 7, R. 10.

statement (*Greaves, J.*) CHANDMULL GANESH-MULL v. DAWANIAJ GANAPATROY

24 C W N 302 : 56 I C 457.

—O 7, R. 10—*Procedure—Appellate Court—When entitled to act under*

Where a claim has been tried and dismissed, the fact that an appeal is preferred only against a part of the decree does not justify the appellate Court to return the plaint under O 7, R. 10 C.P. Code. The rule applies when the suit as originally framed was wrongly so ruled. The abandonment of a claim pendente lite cannot be given retrospective effect so as to vitiate the institution of the suit. (*Stanjon, A J C*) SHEIKH NURKUAN v. SHAIKH RAHIM

54 I C 655

—O 7, R. 10—*Provisions of mandatory duty of Court to return plaint thought not asked for by party. See (1919) Dig Col 215.*

AMBALAVANA PANDARA SANNADHI v. PICCHAK-KUTTI ODAYAN.

(1920) M. W. N 163

—O. 7, R. 10—*Return of plaint to be presented as an application in execution—Power of Court to ignore reliefs asked for*

O. 7, R. 10, C.P. Code empowers a Court to return a plaint for presentation as an application in the Court having jurisdiction to accept it as an application.

There is nothing to prevent a court ignoring a relief as being based on no cause of action and then proceeding to find that the other reliefs are outside its jurisdiction (*Lyle and Ashworth, J.J.*) BALDEO DAS KEDAR NATH v. THE BOMBAY MERCANTILE BANK.

54 I C 364

—O. 7, Rr. 11 and 13—*Rejection of plaint—Order if res-judicata.*

A suit for contribution under a razinama was decreed by the first Court but the Appellate Court rejected the plaint as disclosing no cause of action. Plaintiff instead of appealing against the order brought another suit against the same defendants for contribution. Held, that the finding in the previous suit that plaintiffs have no right to contribution under the razinama is res judicata and hence the second suit must be dismissed as barred by res judicata (*Sadasiva and Napier, JJ.*) SANTHANATHAMMAL v. MINOR ISAKKI SUPPAN ASARI.

(1920) M. W. N. 618 :

12 L. W. 457.

—O 7, R. 11 and O. 17, R. 3—*Rejection of plaint when proper—Defect—Return of plaint for amendment C. P. Code, S. 151.*

A Court has no jurisdiction to either dismiss a suit or reject a plaint merely because the plaint is defective in that it does not comply with a provision of the Law. The proper procedure is to call on plaintiff to cure the defect and on his failure to do so, the Court may proceed to decide the suit forthwith and to dismiss it under O. 17, R. 3 C. P. C. or it

C. P. CODE (1908), O. 8, R. 6.

may reject the plaint under its inherent powers (*Das, J.*) MAHARAJA SIR RAMESWAR SINGH BHADUR v. SADANAND JHA.

1 P L. T. 188 : 55 I C 445.

—O 7, Rr. 14 and 18—*Discovery—Documents relied on by plff.—Production in Court*

A party who sues upon a certain document must produce it at the time he files the plaint and not spring it upon the opposite party a considerable time after when the suit comes on for hearing (*Macleod, C J and Heaton, J.*) GANGADHAR MAHADEV v. KRISHNAJI VISHRAM 44 Bom 625 : 22 Bom. L R 819 : 57 I C 598.

—O. 7, Rr. 14, 17 and 18—*Duty of plff to produce accounts and other documents relied on*

Under O 7, Rr. 14, 17 and 18 C. P. C. it is incumbent on a plaintiff to produce in Court, the accounts or other documents on which he bases his claim when the plaint is filed and if he intends to rely upon any other documents as a piece of evidence in the case he is bound to produce it at the first hearing as is required by O 14, Rr. 1 and 2 C. P. C. (*Rattigan, C J. and Abdul Raof, J.*) RAM SINGH v. RAM CHAND. 1 Lah 6 : 9 P. L. R 1920 : 57 I C 185.

—O 7, R. 18 (2)—*Documents filed by plff.—Use of, for cross-examination of his own witnesses—Propriety of.*

Where document containing depositions of witnesses in a suit bearing on the subject-matter of the suit in which they are produced, are tendered by the plaintiff after the filing of the plaint, but before any of the witnesses are examined, he is entitled to cross-examine witnesses on the basis of the documents, even though the witnesses may have been cited on his behalf.

The expression "defendant's witnesses" in O. 7, R. 18 (2) C. P. C. includes witnesses who have turned hostile to the plaintiff, and may be treated as the adversary's witnesses. (*Mitra, A J C*) SHANKAR v. GOVINDA. 54 I C 311.

—O. 8, R. 3—*Suit on mortgage—Def't. putting plff. to proof of—Effect of.*

If a def't. puts the plff. to a proof of mortgage-deed set up by him, the defendant must be taken to put the plaintiff to proof of the execution, which includes its signing and attestation. (*Ashworth, A J. C.*) SHEIKH MUHAMMAD IBRAHIM v. ALI NABI

54 I. C. 107.

—O 8, R. 6—*Counter claim—Party to a suit alone can make—Costs. See CONTRACT ACT, S. 11.*

38 M. L. J. 353.

—O 8, R. 6—*Set off—Duty of court to try the claim*

The Court is bound to try a claim to set off which falls under the provisions of O. 8, R. 6 of the C. P. Code. (*Abdur Rahim, JJ.*) SUBRAMANIA AIYAR v. DHARMAMBAL AMMAL.

12 L. W. 85 : 57 I C 656.

C. P. CODE (1908), O. 9, R. 2.

—O. 9, R. 2—Failure to file affidavits of service of summons on guardians of minor debtors.—Dismissal for default—Improper.

Plff. failed to file affidavits of service of summons upon the guardians of the two minor debtors and the minors, and the Court passed an order dismissing the suit refusing to grant further time.

Held, that the Court could not dismiss the suit as against the major debtors. What the court should have done was to direct the plff. to proceed w th his suit as aga nst the other debtors, making a note in the order sheet that the decree would not be binding upon the minors. (*Roe and Coutts, JJ*) SURENDRA MOHAN SINGH v. GENA SARDAR.

1 P L T. 125 :
55 I. C. 826.

—O. 9, Rr. 3 and 4—Ascertainment of mesne profits. Dismissal of application for default—Fresh application to superior court

An application for the ascertainment of mesne profits was made to the court which had passed the decree but the amount claimed was in excess of the pecuniary jurisdiction of the Court. The application, was dismissed in default under O 9, Rr. 3 and 4 C. P. C. A fresh application was made to a court having pecuniary jurisdiction and objection was taken that the application was not enterta inable in view of the order dismissing the first application:

Held, that the order dismissing the first application was one made by a court not of competent jurisdiction and that the second application was maintainable. (*Teunon and Beachcroft, JJ*) KAMALA KANTA ROY v. MONARADDI.

58 I. C. 203.

—O. 9, R. 3 and O. 17 Rr. 2 and 3—Disposal under—Court's duty to mention provision under which it acts—Failure to do so—Effect—Adjournment to enable plff. to amend plaint—Omission to do so—Application for further time—Dismissal of suit—Legality—Revision against—C. P. C. S. 115. See (1919) Dig. Col. 218. NAURANG RAM SAHU v. BAKHORI MANDAR.

1 P. L. T. 177.

—O. 9, Rr. 4 and 3—Dismissal for default—Power of another judge to set aside.

On 24th April 1915 the Munsif of Bhera dismissed the suit for default. On the 14th June the plaintiff made an application for the restoration of the case to the Senior Subordinate Judge who sent it for disposal to the Munsif of Sargodha. The latter restored the case to the file and finally passed a decree in plaintiff's favour.

Held, that the Court which can under R. 4 set aside an order dismissing a suit for default is the Court which passed the order of dismissal and that the order of the Munsif of Sargodha setting aside the dismissal of the suit having been passed without jurisdiction all the subsequent proceedings in the suit were *ultra*

C. P. CODE (1908), O. 9, R. 8.

vires and the decree must consequently be set aside. (*Martincau, J*) LACHMAN DAS v. DEVI DIAL. 2 Lah. L. J. 48: 56 I. C. 884.

—O. 9, Rr. 7, 9 and 13—Ex parte procedure—Minor debtor—Omission to appear—guardian's negligence—Application to set aside.

O 9, R. 12 does not merely impose upon the person failing to appear the disabilities contained in the preceding provisions of that order but gives the right to the remedies given by other preceding provisions also.

An application to the Court under O. 9, R. 7. C. P. C can be made through a vakil notwithstanding that the court had decided to proceed *ex parte* owing to the non-appearance of the defendant in person pursuant to an order of Court.

A guardian's laches is a sufficient cause for setting aside an *ex parte* decree or order in the cases of minors. 27 M. L. J. 166 and 6. C. L. R. 69 foll.

Where a Subordinate Judge set aside an order made by his predecessor that a suit should proceed *ex parte* owing to the guardian's failure to produce against the minor defendant in court in pursuance of the court's order on the ground that such non-production was due to the guardian's own laches and did not impose any condition as to the defendant's appearance in person.

Held, that a direction to a party to appear was an order made for the further progress of the suit and to help the court in its proper disposal and decided no right between the parties; that the court could *suo motu* alter it whenever necessary or expedient and that consequently no question of reviewing a predecessor's order or want of jurisdiction arose.

Though in setting aside an order to proceed with the suit *ex parte* under O. 9, R. 7. C. P. C. the court might in its discretion impose a condition as to the defendant's appearance in Court in person an omission to do so was not an improper or irregular exercise of such discretion.

The setting aside of the order to proceed *ex parte* was consequently right (*Krishnan, J*) AVYA NADAN v. THENAMMAL.

27 M. L. T. 171 ;
(1920) M. W. N. 241 ; 11 L. W. 289 ;
55 I. C. 945.

—O. 9, R. 8—Absence of plff. Decree on claim admitted by plff.—Properity of.

If on the date fixed for the hearing of a case the plff. is absent and the Deft. appears, the Court is bound, under O. 9, R. 8 C. P. C. to dismiss the suit for default. It has no jurisdiction to record the defendant's statement and to decree the claim in part. (*Rafique, J*) MATA BUX LAL v. BRIJ MOHAN.

C. P. CODE (1908), O. 9, R. 8.

—O. 9, R. 8.—Dismissal for default—Appointment of Commissioner—Dismissal of suit before report of commissioner is made—Revision—Interference. See C. P. CODE S. 115 and O. 9, R. 8. **54 I C 568.**

—O. 9, R. 8 and O. 43, R. 1 (C)—*Dismissal for default—Restoration—Dismissal of application—Appeal*

An order dismissing a suit owing to the non-appearance of the plaintiff or his pleader is a dismissal for default under O. 9, R. 8 of the C. P. Code. An order dismissing an application for the restoration of the suit is appealable under O. 43, R. 1 (c) of the C. P. Code (*Piggott and Kanhaiya Lal, JJ.*) MAHARAJ SHIBCHARAN DASS v. MAHOMED ZAHUR.

57 I C 245

—O. 9, R. 9 and 13—Application to restore suit—Sufficient cause—*Bona fide* mistake as to date—Inherent powers. See (1919) *Dig. Col.* 229. CHRISTENSEN v MITCHELL. **54 I C 44.**

—O. 9, R. 9—Causes of action—Difference in—First suit by co-sharer for declaration of title and invalidity of alienation—Dismissal—Subsequent suit for partition.

The plaintiffs brought a suit for a declaration of their title to certain properties and for having certain alienations in favour of the defendant declared invalid and not binding on them. They alleged themselves to be co-sharers and in joint possession with the defendant. The suit was dismissed for default under O. 9, R. 9 or the C. P. Code. Subsequently the plaintiffs brought a fresh suit for a declaration of their title to the property, as also for partition and separate possession.

Held, that the subsequent suit was barred by the dismissal of the prior suit for default under O. 9, R. 9 of the C. P. Code.

The cause for action for partition and separate possession does not arise until the plaintiffs decided to separate and the defendants refused or neglected to give them their share. (*Ayling and Krishnan, JJ.*) ASIA BIVI v. SEHU MAHOMED ROWTHER.

39 M L J. 412 : 12 L. W. 431

—O. 9, R. 9—Dismissal for default—Appearance of party but not pleader—Dismissal of suit—Dismissal for default. See C. P. CODE, O. 41, R. 17. **5 P. L. J. 17.**

—O. 9, R. 9—Dismissal for default—Suit for partition—Appeal—Reversal.

On the date fixed for the hearing of the partition suit, the plaintiff and one of his witnesses were alone present. His vakil when asked to pay battra for the arrest of the remaining four witnesses, who though summoned had not appeared, stated that he would do so the next day, whereupon the plaintiff was directed to go on with the suit with such witnesses as he had. The plaintiff's vakil said he had no instructions and the Court disposed of the case.

C. P. CODE (1908), O. 9, R. 13.

Ex parte on the pleadings on the ground that the plaintiff was guilty of gross carelessness. The plaintiff appealed:

Held, (1) that under the circumstances there was no foundation for the finding that the plaintiff was guilty of gross carelessness;

and (2) that it was however his duty to go on with the case as far as he could and that the plaintiff must pay the whole costs of the appeal before it can be allowed. (*Wallis, C J and Seshagiri Aiyar, J.*) KRISHNASWAMI NAYAKAR v. VEERAPPA NAYAKAR. **12 L. W. 500.**

—O. 9, R. 9—Dismissal of suit for default—Power to restore—No sufficient cause within the rule. See (1919) *Dig. Col.* 221. BILASRAI LAXMINARAYAN v CURSONDAS.

44 Bom. 82.

—O. 9, R. 9.—Execution sale—Application to set aside—Dismissal for default.

O. 9, R. 9 C. P. C. does not apply, to an order dismissing for default an application made under O. 21 R. 90 C. P. C. to set aside a sale held in execution of a decree. 17 All. 106 dist (4 P. L. J. 135 Diss) 19 C. W. N. p. 758 foll. (*Lindsay, J. C.*) GAURI v. HINGA. **23 O. C. 349.**

—O. 9, R. 9—Failure to apply within 30 days—Application under O. 47, R. 1—Revision—C. P. Code, S. 115.

A plif who has failed to apply under O. 9, R. 9 of the C. P. Code within thirty days cannot get an extended period of limitation and apply under O. 47, R. 1 of the C. P. Code which is a general provision controlled by the special rule embodied in O. 9, R. 9. A Court acts without jurisdiction in entertaining applications under O. 47, R. 1 on grounds covered by O. 9, R. 9 filed beyond thirty days (*Adami, J.*) RAJA SHEORAJNANDAN SINGH v. GINJANANDAN SINGH. **1 P. L. T. 573 : 58 I. C. 191.**

—O. 9, R. 9.—Suit dismissed for default—Application for restoration by some plaintiffs only—Restoration of suit, whether enures for the benefit of all. See C. P. CODE Ss 64, O. 9, R. 9 etc. **23 O. C. 18.**

—O. 9, R. 12—Minor deft.—Default of appearance.

A defendant, though a minor represented by a guardian is a party to the suit whose production in Court can be compelled by a direction to his guardian and the failure on the part of the guardian to comply with the direction will enable the Court to act under O. 9, R. 12 C. P. C. 28 M. L. J. Dist (*Krishnan, J.*) AYYA NADAN v. THENAMMAL. **27 M. L. T. 171 : (1920) M. W. N. 241 : 11 L. W. 289 : 55 I. C. 945.**

—O. 9, R. 13—Ex parte decree—Application for re-hearing—Conditional order.

In restoring a case for re-hearing under O. 9, R. 13 C. P. C. the court may make it a condition that the decretal amount or some portion thereof be paid into court.

C. P. CODE (1908), O. 9, R. 13.

In cases where there has been no default on the part of the party asking for re-hearing & *g* where he has not been duly served, it is inequitable for the court to impose conditions (*Dawson Miller, C. J. and Das, J.*) SHYAM LAL SAHAI v. RAM NARAIN LAL SETH

5 P. L.J. 420 : 1 Pat. L.T. 443 : 57 I.C. 300

—O. 9, R. 13 and O. 47, R. 1—*Ex parte decree—Application for review, on grounds comprised in O. 9, R. 13—Maintenance of.*

If the circumstances of the case bring an application for review under O. 47, R. 1 of the Civil Procedure Code the fact that an application under O. 9, R. 13 could have been preferred and that it was barred on the date of the review application is no bar to the review. (*Spencer and Krishnan, JJ.*) CHOKKALINGAM CHETTY v. LAKHMANAN CHETTY.

38 M. L.J. 224 : (1920) M. W. N. 228 : 11 L.W. 217 : 55 I.C. 444

—O. 9, R. 13—*Ex parte decree—Application to set aside—Decision on contest against some debtors, and ex parte against others—Appeal by contesting debtors—Application to set aside decree—Jurisdiction to entertain.*

Two of the debtors in a suit were minors represented by their mother as debt. The suit was decided on contest against two of the major debtors, and *ex parte* as against the minors. There was an appeal preferred by one of the major debtors, but neither the minors nor the mother were made parties respondents. After the dismissal of that appeal the minors applied to the Court of first instance to have the *ex parte* decree set aside.

Held, that the application to set aside the *ex parte* decree made in the primary Court lay to that Court and not to the appellate Court. 13 I.C. 377 foll. (*Teunon and Chaudhuri, JJ.*)

ABDUL OHAD v. AMDALI GAZI. 57 I.C. 969.

—O. 9, R. 13—*Ex parte decree—Application to set aside—Dismissal of—No right to re-open decree on the same grounds on appeal.*

Where an application to set aside an *ex parte* decree has been made and rejected and no appeal was filed against that order, it is not open to the defendant to re-open the question in an appeal against the decree in the suit itself. 7 M.I.A. 283 considered. 23 Mad 445 and 30 Mad. 54 ref. (*Abdur Rahim and Oldfield, JJ.*) BADVEL CHINNA ASETHU v. VATTIPALLI KESAVAYYA. 39 M. L.J. 697 :

(1920) M. W. N. 780 : 12 L.W. 507.

—O. 9, R. 13—*Ex parte decree—Non-service of summons—Application to set aside—Dismissal—Fresh suit if competent.*

A party against whom a decree is passed *ex parte* can seek to set it aside by an application under O. 9, R. 13, of the Civil Procedure Code or he can appeal from the decree; but it is not competent to him to start a fresh proceeding to set aside the decree.

C. P. CODE (1908), O. 9, R. 13.

37 Cal 197; 29 All 212 foll. (*Macleod C.J. and Heaton, J.*) IBRAHIM HARUN JAFFER v. JUSUF HUSSAIN JAFFER

22 Bom. L.R. 798 : 57 I.C. 551.

—O. 9, R. 13 and O. 43, R. 1 (d)—*Ex parte decree—Refusal to set aside—Appeal—Power of appellate court to interfere with decree.*

In a suit for recovery of land worth Rs. 400 plff. claimed mesne profits to the extent of Rs. 5,125. The debt. failing to appear the Court granted a decree for recovery of possession of the property in suit and also awarded mesne profits for Rs 1,20 having discarded the evidence of the plff. as to mesne profits but assessing it at the value of the holding itself on its own responsibility and without any evidence and principle as a guide. On an appeal by the debt. from an order requiring to set aside the *ex parte* decree the High Court did not find any reason to interfere with the lower Court's order for possession but interfered with and set aside that portion of the *ex parte* decree relating to the assessment of the mesne profits and directed a further enquiry into the matter of ascertainment of mesne profits on due notice to the debt. (*Atkinson and Adami, JJ.*) BRINDABAN CHANDER CHOUBE v. GOVIND CHANDRA RAY.

(1920) Pat. 56 : 1 Pat. L.T. 467 : 56 I.C. 155.

—O. 9, R. 13—*Ex parte decree—Setting aside—Grounds for—Service on chela, if sufficient*

Defendant applied to set aside the *ex parte* decree on the ground that he was looking for a pleader and was accidentally prevented from being in Court, when the case was called on. The Court allowed the application on the ground that there had been no proper service on the defendant.

Held, that the Court ought not to have disposed of the case on a ground not taken by the defendant himself. Service on the plaintiff's chela was not sufficient service in law (*Lindsay, J. C. J. Sheo Charan Das v. Baij Nath Singh.* 23 O.C. 104 : 57 I.C. 563.

—O. 9, R. 13—*Ex parte decree—Setting aside—Grounds for—Suit or application.*

To impeach an *ex parte* decree not tainted with fraud, the proper remedy is by an appropriate proceeding taken in the suit in which the decree was passed i.e., an application under O. 9, R. 13 of the C.P. Code, to set aside the decree, or an application for review, or an appeal to a superior Court. A separate suit to set aside the decree will not lie. (*Shadi Lal and Wilberforce, JJ.*) JHANDA SINGH v. LACHHMI. 1 Lah. 344 : 2 Lah. L.J. 623 : 56 I.C. 878.

—O. 9, R. 13—*Ex parte decree—Setting aside—Grounds for suppression of summons—Remedy by suit—Fraud.*

A decision that summons was duly served in an application under O. 9, R. 13 C.P. Code is

C. P. CODE (1908), O. 9, R. 13.

res judicata and no fresh suit will lie on the ground that summons had been fraudulently suppressed.

A defendant, who has been duly served w'th summons and fails to contest the suit, which was brought on the basis of a hindnote, cannot be allowed to maint'n a suit on the allegation that the handnote was a forged one, the decision in the previous ex parte suit as to the genuineness of the handnote in suit being *res judicata* in the subsequent suit.

A decree can be set aside on the ground of fraud, but if the question has already been agitated between the same parties and decided by a court of competent jurisdiction the matter is *res judicata* and cannot again be re-opened between the same parties in a subsequent suit.

Duchess of Kingston's case (1776) 2 Smiths Leading cases 745 applied

The fact that previous case had been decided ex parte was immaterial.

Re-South American and Mexican Co., (1895) 1 Ch. D. 27, followed.

The plea that the previous suit was decided on perjured evidence or that the case itself was a false one cannot be called such a fraud as can be raised to set aside a previous decree passed by a court of competent jurisdiction. The fraud must relate to some extrinsic and collateral act.

29 Cal. 395 dist.

I. P. L. T. 119 I. P. L. T. 206 foll. (*Dawson Miller, C. J. and Ross, J.*) JANGAL CHAUDHARY v. LALJIT PARBAN. 1 P. L. T. 735

—O 9, R. 13—Ex-parte decree—Setting aside—Grounds for not sustainable—C. P. Code, S 115—Revision—Interference.

Under O. 9, R. 13 C. P. Code a Court can restore a suit only when the Court is satisfied that deft. was prevented by any sufficient cause from appearing when the suit was called on for hearing and an order of the appellate court directing the re-hearing of a suit without any finding as to the sufficiency of the cause for the non-appearance of the defendant is illegal and without jurisdiction.

Where a Judge passes an order on the assumption of certain facts and those facts are found to be wrong and non-existent the order is clearly without jurisdiction. (*Sultan Ahmed, J. J. RAMESH PRASAD v. GULAB CHAUDHRY.*)

1 P. L. T. 69 :
54 I. C. 945.

—O. 9, R. 13—Minor—Ex parte decree—Setting aside—Grounds for—Negligence of guardian. See DECREE EX PARTE, SETTING ASIDE. 11 L. W. 289.

—O. 11, R. 2—Order disallowing interrogatories—Not a decree—No appeal or revision—Remedy by appeal from decree in suit. See C. P. Code. Ss. 2 (2) 96 and 115.

58 I. C. 721.

C. P. CODE (1908), O. 16, R. 11.

—O. 11, R. 6—Judgment on admissions when to be given—Admission ambiguous and conditional—Effect of See (1919) Dig. Col. 223 KORANALL RAMBULLOBH v. MUNGILAL DALIM CHAND. 54 I. C 836.

—O. 11, Rr. 12, 14, 15, 18 and 21—Production—Discovery—Inspection of documents—Affidavit denying possession—Finality of—Remedy of litigant See C. P. Code, Ss. 32, 115 ETC. 1 P. L. T. 550.

—O. 11, R. 15—Inspection of documents relied on by plff. as evidence—Defendant not entitled to, before filing written statement. See C. P. Code O. 7, Rr. 0 and 24 etc. 24 C W. N. 302.

—O. 14, R. 1—Issues—Duty of court to raise only on pleadings.

In a suit for a declaration that a gift made by a widow shall not affect the plaintiff's reversionary rights, the first Court held that the land was ancestral *qua* plaintiff, that the widow had only a life interest in the property of her deceased husband and had no authority to make the gift. The Lower Appellate Court held that there was no proof that the land was ancestral and that a daughter's son was by custom the heir to the self acquired property in preference to a nephew.

Held, that on the pleadings in the present case (there being no averment in the plaint nor denial in written pleas) no issues arose as to whether the land was ancestral or self acquired, and it cannot be said that the trial court was in error in not framing an issue which did not arise on the pleadings (*Scott-Smith, J.*) FATEH MAHAMMED v. IMAM-UD-DIN.

2 Lah. L. J. 183.

—O. 16, R. 10—Witness—Compelling attendance of—Duty of Court.

O. 16, R. 10 of the C. P. Code does not make it obligatory on the part of the Court to compel the attendance of a witness served, except where an application has been made by one of the parties to that effect. (*Mittra, A. J. C.*) MANALAL v. SUKHLAL. 57 I. C. 311.

—O. 16, Rr. 10 and 12—Non-production of document—Fine—Imposition of, if legal.

A fine cannot be imposed under O. 16, R. 12 of the C. P. Code until after attachment of property under R. 10. O. 31, C. L. J. 363 foll. (*Newbould, J.*) ASHUTOSH MULLICK v. THE SECRETARY OF STATE FOR INDIA.

57 I. C. 302.

—O. 16, Rr. 11 and 12—Witness—Failure to appeal—Fine which can be imposed.

O. 16, R. 11 C. P. C. provides for a case whether the person satisfied the Court that he has not intentionally failed to carry out the order. R. 12 applies to the alternative case of a person failing to satisfy the Court whether he appears in order to offer an explanation or not. But in either case whether the facts are those

C. P. CODE (1908), O. 16, R. 12.

contemplated in R. 11 or R. 12 the Court can only proceed after attachment of the property. (*Beachcroft, J.*) *SIB KUMARI DEBI v. SECRETARY OF STATE FOR INDIA.*

31 C L J 363.

—**O. 16, R. 12—Non appearance in obedience to summons—Order imposing fine—Jurisdiction**

An order imposing a fine on a person under O. 16, R. 12 for failing to appear in obedience to a summons is without jurisdiction unless it is made after attachment of the property of that person under R. 10 (*Beachcroft, J.*) *RAMGOPAL v. SECRETARY OF STATE FOR INDIA.*

55 I. C. 425.

—**O. 17, R. 1 and O. 16, R. 9—Power of court to adjourn hearing—Sufficient cause—Witnesses not served in time with summons.**

The court is not precluded from adjourning the hearing of a suit for sufficient cause, where witnesses are served though process-fee was not paid in time 5 N L R 181 expl. (*Mitra, A. J. C.*) *MADHODAS v. GIRDHARILAL.*

16 N. L. R. 1 : 58 I. C. 436.

—**O. 17, Rr. 2 and 3—Application of—Hearing of suit—Adjournment**

O 17 Rr. 2 and 3, C. P. C. apply only to a case where the actual hearing of the suit has been adjourned. By the hearing of the suit is meant the hearing at which the Judge would be either taking evidence or hearing arguments or would have to consider questions relating to the determination of the suit which would enable him finally to come to an adjudication upon it. But in cases where it was clearly never intended that there should be a hearing of the suit in the ordinary sense of the word but merely some interlocutory matter decided between the parties to the future conduct of the suit, the provisions of these rules have no application. (*Miller, C. J. and Mullick, J.*) *BALMUKUND MARWARI v. LACHMI NARAIN MARWARI*

57 I. C. 748

—**O. 17, Rr. 2 and 3—Scope and applicability of—Plif. unable to produce evidence—Dismissal of suit—Appeal—Second appeal. See (1919) Dig. Col. 225. SHEIK MAHOMED BAKAR ALI v. CHULHAI MAHTON.**

(1920) Pat 118.

—**O. 18, R. 2 and O. 9, R. 3—Dismissal of Suit—Plif's default—non representation of minor deft.—fresh suit on the same cause of action.**

The plaintiff brought a suit against three defendants one of whom was a minor. No guardian having been appointed the minor defendant was not represented in the suit. At an adjourned hearing the suit was dismissed for plaintiff's default. The plaintiff again sued the minor defendant alone on the same causes of action:—

Held, that the second suit was not barred in as much as the order passed in the first suit

C P CODE (1908), O 20, R. 2

was a nullity as between the plaintiff and the minor defendant who was really not a party to it (*Shah and Crump, JJ.*) *DAMU DIGAR VAKRYA NATHU* 44 Bom. 767 : 22 Bom L R 328 56 I C 455

—**O. 18, R. 18—Power of Judge to visit locality—Result of inspection.**

Under O. 18, R. 18 of the Civil Procedure Code a Judge has power to visit a locality and to use the result of his local inspection for certain purposes, e.g., for the purpose of enabling him to understand the questions that are being raised, to follow the evidence to apply it, and to test it. Although it is desirable that he should place the result of his local inspection on the record, yet the omission to do so is a purely formal defect and would not necessarily vitiate his judgment. (*Jwala Prasad, J.*) *RAM CHANDRA RAO v. BABU NARAYAN LAL*

58 I C 909

—**O. 20, R 1—Notice under, presumption. See LIMITATION ACT, S. 5.**

22 O. C. 379

—**O. 20, Rr. 2 and 3—Date of Judgment—Notice to counsel—Judgment recorded and dated by predecessor, pronounced by successor—Legality of.**

A Court adjourned a case to 25—3—1918 for the purpose of pronouncing judgment when a decree for pre-emption was granted coupled with the condition that unless the requisite pre-emption money was paid within one month the decree would become void. Payment was not made within the time but on 7—6—1918 the decree-holder represented to the Court that he was not aware that judgment had been pronounced and asked for permission to pay the money. The judge who passed the decree having been transferred, his successor came to the conclusion that judgment had not been pronounced on 25—3—1918 although the record showed that on that date parces' Counsel were present. The successor accordingly on 1—12—1918 proceeded to pronounce judgment already signed and dated by his predecessor:—

Held, that notice to Counsel was sufficient, there was no reason for holding that judgment had not been pronounced on 25—3—1918 and that the successor of the Judge acted without jurisdiction in pronouncing, for the second time, a judgment dated and recorded by his predecessor. (*Broadway, J. J. BHALLA v. FAZAL MUHAMMAD.*

58 I. C. 143 : 97 P. L. R. 1920.

—**O. 20, R. 2—Judgment—Validity of—Arguments heard by acting subordinate judge subsequently reverted as Munsif—Judgment written after reversion if legal.**

Where the arguments in a suit were heard by an Officiating Subordinate Judge who then reverted as Munsif and the judgment written by him was pronounced by his successor in

C. P. CODE (1908), O. 20, R. 3.

office held that even if he wrote the Judgment after he ceased to be a Subordinate Judge and reverted as Munsif the judgment would not thereby be vitiated in any way. 35 All 368 and 35 Cal. 756 (F. B.) referred to. (*Tudball and Rafiq, JJ.*) *LILAWATHI KUAR v. CHOTTEY SINGH.* 42 All 362 : 18 A. L. J. 356

—**O. 20, R. 3—Judgment written by judge after transfer and delivered by successor—Legality of**

Where the Judge who had heard the evidence and arguments in a case was then succeeded by another Judge and subsequently wrote out and signed Judgment in the case which was pronounced by his successor after notice to the parties held that the Judgment was valid.

35 C 756, 2 C. L. J. 438. foll. 17 W. R. 475, 5 M. H. C. R. 174; 9 W. R. 1; 9 W. R. 61 Ret (*Jwala Prasad and Adami, JJ.*) *LAKHIMA JIU v. LOKNATH DAS.*

5 P. L. J. 147 : 1 P. L. T. 77 : 58 I. C. 437.

—**O. 20, R. 4—Decree—Conditional decree—Pre-emption.**

A decree to which a condition is attached upon the fulfilment of which the decree-holder is to enjoy the fruits of the decree does not complete the disposal or the suit. The Court, having passed such a decree, has no further judicial function to perform in respect of the complete disposal of the suit.

A decree in a pre-emption suit, embodying a condition that unless the purchase money is paid within the time fixed thereto, the suit shall stand dismissed, is a decree complete in itself and a subsequent order dismissing the suit cannot be treated as a decree against which an appeal can be preferred. (*Wazir Hassan A. J. C.*) *JANGA SINGH v. LACHHMI NARAIN.* 23 O. C. 254 : 57 I. C. 488

—**O. 20, R. 4—Small Cause Court—Judgment of—Points for decision—Statement of.**

The Judgment of the Small Cause Judge was in these terms "point: Is the plaint claim true? I find the claim true."

Held, that notwithstanding O. 20, R. 4 (1) of the C. P. Code it was not a Judgment which the High Court could accept. 13 All. 533 and 23 Bom. 334 cons. 48 I. C. 752 not foll, (*Seshagiri Aiyar, J. J. KANDASWAMI CHETTY v. RAMALINGA CHETTY,* 12 L. W. 285.

—**O. 20 R. 6—Decree and judgment—To be distinct.**

In the case of an original Civil suit the decree must be quite distinct from the Judgment.

A paragraph in a Judgment not drawn up in the form of a decree and not embodied in a separate form is not a decree. 19 C. 463 foll. (*Scott-Smith and Le Rossignol, J. J. GELA RAM v. GANGA RAM.* 1 Lah. 223 : 54 I. C. 913.

C. P. CODE (1908), O. 21, R. 2.

—**O. 21, Rr. 1 to 3—Contravention of provisions of—Effect—Judgment pronounced by another Judge—Effect See (1919) Dig. Col. 227. FORT GLOSTER JUTE MANUFACTURING CO. v. CHANDRA KUMAR DAS. 24 C. W. N. 791.**

—**O. 21, R. 2—Adjustment of decree out of Court.**

Under O. 21, R. 2 C. P. C. an adjustment of decree out of Court which is not certified to the Court can only be ignored in proceedings in execution of that particular decree. (*Macnair, A. J. C.*) *MATHURA v. CHOTU.*

58. I. C. 123.

—**O. 21, R. 2—Adjustment—Omission to certify—Effect of—Remedy of Judgment debtor—C P Code, S 47**

Omission on the part of the decree-holder to cause adjustment of the decree to be certified under O. 21, R. 2 (1) C. P. C. does not amount to fraud so as to give the judgment debtor a right to relief by suit or otherwise.

The provisions of O. 21, R. 2 (3) are imperative that a court executing a decree is absolutely prohibited from entertaining directly or indirectly an uncertified adjustment of the decree. (*Atkinson and Adami, J. J.*) *IMAMUD-DIN KHAN v. BINDUBASINI PRASAD.*

5 P. L. J. 70 : 1 P. L. T. 149 : 55 I. C. 890.

—**O. 21, R. 2—Adjustment—Prior to decree—Effect of.**

When a claim is adjusted prior to decree then no decree ought to be passed but if a decree is subsequently passed notwithstanding the compromise, it cannot be said to be satisfied by what took place prior to the decree. (*Chevis, A. C. J. and Wilberforce, J.*) *HEM RAJ v. DOST MUHAMMAD.* 1 Lah. 445 : 57 I. C. 153.

—**O. 21, Rr. 2 and 16—Decree—Transfer—Application for recognition of—Rejection-Grounds—Uncertified adjustment—Existence of, not a ground See (1919) Dig. Col. 231. ANANTHA RAMA AIYAR v. KUMARA SWAMI PANDARAM. 54 I. C. 922.**

—**O. 21, R. 2—Execution proceedings—Minor Judgment debtors—Principle of O. 32, R. 7 C. P. C., applicable, See C. P. CODE O. 32 R. 7. 5 P. L. J. 379.**

—**O. 21, R. 2—Partition decree—Adjustment by sale of share in some lands—Certification.**

O. 21, R. 2 C. P. C. applies to partition decrees which provide for the payment of money as well as for other relief such as a partition of immoveable property and to adjustments with regard to such property. Such an adjustment cannot be recognised unless certified or recorded as required by the rule, 15 M. L. T. 338 ; followed. 25 M. L. J. 586.

C. P. CODE (1908), O 21, R. 2.

not foll. (*Oldfield and Seshagiri Aiyar, JJ*) MAZUMDAR RAMAKRISHNA RAO PANTULU v. MAZUMDAR BALAKRISHNA RAO PANTULU

43 M. L. T. 279 : 56 I. C. 289.

O 21, R 2—Scope of—Arrangement prior to decree to treat it as inexecutable in part—Not a bar to execution. See C. P. Code, S 37 and O. 21, R. 2. 39 M. L J 222

O 21, R 2 and O. 34 Rs. 4 and 5—Uncertified adjustment between the dates of the preliminary and final decree in a mortgage suit—Not a bar to execution See (1919) *Dig Col. 233. SAMBASIVA AIYAR v. TIRUMALAI RAMANUJA THATHA CHARIAR*. 54 I. C. 137.

O 21, R. 2—Uncertified payment or adjustment—Executing court not entitled to recognise.

A Court executing a decree has no jurisdiction to entertain the question of payment or adjustment of the decree out of Court when such payment or adjustment has not been certified to the Court under O. 21, R. 2, C P C. (*Beachcroft, J.*) PRASANNA KUMAR SAHU v. LAL MAIN. 55 I. C. 669.

O. 21, R. 2 (2) and (3) and O. 34, Rr. 4 and 5—Mortgage decree—Compromise—Instalments—Application for final decree—Compromise if can be set up.

O. 34, R. 5 C. P. C. applies to a decree prepared under O. 34, R. 4, when the decree, as shown in Appendix D, directs the payment of the full amount due thereunder on a fixed date.

The provisions of the C. P. Code and of O. 34, are not exhaustive, and a compromise mortgage decree directing payment in instalments is enforceable according to its own terms, unless they are opposed to public policy.

O. 34, R. 5 does not, therefore, preclude the Court from investigating into the question of part-payment out of Court, as pleaded by the judgment-debtor in the shape of a set-off towards the amount due under decree; O. 34 R. 5 (1) is enacted for the benefit of the judgment-debtor and it does not declare that payments out of Court will under no circumstances be recognised.

O. 21, R. 2 applies to all kinds of decrees, including mortgage-decrees and the decree-holder can certify payments at any time, but the judgment-debtor can do so only within the time limit (90) days; 21 C. W. N. 920 foll.

O. 21, R. 2(3) restricts the power of only Courts executing the decree to take note of uncertified payments, but as an application for a final decree in a mortgage-suit is not an execution-proceeding, the Court is competent to take cognizance of the uncertified payment 16. C. L. J. 169; 2 P. L. J. 533 foll.

O. 34, R. 5 did not apply to the instalment decree in the mortgage suit, but the decree-holder was entitled to apply for a final decree, as settled in the compromise decree, and the

C. P. CODE (1908), O. 21, R. 15.

order granting the absolute decree was not *ultra vires*. 10 C. L. J. 91; 14 C. L. J. 648 ; 34 Cal. 886; L. R. 5 P. C. 516; 38 Bom. 32; 55 All. 178 foll.

Where a case is referred to arbitration and the arbitrators returned the papers without submitting their award and the parties also expressed their unwillingness to arbitration, and the Court without expressly recording an order of supersession, fixed a date for deciding the case and passed final orders.

Held, that the procedure followed was irregular.

Quere—Whether the irregularity affected the jurisdiction of the Court to decide the case.

Obiter—Where in fact the reference to arbitration has become impossible and by implication the Court has superseded it, the jurisdiction of the Court to try the issue between the parties is not affected but where the proceeding is still pending before the arbitrators and where from the circumstances it does not appear that the arbitration has in fact been superseded the Court has no jurisdiction to try the case (*Jwala Prasad and Adami, JJ.*) MANGAR SAHU v. BHATOOG SINGH. 1 P. L. T. 416 : 57 I. C. 473.

O. 21, R. 2 (3)—Decree—payment or adjustment of decree—Certifying to Court Limitation.

The payment or adjustment of a decree can be certified or recorded by the Court under O. 21, R. 2 (3) of the Civil Procedure Code, at any time. 43 Cal. 207 foll. (*Macleod, C. J. and Heaton, J.*) PANDURANG BALAKRISHNA v. JAGYA 22 Bom. L. R. 1121

O. 21, Rr. 11 and 17—Execution application—Defects in—Rejection—Amendment—Duty of Court.

The law casts upon an 'executing' Court the duty to ascertain whether an application for execution complies with the requirements of the rules and if it does not, to do one of two things, either to reject the application or to allow it to be amended then and there or within a fixed time. (*Petman, J.*) GANESH DAS v. FATEH CHAND. 2 Lah. L. J. 104 : 55 I. C. 16.

O. 21, R. 11—Execution—Reliefs—Temporary alienation of land.

O. 21, R. 11 (2) makes no mention of a temporary alienation of land the reason probably being that the Court of Execution when refusing to order the sale of the property is expected to direct instead of a temporary alienation thereof without any specific prayer to that effect. (*Shadi Lal and Broadway, JJ.*) SUDARSHAN DATAR KUAR v. RAM RATTAN. 2 Lah. L. J. 398 : 58 I. C. 603.

O. 21, R. 15—Execution application by one of several decree holders—Objection of Judgment debtor.

C. P. CODE (1908), O. 21, R. 16.

O. 21, R. 15, C. P. C. allows one of several decree holders to apply on behalf of all and it is not for the Judgment debtor to say that sufficient steps have not been taken to safeguard the interests of the other decree-holders, when they themselves have made no complaint whatever. (*Mithtra, A. J. C.*) AMIR ALI v. GOPALDAS. 54 I.C. 924

O. 21, R. 16—Assignee of *ex parte* decree—Setting aside—Subsequent decree in favour of assignee.

After an assignment by the decree holder of an *ex parte* decree, the judgment debtor applied to have the decree set aside. The assignee was also made a party to the application and the decree was set aside and after trial a decree was given in favour of the assignee decree holder the original plff. having also asked the Court to do so.

Held, that the Court had jurisdiction to pass a decree in favour of the assignee of the *ex parte* decree (*Lord Dunedin*), BALDEO v. KANHAYA LAL. 16 N.L.R. 103 : 24 C.W.N. 1001 : (1920) M.W.N. 545 : 12 L.W. 408 : 58 I.C. 21.

O 21 R 16—Assignment of decree—Execution by assignee—Notice not served on assignor—Delay—Adjournment.

Where a decree-holder transfers his interest the decree cannot be executed until notice has been served upon the assignor in accordance with O. 21, R. 16 C.P.C. The fact that a notice purporting to be under S. 158 B. (2) B.T. Act, 1885 has been shewn to the assignor will not dispense with the necessity of complying with the provisions of that rule.

Where a party has had plenty of time to comply with such provisions of the law as those contained in O. 21, R. 16 C.P.C. but has omitted to do so, he has no absolute right to insist upon an adjournment in order to allow him to rectify his own omission (*Miller, C.J. and Mullick, J.*) MAHARAJA SIR RAMESHWAR SINGH v. HARIHAR JHA. 5 P.L.J. 390 : 1 Pat. L.T. 666 : 57 I.C. 250

O. 21 R. 16—Assignment of decree—Preliminary decree for redemption—Sale of land—Effect of.

On 16th July 1918, a mortgagor obtained a preliminary decree for the redemption of a plot of land on payment of a certain sum of money within six months. The decree also awarded him the costs of the suit. On the 13th January 1919 the mortgagor sold the land to the appellants who thereafter deposited in Court the amount payable under the decree. The vendees claimed that they were the assignees of the decree under O. 21, R. 16 C.P.C. The sale deed in their favour however dealt with the transfer of the land and con-

C. P. CODE (1908), O. 21, R. 16.

taimed no recital to the effect that the decree was sold to them.

Held, that the appellants' claim to be treated as assignees of the decree was rightly disallowed by the learned Judge 35 A. 204 Rel. (*Shadi Lal and Broadway, JJ.*) AHMAD SHAH v. FAUDAR KHAN. 2 Lah L.J. 1 : 55 I.C. 983.

O 21, R. 16—Decree—Assignment of—Allegation of benami—Effect of.

On an application for execution of a decree by the transferee thereof it is permissible to enquire whether the transferee is really a *benamidar* for the judgment debtor.

Where the transferee of a decree is found to be a *benamidar* for the Judgment-debtor, the Court is bound by O. 21, R. 16 C.P.C. to refuse execution in his favour 22 C.W.N. 491. d.s., 40 M. 296 foll. (*Scott Smith, J.*) GURDIRTA MAL v. PARTAP SINGH

54 I.C. 944.

O 21, R 16—Execution of decree—Notice—Omission to issue—Subsequent execution application—Order *res judicata*.

When the judgment-debtor does not object to the first application for execution of a decree on the ground of illegalities in relation to execution proceedings e.g. non-service of notice on the transferor under O. 21, R. 16 of the Code of Civil Procedure, 1908, he cannot take such objection when a subsequent application for execution is made 8 C. 51; 24 C. 199; 14 C. W. N. 114; 14 C. W. N. 433. (*Coutts and Sultan Ahmed, JJ.*) BRAJLAL MARWARI v. E. M. ATKINSON 5 P.L.J. 639 : 1. P. L. T. 504 : 57 I.C. 707.

O. 21, R. 16—Execution of decree—Property sold with all arrears of rent—Right of decree-holder to execute rent decree.

In execution of a mortgage decree the mortgaged properties were sold together with "all arrears of rent". Before the sale the mortgagors had instituted rent suits against tenants holding *jamas* under the properties hypothecated and obtained decrees on the very day the purchasers at the execution sale obtained their conveyance from the officer of the Court. The purchasers applied for execution of the decrees. *Held*, that the purchasers might be treated as assignees of the decrees under O. 21, R. 6 of the C.P. Code and were, therefore, entitled to take out execution of those decrees and must be regarded as representatives of the original decree-holders within S. 47 of the C.P. Code.

The arrears of rent were none the less arrears, though suits had been brought for them and decrees were passed for them on the day the conveyance was executed in favour of the purchasers (*N. R. Chatterjee and Panton, JJ.*) ANANDA MOHAN ROY v. PROMOTHA NATH GANGULI, 57 I.C. 874

C. P. CODE (1908), O. 21, R. 22.

O. 21, R. 22—Absence of notice—Judgment—debtor given opportunity to show cause.

Although an application for the execution of a compromise decree was made after the expiry of one year from the date of the decree, yet inasmuch as the judgment-debtor had been given an opportunity to show cause why the decree should not be executed against him the mere fact that no notice was served on him under O. 21, R. 22 C. P. C. did not vitiate the proceedings. (*Shadi Lal, J.J. KORA LAL v. PUNJAB NATIONAL BANK, LTD.*)

55 I. C. 818.

O 21, Rr. 22 (1) (b)—Execution sale—Legal representatives not brought on record—Objection to sale to be taken at the earliest stage See (1919) *Dig. Col.* 238 *BRAHMI SAWH v. MANOWAR ALI*

(1920) *Pat. 91.*

O 21, R. 33 Restitution of conjugal rights—Detention in prison—wife—Discretion of Court.

In decreeing a suit for restitution of conjugal rights, the Court will not ordinarily pass an order for detention of the wife in prison in executing the decree (*Macleod, C. J. and Heaton, J.*) *BAI PARVATHI v. MANSUKH JETHA.*

22 Bom L R. 1097.

O. 21, R. 34—Compromise decree—Execution of mortgage—Powers of court.

The respondents brought a suit for declaration that certain property attached by the Appellant in execution of a money decree against another person belonged to them. A compromise was arrived at to the effect the Respondents would execute a mortgage bond for the amount due from the judgment debtor in favour of the Appellant. A decree embodying the terms of the compromise was passed and the mortgage bond not being executed within the time specified in the decree the Appellant applied for execution of the mortgage bond in execution of the decree.

Held.—That the question what is the subject matter of a suit must depend upon the facts of each case and in the present case the execution of the mortgage bond was a matter relating to the suit and having been directed by the decree was capable of being enforced in execution of the decree under O. 21, R. 34, C. P. C (*Chatterjea and Panton, J.J. SAUDAMINI DASI v. BEHARY LAL BISWAS.*)

25 C. W. N. 68.

O. 21, Rr. 35 (2) and 36—Object of—Delivery of possession—Symbolical possession—Failure to affix warrant—Effect of.

O. 21, Rr. 35 and 36 C. P. C. imperatively require that a copy of the warrant of the

C. P. CODE (1908), O. 21, R. 53.

Court for delivery of possession should be affixed in some conspicuous place on or near the property, the object of the provision being that the co-sharers and tenants may know that possession has been transferred to the decree-holder. Failure to comply with the procedure laid down in the Code is fatal to the delivery of possession. 20 P. R. 1917 foll. 10 N. L R. 60 dist. (Scott Smith, J.) *JAHARI LAL v. PEMAN.*

2 Lah. L. J. 202 : 55 I. C. 19.

O. 21, R. 43—Security from depositary of live stock—Mode of enforcement.

The security given by a depositary for the safe custody of live-stock which has been attached (Civil Circular 1—31) cannot be realised by summary process in execution. 12 C. P. L. R 149 Diss (F. Mittra, A. J. C.) *KHETSIDAS v. HARSA.* 16 N. L. R. 178.

O. 21, R. 46—Execution of decree—Attachment of debt due—Security—Money not immediately payable.

An attaching creditor can attach any debt due, although it is not immediately payable.

Money deposited by a judgment debtor as security for the due performance and completion of a contract may be attached by a decree-holder as money due or owing to the judgment-debtor although it is not payable to the judgment-debtor till the completion of contract and may even be liable to forfeiture. (*Ormond and Maung Kin, J.J.*) S. B DAS v. MUTHIA CHETTY.

**12 Bur. L. T. 247:
56 I. C. 948.**

O. 21, R. 52—Fund in Court—Attachment—Rival decree-holders—Priority—Rateable distribution See C. P. CODE S. 73 AND O. 21, R. 52. 39 M. L J. 608 (F. B.)

O. 21, 53—Decree-execution—Attachment of mortgage decree—Sale of mortgage decree in execution—Procedure.

The plaintiff obtained a money decree for Rs. 400 odd against the defendants and attached in execution a mortgage decree which had been passed in favour of defendants. In execution proceeding, the mortgage decree was put up for sale and purchased by the plaintiff for Rs. 200. The plaintiff then proceeded with the mortgage decree and realized R. 600 by sale of the mortgaged property. He again applied to the Court to execute the money decree against the defendants after giving them credit for Rs. 200.—*Held*, that the proceedings were wrongly conceived, for the executing Court was not at liberty to sell the mortgage decree in the way it had done, but it was bound under O. 21, R. 53, of the Civil Procedure Code, to proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed. (*Macleod, C. J. and Fawcett, J.*) *VITHALDAS v. SUBRAYA.*

22 Bom. L. R. 1304.

C. P. CODE (1908), O. 21, R. 53.

—O. 21, Rr. 53 and 54—Decree relating to immoveable property—Attachment mode of—Attachment by small cause court.

A decree relating to immoveable property is not immoveable property within the meaning of the chapter in the Civil Procedure Code, 1908, relating to execution. O 21, R 53, deals, with the mode in which decrees are to be attached and dealt with in execution proceedings. They are a class by themselves whether the decree is one regarding moveable or immoveable property. There is nothing in the present Code to prevent a Small Cause Court from attaching and selling a decree for immoveable property. (*Mitra, A J C.*) *KRISHNAJI v BALIRAM.*

16 N. L. R 72

—O. 21, R 57—Execution application on—Removal of, from register for statistical purposes—Fresh application treated as one to continue old application—No limitation. See LIM ACT, ART. 181 AND 182. 11 L. W. 42

—O. 21, R 57—Execution of decree—Prior execution case consigned to record room—Effect on attachment—Default of decree-holder

There were several simple money decrees against a judgment-debtor. A took out execution on his decree in the court of a Munsif and attached a house of the judgment-debtor. Later on B took out execution of his decree in the Court of the Subordinate Judge asking for attachment and for transfer of his decree to the Court of the Munsif for rateable distribution which was done. After sometime an order was passed on B's application that inasmuch as the execution proceedings in which the decree-holder was to get rateable distribution in the Court of the Munsif had been consigned to records the present application also was consigned to records for want of execution.

Held, that it was not an order of dismissal under O. 21, R. 57 for the simple reason that there was no default on the part of the decree-holder and the effect of that order was not to discharge the attachment which had been made by the Subordinate Judge. (*Lindsay, J. C.*) *NARINDRA BHADUR RAI v. GANGA SAGAR PANDIT.* 23 O. C. 168 : 57 I. C. 508.

—O. 21, Rs 58 and 63—Execution of decree—Attachment—Objection to—Order of executing Court—Binding on auction purchaser. See (1919) *Dig. Col. 243.* *VEDALINGAM PILLAI v. VEERATHAL.*

(1920) *M. W. N. 77 : 54 I. C. 530.*

—O. 21, R. 58—Mortgage decree—Execution of—Attachment—Claim—Investigation.

Where there is a mortgage decree for sale no attachment is necessary and O. 21, R. 58 C. P. Code does not apply and the executing Court has no jurisdiction to entertain objections. (*Chavis, O. C. J.*) *TARA CHAND v. RAJ KISHORE.*

2 Lah. L. J. 343 : 55 I. C. 895.

C. P. CODE (1908), O. 21, R. 61.

—O. 21, Rs 58 and 63—Scope of—Claim petition by an exonerated defendant—Dismissal of petition—Remedies of claimant party—Applicability of O. 21, Rr. 58 to 63 to parties to suits—C. P Code. S 47. See (1919) *Dig. Col. 244.* *VENKATACHELLA REDDI v. MUTHIALU REDDI.* 54 I. C. 536.

—O. 21, R. 60—Attachment—Application by person in possession claiming a charge of maintenance on the property—Sale in execution subject to a charge—Suit by auction-purchaser to recover possession after death of charge holder.

Certain property belonging to the judgment-debtor having been attached in execution of a decree, his mother applied to raise the attachment on the ground that it was in her possession and that she was entitled to retain it during her life-time and that there was a charge thereon for a certain sum to be paid by the brothers for her funeral ceremonies after her death. The property was eventually sold in execution subject to her charge and purchased by the plaintiff. After the mother's death the plaintiff sued to recover the judgment-debtor's share in the property; the judgment-debtor and his brother (defendants Nos. 2 and 1) contended that as there was no attachment of the property, the Court sale was null and void. The trial Court held that the sale was valid even in the absence of attachment, and allowed the plaintiff to recover his share by partition. Defendant No. 1 alone appealed from the decree, with the result that the sale was declared to be null and void in consequence of the absence of attachment.

Held, that the property in dispute was sufficiently attached and that all the subsequent proceedings including the sale of the right, title and interest of the judgment-debtor were in order, and that there was no real basis for the objection that the sale was void in consequence of the absence of attachment.

Defendant No. 2 not having appealed, the decree of the trial Court could not, on the appeal by defendant No. 1 alone, be properly reversed. (*Shah and Crump, JJ.*) *VAIKUNT SHRIDHAR BHATTA v. MANJUNATH MADHAV BHANDARI.* 44 Bom. 860 : 22 Bom. L. R. 640 : 58 I. C. 217.

—O. 21, Rr. 61 and 63—Decree—Execution—Obstruction to attachment—Remedy by suit.

Where there are two claimants to the property which is being attached namely, the party who seeks the assistance of the Court by execution and the opposite party who claims that the property belongs to him, there are many ways of proceeding. The Court in execution may decide in favour of one side or the other, in which case the order will not be final, or it may direct one of the parties to file a suit to have the question decided. In such a suit the defendant can raise any defence which might have been the subject matter of a

C. P. CODE (1908), O. 21, R. 61.

separate suit brought to avoid the claimant's title (*Macleod, C. J. and Heaton, J.*) **BHIMRAY v. LAXMAN.** 22 Bom. L. R. 743; 57 I. C. 430.

—**O. 21, R. 61**—Execution—Attachment—Suit by purchaser from judgment-debtor to raise attachment—Withdrawal of suit on attachment being withdrawn—Suit by purchaser to recover possession of property from his vendor—Art 13 no bar. See LIM. ACT, ART. 13. **22 Bom. L. R. 1446.**

—**O. 21, R. 62 and 66—Mortgage—Property subject to—Purchaser in execution sale when estopped from disputing.**

If a person purchases an estate subject to a mortgage whether under a private or an execution sale or undertakes to discharge it, he cannot be heard to deny the validity of the mortgage subject to which he made his purchase. Where, however, the purchaser merely buys an estate which is under mortgage but does not take it subject to the encumbrance or undertake to discharge it, he is not precluded from impeaching the validity of the mortgage. The distinction between the two classes of cases depends upon the question, whether the property has been sold subject to the mortgage or whether mere notice of the mortgage has been given in the proclamation of sale. The former contingency is provided for by O. 21, R. 62, C. P. C and the latter is contemplated by O. 21, R. 66. (*Mookerjee and Panton, JJ.*) **KALIDAS v. PRASANNA KUMAR DAS.**

55 I. C. 189.

—**O. 21, R. 63—Claim suit—Fraudulent transfer—Plea of in defence.**

It is open to an attaching decree holder to plead in defence to a suit by the alienee whose claim has been rejected that the alienation is a fraudulent one intended to defeat or delay the alienor's creditors 30 M. L. J. 565; 41 Mad. 612 F. B. overruled. (*Wallis, C. J., Oldfield, Sadasiva Aiyar, Spencer and Seshagiri Aiyar, JJ.*) **RAMASWAMI CHETTIAR v. MALLAPPA REDDAR.** 43 Mad 760; 39 M. L. J. 350 : 28 M. L. T. 170 : 12 L. W. 475 : (1920) M. W. N. 572 (F. B.)

—**O. 21, R. 63—Claim suit—Onus of proof—Plea of fraudulent transfer, if available as a defence.**

Although the investigation in proceedings under O. 21, R. 58 C. P. C. is summary, the order made is, subject to the result of a suit under R. 63 final.

In a suit under O. 21, R. 63 C. P. C. the burden of proof lies on the plff. to show that the adjudication in the objection proceedings was wrong. 2 N. L. R. 87 followed.

A defendant may impeach a transaction voidable as against him, such as a fraudulent transfer, when it is sought to be enforced, whether by a declaration or otherwise.

30 M. L. J. 565; 41 M. 612; diss from.

C. P. CODE (1908), O. 21, R. 66.

The mere existence of a part of the consideration for a transfer does not prevent the transfer being a fraudulent transfer voidable at the instance of the person defrauded. (*Mittra, A. J. C.*) **HAJI ABOO v SOBHAG CHAND.**

55 I. C. 752.

—**O. 21, R. 63—Rejection of claim—Suit to set aside order also dismissed—Subsequent suit to enforce mortgage.**

In a suit upon a mortgage it was found that the hypotheca had been attached on a prior occasion by one of the defendants in a suit of his, that the present plaintiffs mortgagees put in claim based on their mortgage which failed and that they subsequently brought a suit under O. 21, R. 63 Civil Procedure Code which was also dismissed. The auction purchaser in the sale held in pursuance of the above execution proceedings contested the maintainability of the present suit by the plaintiffs.

Held, (i) that on the dismissal of the plaintiffs prior suit the order rejecting his claim became conclusive.

And (ii) that the present suit was therefore unsustainable.

(1) 11 L. W. 343, (2) 27 I. C. 800. (3) 8 Cal. 279. Ref. (*Ayling and Odgers, JJ.*) **R. SINGARIAH CHETTY v. CHINNABBI.**

12 L. W. 725.

—**O. 21, R. 63—Suit by defeated claimant—Onus of proving valid transfer.**

In a suit by a defeated claimant under O. 21, R. 63 C. P. C., claiming under a transfer from the Judgment-debtor the ordinary method of establishing the *bona fides* of the transfer is to prove that the consideration passed and that possession was actually transferred, and this being done, the onus would be shifted on to the contesting party to show that there was nevertheless an intention to defeat creditors. (*Drake-Brockman, J. C.*) **RAGHUNATH v. NANHU.** 55 I. C. 72.

—**O. 21, R. 63—Suit by defeated claimant—Transfer from debtor—Plea of fraudulent transfer if available as a defence to attacking decree-holder—T. P. Act, S. 53.**

Where a transferee from the judgment-debtor whose claim under O. 21, R. 58 C. P. C. was dismissed sues under O. 21, R. 63 for a declaration of his right to the property, it is open to the attaching creditor to plead as a defence to the suit that the alienation is void under S. 53 of the T. P. Act, 41 Mad. 612 diss. 42 Mad. 151 16 C. W. N. 717 app. (*Drake-Brockman, J. C.*) **DHANSUKHDAS v. JHANGO.** 16 N. L. R. 3 : 54 I. C. 798.

—**O. 21, R. 66—Execution sale—Mortgage notified—Rights of purchaser of mortgage.**

Where a person sets up title as mortgagee of certain property attached in execution of a decree and the Court directs, under O. 21, R. 66 C. P. C. that the mortgage be notified, the purchaser at the execution sale can contest the validity of the mortgage in a suit by the

C. P. CODE (1908), O. 21, R. 66.

mortgagee. He is not bound to sue to set aside the mortgage. (*Tudball and Rafique, J.J.*) **KISHEN LAL v. RUPRAM.** 55 I. C. 354.

— **O. 21, R. 66 and O. 43, R. 1—Sale proclamation—Order on appeal.**

An order under O. 21, R. 66 is not appealable under O. 43, R. 1.

An objection as to defect in signature or verification in the petition under O. 21, R. 66 (3) must be raised within the time fixed by the notice under R. 66, and after the filing of the valuation affidavit and the order for sale, the judgment debtor cannot be permitted to object.

Where the decree directed that the decree-holder was to get a particular allowance from the judgment debtor, and which further, was made a charge on a certain property.

Held that no separate suit was necessary to enforce the decree and realise the money, S. 67 of the T. P. Act having no application; that the property could be sold in execution of the decree, and it was not necessary to have the decree realized from the profits of the property by the appointment of a receiver; and that the decree would be executed as a money decree provided for the execution of ordinary money decrees. (*Jwala Prasad and Adami, J.J.*) **RAJA BRAJA SUNDAR DEB v. SIVARANJAN DEI.**

1 P. L. T. 647.

— **O. 21, R. 72—Execution proceedings—Transfer of, to Collector—Leave to bid and to set off—Application to be made to which Court—Bombay High Court Circulars.**

Where proceedings in execution of a decree have been transferred to a Collector the decree holder can apply to the Collector to grant him leave to bid at the sale under R. 91 sub clause 16 of the Bombay High Court Circulars, 1912. If the decree-holder desires a set off he should apply to the Court under O. 21, R. 72 C. P. C. (*Macleod, C. J. and Heaton, J.*) **MARTAND TRIMBAK GADRE v. DAYA APAJI PHATAK.**

44 Bom. 346 : 22 Bom. L. R. 106 :

55 I. C. 527.

— **O. 21, R. 78—Execution of decree—Sale of goods not answering description—Remedy of purchaser—Failure of consideration—Suit for recovery of price if maintainable.**

Where goods offered for sale whether in execution of a decree or privately, are described as of a particular denomination, and every circumstance points to the buyer having contracted for the specific goods produced as described, but the goods tendered do not answer that description the purchaser is entitled to reject them and, if he has paid for them, to recover the price as money had and received for his use. (*Mitra, A. J. C.*) **TUKARAM v. DEOJI.**

54 I. C. 315.

— **O. 21, R. 82—Decree for sale in execution of mortgage decree—Provisions of, if applicable.**

C. P. CODE (1908), O. 21, R. 89.

The provisions of O. 21, R. 83 C. P. C. do not apply to a sale of property directed to be sold in execution of a decree for sale in enforcement of a mortgage on such property. (*Shadi Lal, J.*) **KORA LAL v. THE PUNJAB NATIONAL BANK, LTD.**

55 I. C. 816.

— **O. 21, R. 83—Co-Judgment-debtors—Attachment in execution of decree against sharers—Permission to sell obtained by one—Sale in pursuance of—Effect on other's share—Purchaser's rights See (1919) Dig. Col. 248. *RAMAYYA AIYAR v. KRISHNAMACHARIAR.***

11 L. W. 213.

— **O. 21, Rr. 84 and 92—Order Setting aside execution sale on default of deposit—Appeal.**

An order setting aside a sale in execution of decree because of the default of the auction purchaser in depositing the purchase money, is not appealable. (*Banerji, J.*) **KATORI KUNJRA v. AJUDHIA PRASAD.**

58 I. C. 597.

— **O. 21, R. 89—Applicability of—Sale on the original side of the High Court under mortgage decree.**

O. 21, R. 89 may apply ordinarily to sales on mortgage decrees after attachment under the C. P. Code (as in the Mofussil) but it does not apply to a suit on the Original Side of the High Court where without attachment the sale has been held by the Registrar in conformity with the rules of the Court.

The practice under the rules of the High Court and the C. P. C. are not workable together in this respect. (*Woodroffe, J.*) **SURENDRA KRISTO ROY v. GURU PADA GHOSH.**

24 C. W. N. 536.

— **O. 21, R. 89—Execution sale—Original Side of High Court.**

O. 21, R. 89 C. P. C. applies to sales in execution of mortgage decrees on the original side of the High Court and the practice which at present prevails on the original side is contrary to law. 24 C. W. N. 536 dist. (*Mookerjee, C. J. and Fletcher, J.*) **VIRJIBUN DASS MOOLJI v. BISSESSWAR LAL HARGOVIND.**

24 C. W. N. 1032.

— **O. 21, R. 89—Execution Sale—Private purchaser before confirmation—Right of purchasers and Judgment debtor to set aside sale.**

A purchaser at a private sale from a judgment-debtor after court auction but before its confirmation is entitled to apply to set aside the sale under O. 21, R. 89 C. P. C. but the Judgment debtor who has parted with his rights is debarred from so applying.

The words "owning the property" in O. 21 R. 89 C. P. C. mean owning on the date of the application and not owning on the date of the Court auction sale. 9 A. L. J. 19. not foll. 24 M. L. J. 205 ; 38 M. 775 ; foll.

Per Spencer, J.—When both the Judgment-debtor (who has sold the property after Court auction) and the private purchaser jointly

C. P. CODE (1908), O 21, R 89.

apply to set aside the sale, there is no reason to refuse their joint application. The right to apply depends on whether the judgment-debtor has actually sold his interest unconditionally on the sale being set aside and had thus divested himself of all further interests in the property or has only agreed to sell it on that condition (*Sadasiv Aiyar and Spencer, JJ.*) **GANTASOLA JAGANNADAN v. THATWARTHI RAMABRAHMAN** 54 I C 753

O. 21, R 89—Right to apply—Mortgagee after execution sale.

A person who acquires a mortgage in trust from the judgment-debtor of the properties sold in an execution sale subsequent to the Court sale is not a person entitled to apply to set aside the sale under O 21, R. 89 C.P.C. (*Wallis, C. J. Ayling and Coutts Trotter, JJ.*) **GOPALA KRISHNA NAICKER v. VISVANATHA AIYAR**. 39 M. L J 84. 12 L. W. 165: 28 M. L. T. 162: 58 I C 856 (F B)

O 21, Rr. 89 and 92—Sale in execution of a decree which is modified in review before confirmation—Sale if should be confirmed. See (1919) Dig Col 251 *SHEIKH ARIATULLAH v. SASHI BHUSAN HAZRAH*.

55 I C 547.

O. 21 R 89—Sale in execution by revenue officer—Application to set aside sale to be made to Civil court.

An application to set aside a sale held in execution of a decree, under O. 21, R. 89 C. P. C. must be made to the Civil Court, and not to the Revenue Officer. (*Maccold, C. J. and Heaton, J.*) **TIPANGAVDA v. RAMANGAVDA**.

44 B 50. 22 Bom L R 35: 54 I. C. 670.

O. 21, Rr. 90 and 67 (2)—Execution Sale—Appl'caton to set aside—Material irregularity—Omission to advertise in gazettes—Effect of—Substantial injury—Proof of essential—Objections not specifically taken not to be cons'dered. See (1919) Dig. Col 252. *GOPI CHAND v. BENARASI DAS*.

1 Lah. L J. 197.

O. 21, R. 90—Execution sale—Injunction order—Sale in contravention of, not a nullity—Mere irregularity. See C. P. Code O 39, R. 1.

54 I. C. 928

O. 21, Rr. 90 and 54—Execution sale—Material irregularity in conducting sale—Drum not beaten.

Under O. 21, R. 54 C. P. C. it is sufficient if a proclamation of sale is announced by beat of drum. A drum need not be beaten at the time of the sale. Unless the judgment debtor proves that the irregularity has resulted in material loss, the Court will not set aside the sale on the ground of such irregularity. (*Tudball and Sulaiman, JJ.*) **BHIGWATI PRASAD v. MUKAND SARUP**.

56 I. C. 523.

C. P CODE (1908), O 21, R 90.

O 21, R 90—Execution sale—Material irregularity—Illegality—Sale held at a place different from that advertised.

Where in publishing a sale proclamation the process server substituted for the selling officer and place of sale fixed by the Court in the sale proclamation, a different selling officer and a different place of sale and thus the sale proclamation as framed by the court was never published in the village.

Held, that the non-publication of the sale proclamation is an illegality which invalidated the proceedings and consequently the sale is a nullity.

Per-Seshagiri Iyer, J.—Where a substantial provision of law has been violated and that has the effect of not attracting persons who could be expected to be present for the purpose of bidding at the sale, the sale should be regarded as having been illegally conducted. 16 Cal. 794 applied; 11 Bom L. R. 380 doubted. (*Oldfield and Seshagiri Iyer, JJ.*) **JAYARAMA IYER v. VRIDHAGIRI IYER**.

39 M L J 188. 12 L. W. 182: (1920) M. W. N. 490.

O. 21, R. 90—Execution sale—Setting aside—Application dismissed for default—Not appealable See. EXECUTION SALE.

56 I. C. 981.

O. 21 R 90—Fraud—Undervaluation—Purchase by decree holder—Setting aside—Sale.

Where the property was put up for sale previously and the decree-holder had himself made a bid of Rs. 8,762 the highest bid being Rs. 9,000 but the sale was postponed and in the subsequent sale, the value put was Rs. 5,000: the decree holder purchased it for that amount, there being no other bidder.

Held—that the value could not be less than Rs. 8,762 and the inadequacy of price resulted from the undervaluation and the sale was liable to be set aside on that ground (1917) 42 I C 394 followed. (*Coutts and Sultan Ahmed, JJ.*) **MIRZA MAHOMED ZAHUR BEG v. GOPAL SARAN NARAYAN SINGH**.

1. P. L T 441. 57 I. C. 640.

O 21, Rr. 90 and 92—Material irregularity—Execution sale—Joint Family property—Relicase of a portion—Sale without fresh proclamation.

Just before the sale of certain items of property in execution of a decree on mortgage of the properties belonging to a Hindu joint family one of the defendants paid a sum of money and got half the interest in those terms released from sale. The remaining half was put up for auction without a fresh proclamation. Prior to the mortgage suit the members of the family had become divided and this fact was known to the decree-holder, the judgment debtor and the auction purchaser. Held, there was no irregularity in the conduct of the sale and that even assuming there was one, there was no substantial loss resulting from the

C.P. CODE 1908, O. 21, R. 90.

irregularity and that the sale was valid under the circumstances 3 Cal 544 foll (*Seshaiah Aiyar v. Moore, JJ*) *SETTHAI GOUDEN & SINGRAMANNA CHETTIKAR*.

11 L W 477**O 21, R 90—Material irregularity—Substantial injury—Proof of essential**

Before an execution sale can be set aside on the ground of material irregularity in publishing or conducting it, the judgment-debtor must prove not only the irregularity but also substantial injury resulting from the irregularity.

Where the valuation of the property to be sold entered in the sale proclamation is inadequate but the price fetched at the auction is adequate, the sale cannot be set aside inasmuch as the judgment-debtor has suffered no injury (*Newbould and Patton, JJ*) *HALADHAR MITRA CHOWDHURY v. PRAFULLA NATH TAGORE*

57 I C 892**O 21, R 90—Right to apply—Purchaser at execution sale, if a person "whose interests are affected by the sale"**

A purchaser at an auction in execution of a decree is a person whose interests are affected by the sale under O 21, R 90 C.P.C.

The term "interests" in R. 90 of O. 21 is not confined to interests that existed prior to the auction sale but includes interests created by the sale itself. (*Spencer and Bakewell, JJ*) *BRAMSETTI GOPALA KRISHNAYYA v. SAN JEEVA REDDI*. 38 M. L. J. 228 : 11 L W 184 : (1920) M. W. N. 152 : 55 I C 333.

O 21, Rr 91, 92 and 93—Auction purchaser—Remedies of—No saleable interest in judgment-debtor

In the absence of fraud the only remedy of a purchaser at a sale in execution of a decree who finds the judgment-debtor had no saleable interest in the property is an application to set aside the sale under O 21, R. 91 C.P.C.

The implied warranty of title in respect of sales by private contract cannot be extended to court sales except in so far as such extension is justified by the processual law in India. (*Twomey, C. J. and Duckworth, JJ*) *S. C. SMITH v. S. S. A. O. CHETTY*.

12 Bur. L. T. 211.**O 21, Rr 91 and 93—Execution sale—Judgment-debtor having—no saleable interest—Suit for refund of purchase money—Right to sue—Warranty of time.**

The provisions of the present Code of Civil Procedure do not unlike those of S. 315 of the Code of 1882 recognize any substantive right of the auction purchaser at an execution sale to maintain a suit for the refund of the purchase money where it is found that the judgment-debtor had no saleable interest in the property sold. His right is limited to an application for an order for repayment of the purchase money, in case the sale has been set aside by the court.

C.P. CODE 1908, O. 21, R. 100.

A purchaser at an auction sale in execution of a decree knows that all that he purchases is the right and title of the judgment-debtor whatever that may be, in the property put up to sale and that there is no warranty of title on behalf of the judgment-debtor or the decree holder or any one else. He purchases with his eyes open and at his own risk. Apart from any express legislation there is therefore no rule or principle of equity which would entitle him to claim a refund of the purchase money on its being found subsequently that the judgment-debtor had no title in the property purported to be sold. 23 A. 355 ; 35 A. 419 ; 23 M. L. J. 487 ; 37 C. 67 ; 36 A. 329 ; 39 A. 114 foll (*Sulaiman and Gokul Prasad, JJ*). *RAM SAROOP v. DALPAT RAI*

18 A. L. J. 905. 53 I C 105.**O 21, R. 92—Execution sale—Confirmation—Parties to appeal against order**

An appeal against an order confirming an auction sale to which the auction purchasers were not made parties till long after the appeal was time-barred as against them should be dismissed. (*Rattigan, C. J. and Dundas, J.*) *KHAIRA v. SALEM RAJ* 1 Lah 21

O 21, R. 93—Execution Sale under old Code—Judgment-debtor having no saleable interest—Discovery of the fact after coming into force of new Code—Right to refund.

Where an execution sale was held under the old C.P. Code and it subsequently turned out that the judgment-debtor had no saleable interest in the property the purchaser is entitled to maintain a suit against the decree holder for recovery of the purchase money paid over to him even though the non-existence of the saleable interest was ascertained in 1900, after the coming into force of the new C.P. Code. 23 M. L. J. 487 and 40 Mad. 1009 ref. (1905) A. C. 369 foll. (1895) A. C. 425 dist. (Ayling and Odgers, JJ) *ALANJI ISACK SAMID v. VANGA GAETTY*

(1920) M. W. N. 736 : 12 L W 639.**O 21, R. 97—Suit for possession by auction—purchaser—Maintainability of.**

The fact that a plff. has a summary remedy under O. 21, R. 97 of the C.P.Code, would not in the absence of express words therein prevent him from availing himself of a regular suit. (*Prideaux and Mittra, A. J. C.*) *BALLABHDAS v. GULABSINGH*. 57 I. C. 177.

O 21, Rr. 99 and 103—Decision as to possess-on—Finality of, subject to suit—L'm Act, Art. 11 See (1919) Dig Col 259. CHAIL BEHARI LAL, v. KIDAR NATH.**1 Lah. 57. 1 Lah. L. J. 14.****O 21, R. 100—Dismissal of claim for default—Nature of order—Suit after one year, if barred**

Where in a proceeding under O 21 R. 100 of the C.P. Code, the court passed the order:

"Applicant again applies for time. It is

C. P. CODE (1908), O 21, R 101.

highly frivolous, and, therefore, rejected. Applicant takes no steps to adduce evidence. Other side is ready. Ordered the application is struck off for default with costs." The applicant instituted a suit to establish his title more than a year after the passing of the order. Held, that the suit was barred under Art. 11 of the Limitation Act of 1908 which is more general and is sufficiently comprehensive to cover the case of orders made disallowing claims for default and without any investigation on the merits (*Coutts and Sulta v. Ahmad, JJ.*) SYED RAZIUDDIN HUSSIN v. BINDESRI PRASAD SINGH. 1 P. L. T. 539

O 21, Rr. 101 and 103—Order under—Right of puisee mortgagee to redeem, if affected.

A right to possession upon redemption is not a right to the present possession of the property.

An order passed under O 21, R. 101 C.P.C. becomes conclusive under rule 103, only so far as the present right to possess on of the property is concerned. It does not affect a party's right to possession upon redemption (*Mitra, A. J. C.*) BALIRAM v. NARAYAN. 54 I.C. 276.

O 21, R. 103—Suit to establish right to possession—Nature and scope of.

A suit under O. 21, R. 103, is not concerned only with the question of actual possession at the date of the summary order under R 98 or R. 99, but as to the right to possession.

An unsuccessful claimant suing under R. 103 will ordinarily be entitled to succeed on his showing the fact of his possession on the date of the order only if the decree-holder fails to prove a subsisting title in him carrying with it the right to possession.

A person in actual possession has a possessory title against the world, and can only be dispossessed by the true owner and those claiming under him.

A decree-holder may establish his right to the present possession at the date of the summary order.

The scope of the suit is the same whether the summary order was passed under Rr. 98, 99, or 101. (*Wallis, C. J. and Seshagiri Aiyar J.*) THENNUTTI KALLINGAL UNNI MOIDIN v. THENNUTTI KALINGAL UNNI MOIDIN'S SON POKKER. 39 M. L. J. 626.

28 M. L. T. 342. 12 L. W. 598.
1920 M. W. N. 698.

O. 22, R. 1—Abatement—cause of action—Suit for damages for breach of contract of marriage—Death of plffs. suit abates. See DAMAGES.

22 Bom. L. R. 143

O. 22, Rr. 2 and 3—Co-sharer landlords—Suit for rent—claim for abatement—Appeal by tenants—Death of one—Legal representative not brought on record—Abatement—B. T. Act S. 52 Sec (1919) Dig. Col. 260 NARENDRANATH KUTI v. SATYADANAN GHOSAL

54. I.C. 396.

C P CODE (1908), O. 22, R. 3**O. 22, Rr. 2 and 5—Legal representative—wrong persons brought on record—Their heir not bound**

An application asking the court to bring on record somebody other than the legal representative of a deceased defendant cannot alter or bind the true representatives.

On the death of a defendant the plaintiff put in an application stating that the father was the legal representative who was already a party on the record; subsequently, an application was made beyond time stating that the widow was the legal representative and asking that she might be added as a party. Held, that the making of the first application did not affect the true legal representative and that the suit had abated as against the widow (*Banerji and Tuabali, JJ.*) MUHAMMAD JUNID v. AULIA BIBI. 42 A. 497. 18 A. L. J. 613.

O 22, Rr. 2 and 9—Second appeal—Abatement—Suit for declaration that defts. are not entitled to share in Shamariat—Death of one of the defts.—Respondents—Heirs not brought on record

In 1858 the ancestors of the plaintiffs made over proprietary rights in certain land to the ancestors of defendants 1 to 10. The ancestors of defendants brought a suit for a declaration that they were owners of said land and obtained a decree on the 13th June, 1857. In the present suit the plaintiffs asserted that these defendants have no right to a share in the shamariat appertaining to the proprietary land held by them as owners under the aforesaid agreement and decree. The first Court decreed their claim but the District Judge reversed this decree on appeal. During the pendency of second appeal one S., a respondent, died and no application to bring his legal representatives upon the record was made within the period prescribed by law.

Held, that where the interests of defendants-respondents are joint and a decree could not be reversed without the representative of the deceased respondent being brought on the record the whole appeal must abate.

62 P. R. 1913 : 41 P. R. 1215 ; 3 P. R. 1915
96 P. R. 1917 followed.

Held, consequently that the decree could not be set aside without the heirs of S. being before the Court and therefore, the abatement of the appeal as against him involves the abatement of the appeal as a whole. 62 P. R. 1913 foll. Ignorance of law was not sufficient cause for not applying within time to bring the legal representative of a deceased respondent on the record. 41 P. R. 1915 foll. (*Scott-Smith and Leslie-Jones*) FATTI v. SIKANDAR.

2 Lah. L. J. 442 : 56 I. C. 927.

O. 22, Rr. 3 and 6—Abatement—Effect of setting aside—Sufficient cause.

A suit for a declaration to the effect that the land in suit is the village *shamariat* and that the plaintiffs are entitled to get a share of the same in proportion to Khewat having been dismissed by the Lower appellate Court as barred by

C P. CODE (1908), O. 22, R. 3.

l'mitation, a second appeal was lodged. During the pendency of appeal some of the deceased defendants respondents died and no application to bring their legal representatives on record was made within six months.

Held, that the appeal abated against the deceased respondents only and not against the other chief respondent.

There was no sufficient reason to set aside the abatement, very gross negligence being apparent on the part of the appellants, who though living in a distant village, admittedly owned land in the village where the chief respondents resided and must have occasion to go there to raise rent. (Scott Smith and Martineau, JJ.) DEVI DAS v. MAHOMED 1 Lah L J 26

O. 22, Rr. 3, 5 and 9—Abatement—Order of—Appeal.

O. 22, R. 3, C. P. C. applies only where an abatement takes place by reason of an application not having been made in time to implead the legal representative of a deceased plaintiff. The rule has no applicability to cases in which the suit has abated on account of some other cause. (Broadway and Dundas, JJ.) RAM SANUP v. MOTIRAM 1 Lah 493 : 57 I C 137

O. 22, Rr. 3, 4, 9 (3) and 11—Death of one of the respondents—Abatement—Competency of appeal—Defect of parties—Death—Ex parte order setting aside abatement—Liable to be vacated—C. P. Code O. 41, Rr. 20 and 33—Powers under when to be exercised See Dig. Col. 262. KALI DAYAL BHATTACHARJEE v. NAGENDRA NATH PAKRASHI. 54 I. C. 822

O. 22, R. 4—Delaratory decree—Suit by followers of shrine—Omission to implead legal representatives.

Plffs. the followers and disciples of a shrine sued for declaration that certain property was waqf and that the sale thereof by the defendants was void. The suit having been decreed, defendants appealed. During the pendency of the appeal one of the plffs. resp. died and his legal representatives were not impleaded.

Held, that the right to appeal against the deceased plaintiff did not survive against his legal representatives as he was suing only in his capacity as a follower of the shrine and the appeal did not abate. (Broadway and Martineau, JJ.) RAHIM BAKSH v. CHANNAN DIN. 55 I. C. 210.

O. 22, Rr. 4 and 11—Pro forma respondent—Substitution after time.

Omission to implead as respondents in appeal to the High Court the representative of a deceased proforma defendant who had been brought on to the record of the lower appellate court would afford no ground for the abatement of the appeal, especially as they had been substituted before the hearing of the appeal (Broadway, J.) ABDULLA v. MAHOMED KHAN. 2 Lah L J. 601.

C P. CODE (1908), O. 22, R. 8.**O. 22, R. 4—Suit on a mortgage—Death of one of the plffs.—Joint decree—Abatement.**

A suit on a mortgage was originally filed by B S. and H., the latter being the mother of the two former. The plaintiff jointly claimed a sum of Rs. 7,284 as due under a mortgage from the defendant appellant. They alleged that they were heirs and in possession of the property of D who was the original mortgagee and this allegation was admitted by the defendant as being correct. The first Court granted plaintiff a joint decree for Rs. 6,570 with costs realizable by sale of the mortgaged property. Against this decree the defendant appellant preferred the present appeal. It was admitted by appellant that he died in 1915 and that this fact was known to him. In spite of this however no steps were taken to bring her legal representatives on the record and it was stated that her heirs are her daughters and not the other respondents, her sons.

Held, that the decree being joint the appeal abated in its entirety. 6 C. W. N. 196; 10 C. W. N. 981; 11 C. W. N. 504; 31 C. 487 P. C.; 53 P. R. 1896; 6 P. R. 1913; 41 P. R. 1915; and 67 P. R. 1919 foll.

Held, also that the decree was a joint one and so far as the deceased respondent is concerned cannot now be in any way interfered with. (Broadway and Bryan-Petman, JJ.) SARDARI LAL v. RAM LAL.

1 Lah. 225 : 1 Lah. L J. 225 : 57 I C. 199.

O. 22, R. 8—Death of appellant before hearing—Decree a nullity.

An appellant died on the day fixed for the hearing of the appeal but before the hearing and the appeal was heard and decided in ignorance of the fact.

Held, that his legal representatives were not bound by the decree and that the appeal must be re-heard. (Daniels, A. J. C.) AMANAT KHAN v. MIYAN KHAN. 55 I. C. 498.

O. 22, R. 8—Insolvency of plaintiff—Dismissal of suit without notice to official Receiver—Dismissal improper.

On the insolvency of the plaintiff in a suit the Court ought not to come to the conclusion that the official receiver or assignee has refused or neglected to continue the suit or to give security for the costs thereof, unless he had been given notice either by the defendant or by the Court to appear to state whether he is willing to continue the suit and give security, or unless it appears that he has had notice of the pendency of the suit and has taken no steps for a long time.

Per *Chief Justice* :—Where on the insolvency of the plaintiff the Court dismisses the suit without giving notice to the Official Assignee it acts with material irregularity in the exercise

C. P. CODE (1908), O 22, R 9

of its jurisdiction (*Wallis, C J and Sadasiva Aiyar, J*) OFFICIAL RECEIVER, RAMNAD v. CHIDAMBARAM CETTY

12 L W 551.

—**O. 22, R 9—Abatement—No order—Application for substitution—sufficient cause.**

When an appellant dies and no application is made within six months to bring his heirs on the record, the appeal abates automatically. The absence of any order of abatement does not serve as an obstacle to the making of an application for substitution of name which is in effect an application to set aside the order of abatement.

O. 22, R 9 (2) is not controlled by cl (3) and the "sufficient cause" mentioned in cl (2) is not confined to the circumstances given in S. 5 of the Lim. Ac. (*Walsh, J.*) LACHMI NARAIN v. MUHAMMAD YUSUF

42 All. 540 : 18 A L J 638

—**O. 22, R 9—Abatement cause—Mistake of law applicable**

An appellant died leaving sons, daughters and a widow. The sons applied to have their names brought on the record as legal representatives and the application was granted subject to all just exceptions. On the hearing of the appeal it was urged that the appeal had abated inasmuch as the names of the daughters and the widow who were also heirs under Muhammadan Law, had not been brought on the record.—

Held, that as the parties were governed by customary law, the appellants were justified in believing that they alone were the sole heirs and legal representatives of the deceased and that therefore the appeal did not abate. (*Scott Smith and Abdul Raouf, JJ.*) ABDUL RAHMAN v. SHAHABUDDIN.

1 Lah. 481 : 55 I. C. 883.

—**O. 22, R 9—Order of abatement—Effect of—Force of a decree—Subsequent suit—Barred. See ESTOPPEL** **11 L. W. 139.**

—**O. 22, R 9—Sufficient cause—Bona-fide mistake.**

Two of the defts. in a suit died during its pendency and their legal representatives were brought on the record by that court but by a mistake these legal representatives were not made respondents in the High Court and it was not till some nine months after the institution of the appeal that an application was made for the rectification of this error. The error was due to a mistake in the Judgment on the part of the copying department which did not show the names of the legal representatives, although they had long been brought on the record.

Held, that the provisions of O. 22 C. P. C. do not apply to these circumstances. If they did apply the mistake being a *bona fide* one there would be sufficient ground for extending the period of limitation. (*Wilberforce, J.*) KARTAR SINGH v. RALLA.

2 Lah. L. J. 44.

C. P. CODE (1908), O 23, R 1.

—**O. 23, R 1—Appellate Court—Leave to withdraw—Grant of.**

It is competent to an Appellate Court to allow a plaintiff appealing against an order dismissing his suit to withdraw his suit with liberty to bring a fresh suit. (*Macleod, C. J. and Heaton, J.*) CHINNUBHAI MANSUKH v. DAHYABHAI GOVIND **44 Bom. 598 : 22 Bom. L R 774. 57 I C 530.**

—**O. 23, R. 1—Applicability of—Probate proceeding—Prob. and Admira. Act. S 55.**

O. 23, R 1 C.P.C. does not apply to probate proceedings, the provisions in S 55 of the Prob. and Adm. Act being qualified by the words "so far as the circumstances of the case will admit." **40 I C 345, 20 C W N. 986 and 21 B 335 Rel 38 B 303 dist.**

Even if O. 23, R 1 C.P.C. were considered to be applicable the necessary permission to bring a suit was given to the plaintiffs inasmuch as in the statement made by them in the probate proceedings, they said that they intended to file a regular suit, and asked for permission to withdraw from their application and the Court passed an order permitting the plaintiff to withdraw which must be construed as granting permission to the plaintiff to file a suit. **34 M. L. J. 515 and 35 C. 990 (995) foll.** (*Shadilal and Martineau, JJ.*) BANWARI LAL v. KISHEN DEVI.

2 Lah. L. J 242.

—**O. 23, R. 1—Application for withdrawal of suit with leave to bring a fresh suit—Procedure—Courts duty—Jurisdiction—C. P. Code S. 115.**

When a plaintiff applies for withdrawal of his suit with permission for a fresh suit, the court acts without jurisdiction in dividing the application into two parts allowing the suit to be withdrawn and refusing the permission to bring a fresh suit. The Court can dismiss the application and hear the suit on the merits or dismiss it for want of prosecution. (*Coutts, J.*) SHAMANANDAN PRASAD v. MULCHAND RAM.

1 P. L. T. 292 : 56 I. C. 286.

—**O. 23, R. 1—Application for withdrawal with permission to bring fresh suit—Proper order to be made.**

Where a plaintiff files a petition under O. 23, R. 1 praying for withdrawal of the suit with permission to bring a fresh suit on the same cause of action, the court cannot refuse the permission and at the same time allow the case to be withdrawn; the proper order is to reject the petition and if the plaintiff does not adduce evidence then to dismiss the suit.

Ordinarily an application to withdraw with permission to bring a fresh suit in no way means an application to withdraw if no such permission is granted (*Adami, J.*) SUGGI LAL v. WALIULLAH.

1 P. L. T. 299 : 56 I. C. 756.

—**O. 23, R. 1—Formal defect—Dismissal of suit—Fresh suit barred.**

C. P. CODE (1908), O. 23, R. 1.

Where instead of amending his plaint, a plff requested his suit to be dismissed and it is so ordered a subsequent suit by him, including part of the subject matter of the previous suit, is barred by O. 23, R. 1 (5) C.P.C. (*Rattigan, C.J.*) *SHEIKH HASAN v. GAWRI SHANKAR*

129 P.R. 1919 : 58 I.C. 271

—**O. 23, R. 1—Leave to withdraw suit with liberty—Refusal of—Procedure:**

If the court reuses leave to withdraw a suit with permission to bring a fresh suit it should hear the suit on the merits or dismiss it for want of prosecution if the plaintiff refuses to proceed. (*Coutts, J.*) *DARSAN SINGH v. SHEOKAJ SINGH*

56 I.C. 286

—**O. 23, R. 1—Leave to withdraw with liberty—Erroneous grant of—Subsequent suit—Validity of prior order not to be questioned:**

An order for withdrawal of a suit with leave to institute a fresh suit made under O. 23, R. 1 C. P. C. but in circumstances not within the scope of the rule, cannot be treated as an order made without jurisdiction; such order is consequently not null and void.

A fresh suit instituted upon leave so granted is not incompetent.

The Court trying the subsequent suit is not competent to enter into the question, whether the Court which granted the plaintiff permission to withdraw the first suit with liberty to bring a fresh suit had properly made such order. (*Mookerjee, Fletcher, Chatterjee, Teunon and Chaudhuri, J.J.*) *HRIDOV NATH ROY v. RAM CHANDRA.*

31 C.L.J. 482;
58 I.C. 806

—**O. 23, R. 1—Order for the withdrawal of suit by appellate court when there is no formal defect—Order without jurisdiction—Institution of fresh suit res judicata—Power of co-ordinate courts to ignore order:**

An appellate Court which passes an order under O. 23, R. 1 C. P. Code allowing withdrawal of the suit and granting permission to the plff. to bring another suit on the same cause of action when there is no formal defect as contemplated therein acts w/out jurisdiction and the order passed by him is not only illegal, but void and a nullity (1855) 6 M.I.A. 134; (1912) 16 C.W.N. 1027 (1869) 13 M.I.A. 160 applied.

Consequently a fresh suit on the same cause of action is barred by the rule of res judicata the decision of the trial Court having become final between the parties (1916) 20 C.W.N. 1000 : (1918) 3 P.L.J. 404 followed.

It is quite competent for any court whether exercising higher, lower or co-ordinate jurisdiction to ignore an order passed by the appellate court which is void and a mere nullity, as a court determining the question of res judicata is entitled to consider the question of the competency of the Court which passed the previous decree or order. (1920) 31 C.L.J. 272, followed.

C. P. CODE (1908), O. 23, R. 3.

(*Coutts and Sultan Ahmad, J.J.*) *RAMA SINGH v. JANAK SINGH.* (1920) Pat 232 : 1 P.L.T. 300 . 56 I.C. 697.

—**O. 23, R. 1—Withdrawal of suit—Appellate Court if can grant permission:**

It is permissible to an appellate court in an appeal pending before it to give leave to the plaintiff to withdraw from a suit with permission to bring a fresh suit in respect of the same subject-matter 55 B 261 dist. 22 Bom. L.R. 774 Rel. (*Shah and Crump, J.J.*) *SHEIK HASSAN GULAM MD'HDIN v. MAHOMED ALI SHEIKH MAHOMED* 22 Bom. L.R. 1183.

—**O. 23, R. 1—Withdrawal of suit by one of several plaintiffs:**

It is not open to one of several plaintiffs to withdraw a suit without obtaining the consent of all (*Ferard S. M. and Harrison, J.J.*) *MUSSAMMAT SUASATI BIBI v. BHARAT RAI*

55 I.C. 926

—**O. 23, R. 1—Withdrawal of suit with leave to sue—Formalities necessary for—Improper grant of leave—Effect of—Grant of leave by implication:**

The permission mentioned in O. 23, R. 1 C. P. C need not be express, and it is sufficient if the grant of permission can be implied from the order, read with the application on which the order was passed. 3 P.R. 1905 at p 25 and 97 P.R. 1916 dss.

It is not open to the defendants to question the propriety of the order granting the permission which has become final 15 I.C. 175 foll. (*Shadi Lal and Martincau, J.J.*) *BANWARI LAL v. KISHEN DEVI.* 2 Lah. L.J. 242.

—**O. 23, R. 1—Withdrawal of suit without leave—Effect of:**

Sensible: The withdrawal of a suit without leave to sue merely bars the remedy but does not extinguish the right, 26 M. 410 Rel. (*Seshagiri Iyer and Bakewell, J.J.*) *SOLAI AMMAL v. JOGI CHETTY.* 27 M.L.T. 53 . 56 I.C. 675.

—**O. 23, R. 3—Arbitration—Reference to—Award—Adjustment or compromise of the suit—Decree in terms of the award—Practice—Inquiry—Duty of Court. See C.P.CODE, SCH. II PARAS. 1 and 17.**

22 Bom. L.R. 1048.

—**O. 23, R. 3—Compromise—Award on private reference—Enforcement of—Lawful Compromise—Allotment of share in excess of that allowed by law:**

An award made on a reference to arbitration without the intervention of the Court can be recorded and enforced as a compromise under O. 23, R. 3, C.P.C.

A compromise is not unlawful merely because the parties do not get the shares to which they would be entitled under their personal law. (*Teunon and Beachcroft, J.J.*) *SASHIBALA DASI v. KAMIKSHA NATH DUTT.*

55 I.C. 716.

C P CODE (1903), O 23, R. 3.

—**O. 23, R. 3**—Compromise decree—Penal clause—Foreclosure—Relief against *Sue COMPROMISE DECREE* 24 C.W.N. 545.

—**O. 23, R. 3**—Compromise—Decree—Registration if necessary—Immovable property affected

The terms of a compromise not embodied in a registered document but incorporated in the decree passed in a suit for ejectment, according to which the defendant is to hold the land in dispute as an under-*raiyat* of the plaintiff and is not to be liable in ejectment from his under-*raiyati* holding, are admissible in evidence and bind both parties 47 Cal 485, 401 (Mookerjee, A.C.J. and Fletcher, J.) PROTAP CHANDRA PAL v. NITYANANDA NAG

57 I.C. 751

—**O. 23, R. 3**—Compromise—Duty of court not to recognise if in violation of statute.

A court will not recognise any compromise of an action with the facts of which it is entirely unacquainted or if one of the terms of the compromise is a clear violation of a statutory rule (Sultan Ahmad, J.) MUSSAMMAT SAKLI v. RAM KISHUN. 55 I.C. 504

—**O. 23, R. 3**—Compromise—Settlement of all points in dispute—Intention of parties to have a formal document drawn up—Agreement if enforceable

Where the parties to a litigation having settled all the matters in dispute between them in the suit in the presence of some mediators put the agreement into writing and signed the same but the *raznamah* recited that *Vakils* should be consulted and another *raznamah* should be prepared and filed in court in accordance with the reliefs which each party had to get and it was found that all that was meant by the recital was only the mention in the *raznamah* of certain facts which had no reference to the points in dispute and the drafting of a more formal document or compromise to be presented in Court and that the compromise already arrived at was not conditional either on the mention of those facts or the presenting into court of the more formal document

Held, that there was a complete and enforceable compromise which could be given effect to under O. 20, R. 3, C.P. Code.

The non-mention of the fact and the omission to have a more formal document drafted did not render the compromise already arrived at, any the less complete. (Spencer and Krishnan JJ.) KAMALAMBAL v. DORASAMI CHETTIAR 11 L.W. 179 : 56 I.C. 26.

—**O. 21, R. 3**—Compromise of suit by parties—Petition presented by *Vakils*—Authority of *Vakils*.

Where a *raznamah* petition was presented by the parties through their *Vakils*, and the Court acted upon the *raznamah*.

Held, there was no question of the authority of the pleaders to compromise the case on behalf of their clients, as the compromise was

C P CODE (1903), O 26, R 14.

the act of the parties and not that of their pleaders (Abdur Rahim and Oldfield, JJ.) PAMBRYAM CHETTY v. KANDASWAMI AIYAR 12 L.W. 562.

—**O. 23, R. 3**—Compromise—trustee of religious endowment—Compromise lawful. See RELIGIOUS ENDOWMENT, TRUSTEE

12 L.W. 562

—**O. 23, R. 3 and O. 34, R. 4 and 5**—Mortgage suit—consent decree—Form of—Execution without final decree being passed—Attachment

A decree under O. 34, R. 4 C.P.C. is incapable of execution until a final decree is passed under O. 34, R. 5. It does not follow that in a mortgage suit the Court is powerless to pass a consent decree otherwise than in accordance with the provisions of O. 34, R. 4. O. 23, R. 3, C.P.C. gives ample power to the Court to pass a decree in accordance with the terms of settlement, and O. 34, R. 4 must be taken as subject to the provisions of O. 23, R. 3.

Where a consent decree in a mortgage suit provides that the properties shall remain mortgaged and hypothecated and if the money due to the plaintiff is not paid by a certain date he would be entitled to take out execution, and default is made in payment of the money it is not necessary for the plaintiff to go through the formality of attaching the properties before taking out execution. (Das and Adami, JJ.) MUSSAMMAT ARUNBATI KUMARI v. RAMNIKANJAN MARWARI.

58 I.C. 299.

—**O. 23, R. 3**—Pending suit—Reference to arbitration—Award—Compromise.

Where in a pending suit, the parties refer the matter to arbitration without the intervention of the Court, the award made cannot be enforced either under O. 23, R. 3, C.P.C. or under the provisions of the Arbitration Act. (Rankin, J.) THE DEKARI TEA CO., LTD. v. THE INDIA GENERAL STEAM NAVIGATION CO. LTD 25 C.W.N. 127.

—**O. 26, R. 4**—Examination on commission of plff—Propriety of.

The evidence of a plaintiff in a case ought not to be taken on commission except for very strong reasons.

The case of a defendant is different because the defendant has not chosen the forum. (Rigg, J.) MUDALIAR v. ABDUL RAHMAN BROTHERS & CO. 13 Bur. L.T. 33. 57 I.C. 955.

—**O. 26, R. 14 (2)**—Commissioner's report—Objection to—Power of appellate court to entertain.

An appellate Court has the same powers in dealing with objection to the report of a commissioner as the original court, and a party cannot be heard in the appellate court unless he had filed his *objection* before the original court 5 C.W.N. 692 foll. (Twomey, C.J. and Ormond, J.) MA DWE v. MA TIN LUN. 12 Bur. L.T. 228 : 56 I.C. 972.

C P. CODE (1908), O. 26, R. 15.

O 26, R 15—Commissioner's fees—Duty of court to fix amount—Deposit before passing final orders in suit—Reduction of Commissioner's bills—When justified.

Under O 26, R. 15 of the C. P. Code the Court has to order the parties to make the deposit for the necessary remuneration of the commissioners; and as it has to be entered in the decree, as is shown in form D, it is necessary to determine the fee of the commissioners before the final disposal of the case.

The court having ordered the parties to deposit Rs. 1,200 after reducing the commissioners' bills, and the parties having deposited the same and their pleaders having raised no objection thereon, there was no justification for the court to re-open the matter after the case was disposed of, when the commissioners applied for withdrawal of the amount deposited by the parties as their remuneration. 15. C W N. 221 foll.

There must be some confidence reposed in the commissioners, who are pleaders and officers of the court, and their report as to the amount of work done by them can only be set aside on substantial and definite grounds. (*Jwala Prasad, J.*) BHAGWAT SAHAI v. BRISH BHUKHAN PRASAD SINGH. 1 P. L. T. 171: 57 I. C. 291

O 32, Rr. 1 and 4—Minor—Plff.—Wrong person named as next friend—Substitution of right person after expiry of period of limitation.

In a suit for ejectment a minor was included among the plffs. under the guardianship of a person. There was a dispute between that person and another as to who was the minor's guardian resulting in the latter being substituted as the guardian. *Held*, that the suit as originally filed was not faulty in its citation of plaintiffs even though the substitution is made after the period prescribed for the filing of the suit has expired. (*Ferard S. M and Harrison, J. M.*) ISHWARI CHAUDHARI v. DUKHI. 54 I. C. 575.

O. 32, R. 3—Execution proceedings
Minor

The writ of attachment issued against a minor for whom no guardian has been appointed under O. 32, R. 3 of the C. P. Code is not legal.

Even if O. 32, R. 3 does not directly apply to execution proceedings, the principle underlying O. 32, R. 3 must be held to apply to such proceedings. 29 Mad. 329 and 26 Bom. 109 ref. (*Sultan Ahmed, J.*) TANNAK LAL MANDAR v. EMPEROR. 1. P. L. T. 654

O. 32, R. 4—Effect of—Guardian ad litem Appointment of—Consent—Proof of

The effect of O. 32, R. 4, is that no person can be appointed a guardian *ad litem* without his express consent. The question whether the person appointed guardian *ad litem* consented to act will always be one of importance on the merits. (*Richardson and*

C. P. CODE (1908), O. 32, R. 4

Shanishl Huda, JJ) RADUASHYAM DASS v. RANGA SUNDARI DASSI. 24 C W. II. 541.

O 32, Rr 4 and 7—Next friend—Conflict of interest with that of minor—Effect of—Compromise—Fraud and collusion—Minor not affected.

If in a suit the personal interest of the next friend of a minor conflicts with his duty towards the minor then, unless the next friend shows *überreina fides*, he is not competent to act as the minor's next friend. In such a case the minor is not properly represented and the decree in the suit would not be binding upon him. 22 W. R. 290 followed.

It is no dereliction of duty on the part of a guardian to refuse to litigate on his ward's behalf a claim which he knows to be false and unfounded in fact.

In giving permission to compromise a suit on behalf of a minor it is usual and desirable that the Court should record an order stating that it considers the compromise to be for the benefit of the minor but such an order is not essential to the validity of the compromise. The addition of the words "expressly recorded in the proceedings" in O. 32, R. 7 C. P. C. has not changed the pre-existing practice under S. 462 of the Code of 1882 (*Richardson and Shamsul Huda, J J*) BEJOY SINGH HAZARI v. MATHURIYA DEBYA. 56 I. C. 97.

O. 32, R. 4 (1)—Requirements of not strictly complied with—Effect of—Prior decree if a nullity

Where a prior decree had been obtained against the plffs. who were then minors represented by their mother as guardian *ad litem* and the plffs. instituted a subsequent suit for possession within three years of their attaining majority it was contended that the suit was barred as no suit had been brought in time to set aside the prior decree. In answer the plffs. pleaded that the interest of the mother in the prior litigation was adverse to theirs, that she was not therefore competent under O 32, R. 4 (1) of the C.P. Code to represent them, that the decree was therefore a nullity and need not be set aside:

Held, that any possible adverse interest in the mother did not render the prior decree a nullity.

A defect in following the rule as to representation of minors was not fatal to the proceedings in the prior suit and the present suit was consequently barred. 30 Cal. 1021, foll. 38 All. 315 and 32 Cal. 596 dist. (*Oldfield and Phillips, JJ*) KUPPUSWAMI AIYANGAR v. KAMALAMMAL. 43 Mad. 842: 39 M. L. J. 375: 12 L. W. 243.

O. 32, R. 4. (2)—Guardian ad-litem—Person appointed failing to furnish security—Effect of—Non representation of minor.

If a person is appointed guardian of a minor conditional on his furnishing security and he fails to furnish the security and the necessary certificate is not issued to him, he cannot be regarded

C. P. CODE (1908), O. 32, R. 4.

as a proper guardian *ad litem* of the minor in a suit. The minor is not represented in a suit by such person unless the latter is formally appointed guardian *ad litem* of the minor. (*Chatterjee and Panton, JJ.*) BHUTNATH NAG v. SATYA KINKAR NAG. 54 I. C. 368

O. 32, R. 4 (2) — Minor deft.—Appointment of guardian by court—Different guardian *ad litem* appointed—Effect

Where a minor defendant has already a Court guardian validly appointed for him the appointment of another person as guardian to the minor for the purpose of the suit is illegal even though neither the Court nor the plaintiff had any knowledge of the existence of such guardian. A decree passed against the minor under such circumstances is liable to be set aside. 31 All 572, 32 Cal. 296 foll. (*Sadasiva Aiyar and Spencer, JJ.*) PUJARI BHIMJI v. RAJABHAI HUSSAIN SAHIB.

43 Mad 138 : 39 M. L. J. 239 : 12 L. W. 114 : 28 M. L. T. 295

O. 32, R. 4 (3)—Guardian-*ad litem*—Appointment of—Consent—Presumption—Silence—No prejudice to minor—Decree binding on minor.

The consent required by O. 32, R. 4 (3) of the C. P. Code need not be express, but may be implied from conduct and other circumstances.

The presumption or implication of consent may, under suitable circumstances, arise even where the proposed guardian *ad litem* remains silent and absent. For example, where in a suit on bond against the manager and the other members of a joint Hindu family some of them were minors, and their brothers were proposed as their guardians *ad litem* but remained silent and absent, and it was not shown that they had any defence to the suit, it was held that the brother's consent to the proposed guardianship could be rightly implied, and so there was no irregularity in their appointment as guardians *ad litem* of the minors.

Held, further, that even if there were an irregularity the minors could not get the decree passed in that suit set aside, as they had not established that their interests had been prejudiced by such irregularity. 30 Cal 1021 and 14 A. L. J. 589 foll. (*Walsh and Gokul Prasad, JJ.*) CHHATTER SINGH v. TEJ SINGH. 18 A. L. J. 956.

O. 32, R. 7—Compromise—Sanction of court based on mistake.

Where the sanction of the Court is obtained to a compromise on behalf of a minor under a misapprehension of a material fact as to the true position of the minor, a decree passed on such compromise is not binding on the minor. (*Shadi Lal and Wilberforce, JJ.*) JHANDA, SINGH v. LACHHMI. 1 Lah 344 : 2 Lah. L. J. 623 : 56 I. C. 878.

O. 32, R. 7—Decree Adjustment of Minor Judgment debtors—Express sanc-**C. P. CODE (1908), O. 32, R. 7.**

tion of Court if necessary—Remedy open to minor—Review—Appeal.

On the 12th April, 1919, the judgment debtors some of whom were minors represented by their guardian *ad litem* informed the court by petition that the decree-holder had agreed that the sale which had been held in execution of the decree might be set aside upon payment of Rs 37,283 by the 27th May. The court adjourned the case "to the 27th May as agreed to by the parties". On the 27th the Judgment debtors asked for permission to deposit Rs. 15,000 and stated that the decree-holder had agreed to grant two months further time. On the 30 May the judgment-debtor filed a petition stating that the decree-holder had agreed to take Rs 15,000 by the 27th May and Rs 15,400 within two months thereafter. The hearing of this petition was also fixed for June 7th. On that date the adult judgment-debtors objected that the compromise of the 12th April was not binding on the minors as express sanction of the court under O. 32, R. 7, C. P. C. had not been given.

Held, that the order of the 12th April was an order certifying an adjustment which the court had jurisdiction to make.

Assuming that O. 32 applies to execution proceedings the omission of the court's express sanction was an error of law which did not affect its jurisdiction. 26 B. 109; 29 M. 309, 4 P. L. J. 135 Ref.

Whether O. 32, R. 7, applies to execution proceedings or not its principle applies, and if the minors had really been prejudiced the H'gh Court would have held that the lower court was right in declining to confirm the sale. 2 M. 264 referred to. The only remedy open to the minors was to apply for review. S. 47. C. P. C. barred a fresh suit and as the order sought to be set aside was an interlocutory order they had no right to apply by motion; 31 C. L. J. 150 ref.

There being no application for review the lower court had no jurisdiction to make the order of the 12th April unless the court was justified in doing so under its inherent powers. (*Mullick and Sultan Ahmed, JJ.*) RAM GULAM SAHIB v. SHAM SAHAIBS. 5 P. L. J. 379 : 1 Pat. L. T. 663 : (1920) Pat 358.

O. 32, R. 7—Execution proceedings—Omission to give sanction—Ultra vires order—Cancellation of.

Where in a case under O. 21, R. 90 of the C. P. Code for setting aside an execution sale both the parties effected a compromise, but on the subsequent dates fixed for payment of the decree amount, the objection was raised as to the invalidity of the compromise for want of court's sanction under O. 32, R. 7 in respect of the minor judgment-debtors, and the Court vacated its previous order, and the decree holder moved the High Court in revision.

Held, (1) that the principle of O. 32, R. 7 applies to execution proceedings. 26 Bom. 109, 29 Mad. 309, and 1 Pat. L. J. 135 ref. and (2) that the

C P. CODE (1908), O 32, R 7

omission to record sanction, in the absence of proof of any prejudice to the minors, did not make the compromise *ultra vires* and there being at best only an error of law the Court was not justified in vacating it 2 Mad 264 rei.

Held also, that the only remedy of the minors was to apply for review; they could not bring a suit, which was barred under S. 47, nor could they apply by motion, the order being not an interlocutory order 31 C.L.J. 150 rei (*Mullik and Sultan Ahmed, JJ*) RAMGULAM SAHU v. SHAM DAS. 5 Pat. L.T. 379:

1 P. L.T. 663 : (1920) Pat. 358

—O. 32, R. 7—Minor—Compromise of suit by natural guardian not guardian ad-litem—Sanction of Court—Absence of

In execution of a decree obtained against the minor plaintiffs' father, an application of compromise signed not by the minor's guardian *ad-litem* but by their natural mother was presented to the Court which recorded it, without granting or rejecting it. Whilst the execution proceedings were pending the minor's mother sold the minor's property to the decree-holders on terms and conditions set out in the decree. The sale-deed was not sanctioned by the Court as provided by O. 32, R. 7 C.P.C. Subsequently, the minors having sued to have the sale-deed set aside:—

Held by Macleod, C.J., that the sale-deed was null and void, since as the minor's mother had applied to the Court to sanction the compromise she had thereby put it out of her power to settle the creditors claim as the minors natural guardian without the Court's consent.

Heaton, J., that the sale deed was contrary to law because in effect it defeated the purpose of S. 462 which necessarily implied that during the continuance of proceedings in Court the dispute between the minors and another party which the court had to decide could not be compromised except by the guardian *ad-litem* of the minor and by him only with leave of the Court.

(*Per Macleod, C.J.*) Though O. 32, R. 7 C.P.C. Code applies to execution proceedings, there seems to me to be a distinction between a case where a minor's liability has already been determined by a decree in his father's lifetime and a case where the minor's liability in the first instance is in dispute. For in the former case there is a debt which the guardian is clearly entitled to pay off in full, and the fact that the judgment-creditor has issued execution against the minor making an outsider his guardian *ad litem* does not in my opinion alter the situation. (*Macleod, C.J. and Heaton, J.*) GURUMALLAPPA v. MALLAPPA.

44 Bom. 574 : 22 Bom. L.R. 725 : 57 I.C. 417.

—O. 32, R. 7—Minor—Guardian ad-litem—Minor's mother consenting to arbitration—Decree upon award by consent—Minor entitled to set aside decree after attaining majority.

C P. CODE (1908), O. 32, R. 7.

In 1896 the plaintiff's father mortgaged his house to defendant No. 1 for Rs. 1000. After his death but during the plaintiff's minority the mortgage claim was referred to arbitration and, on an award so obtained a decree was passed wth the consent of the plaintiff's mother in 1901. In execution of the decree the house was put up to sale and purchased by defendant No. 1 at an under value *viz* for Rs 1707. The plaintiff having attained majority in 1911, sued in 1912 to have the decree set aside.—

Held, that having regard to the terms of the award and the subsequent result of the decree, namely a sale at an undervalue in favour of the defendants it was clear that the minor was not effectively represented in the proceedings initiated by the defendants in 1901; and that the decree was, therefore *null* and *void* under S. 443 of the Civil Procedure Code of 1882 (*Shah and Hayward, JJ*) SADASHIV RAM CHANDRA DATAR v. TRIMBAK KESHAV.

44 Bom. 202 : 22 Bom. L.R. 266 : 56 I.C. 399.

—O. 32, R. 7—Minor—Mortgage suit—Decree on admission—Second mortgage without sanction of court in lieu of prior one.

In a mortgage suit some debts were minors and their claim was admitted on their behalf by their guardians. A preliminary decree for foreclosure was passed. The decree was not made absolute. The guardian of the minor then executed another mortgage of the same property in favour of the decree-holder in part payment of his decree and for the remainder executed a money bond. This arrangement was not sanctioned by the Court. Upon a suit on this mortgagee, Held, that the mortgagee was not *void* but merely voidable as against the person who contested it. (*Macnair A.J.C.*) BHAGIRATH v. NARAYAN

58 I.C. 178.

—O. 32, R. 7—Reference to arbitration—Compromise by guardian *ad litem*—Subsequent to reference—Benefit of minor—Duty of court—Arbitrators embodying compromise in their report.

After referring a pending suit to arbitration the parties entered into compromise amicably settling their dispute and the arbitrators reported to the court to that effect requesting it to pass a decree in accordance with the compromise, which was done Plff. a minor was represented by a guardian *ad litem* in the previous proceedings then sued for a declaration that the decree thus obtained was ineffectual against him, and for possession of properties on the ground of his guardian's negligence.

Held, that the report of the arbitrators embodying the compromise entered into between the parties was not an award.

It was the duty of the Court to have examined the compromise and to have decided whether it was for the benefit of the minor and

C. P. CODE (1908), O 32, R 7.

whether leave should or should not be given to plaintiff's guardian to enter into the proposed compromise:

The decree passed in accordance with the compromise was not binding on plaintiff, inasmuch as the compromise was not sanctioned by the Court. O. 32, R. 7 C.P.C. (*Abdul Raouf, J.*) *GHULAM RASUL v. BEGAM.* 55 I.C. 218.

—O 32, R. 7 and Sch II Para 1—Scope of—Reference to arbitration by next friend of minor plaintiff—Leave of Court is essential—Ratification—Plaintiff, if can challenge reference. See (1919) *Dig. Col.* 273. *MUHAMMED IBRAHIM v. ALLAH BAKSH.* 1 Lah. L.J. 138.

—O 32, Rr 8 and 4—Minor—Application for appointment of guardian—Absence of affidavit—Effect of

The absence of an affidavit such as is required by S. 456 C.P.C. of 1882 is not sufficient to render the proceedings illegal and void as against the minor on the ground that he was not properly represented. (*Scott, Smith, J.*) *IMAM DIN v. PURAN CHAND.* 1 Lah. 27: 55 I.C. 833.

—O 32, R. 11—Applicability—Ex parte proceedings—Power to remove Guardian.

The power of the Court under O. 32, R. 11 C.P.C. to remove the guardian for the suit of a minor debt, and appoint a new guardian instead may be exercised at any time during the pendency of the suit and the same is not taken away by the fact that an order to try the suit *ex parte* has previously been passed (*Krishnan, J.*) *AYYA NADAN v. THENAMMAL.* 27 M.L.T. 171: (1920) M.W.N. 241: 11 L.W. 289: 55 I.C. 945.

—O 33, R. 2—Leave to sue in forma pauperis—Presentation of application through clerk of the Crown.

The presentation of an application for leave to sue in forma pauperis to the Judge through the Clerk of the Court is a proper presentation within O. 33 R. 2 C.P. Code. It is not necessary for the applicant to place the petition in the actual hands of the Judge himself. (*Hallifax and Kotwal, A. J. C.*) *JAIRAM v. MOTILAL.* 58 I.C. 961.

—O 33, Rr 5, 6, 7 and 15—Suit for Maintenance—Cause of action—Meaning of.

O. 33 R. 15 C.P.C. is to be read along with provisions of Rr 5, 6, and 7. R. 5 contemplates a summary rejection by the Court at the earliest stage of the proceedings. Rule 7 contemplates a refusal of the application to sue as a party on the fourth ground mentioned in R. 5 namely that the allegations of the petitioner do not show a cause of action.

O. 33 R. 15 contemplates the refusal of a second application when it is in respect of the same right to sue; that is, the right to sue

C. P. CODE (1908), O. 34, R. 1.

which formed the basis of the previous application.

An application for leave to sue in forma pauperis by the petitioner, who was the wife of the opposite party, for maintenance from her husband was dismissed on the ground that the allegations in the plaint did not show a cause of action. More than two years afterwards, she made the present application on the 5th of August, 1918 for leave to sue in *forma pauperis* to recover maintenance from her husband for a period of more than two years subsequent to the date when the previous application was filed.

Held, that the subsequent application to sue in forma pauperis was not barred under O. 33, R. 15 C.P.C.

There is no substantial distinction between a right to sue in R. 15 and a cause of action in R. 5 of O. 33. (*Mookerjee and Panton, JJ.*) *RATNAMALA DASI v. KAMAKSYA NATH SEN.*

31 C. L.J. 351: 57 I.C. 9.

—O. 33, Rr. 5 and 6—Whether next friend of pauper minor plaintiff should prove his own pauperism. See (1919) *Dig. Col.* 275. *MUSSAMMAT AMIR MAI v. SECRETARY OF STATE FOR INDIA.* 58 I.C. 445.

—O. 33, R. 5 (d)—Application for leave to sue in *forma pauperis*. Matters to be considered—Investigation of evidence not to be made. See (1919) *Dig. Col.* 275. *NATESA AIYAR v. MANOGYA AIYAR.* 54 I.C. 462.

—O. 33, Rr. 15 and 5—Pauper suit—Leave refused owing to failure to insert schedule of property—Second application not barred.

O. 33, R. 15 C.P.C. does not bar a second application where the first application was rejected under R. 5 (a), as not having been accompanied by a schedule of moveable and immoveable property. 42 I.C. 803, F.B. ref. 33 I.C. 812 dist. (*Abdul Raouf, J.*) *MUSSAMMAT BAL KAUR v. SHIB DAS.* 1 Lah. 151: 56 I.C. 207.

—O. 34, R. 1—Parties—Joinder of. O. 34, R. 1 C.P.C. does not prohibit the joinder of any person as a party but merely lays down that subject to the provisions of the Code all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties.

The transferee of mortgaged property in breach of a covenant against alienation may be made a party to a foreclosure suit. (*Drake-Brockman, J. C.*) *TEJSINGH v. PATIRAM.*

55 I.C. 438.

—O. 34, R. 1—Parties—Joint Hindu family—Manager—Junior members if necessary parties.

The managers of a joint family effectively represent the interest of the members of the family and the Karta of a joint Hindu family need not join as party one of the members of

C. P. CODE (1908), O 34, R. 1.

the family who has a joint interest with him in the mortgage in a mortgage suit.

The decision of the Judicial Committee in the case of 36 All 383 must be taken to have overruled the ruling in 41 Cal. 727.

The only result of not bringing the sons of the defendants who have got an interest in the right of redemption on the record as parties defendants in a mortgage suit is to leave their interest unaffected by the decree which is passed in the case. The question whether they have been substantially and virtually represented in the action by their father cannot arise in the action in their absence (*Coutts and Das, JJ*) *BAIJ NATH GOENKA v. DULUP NARAIN SINGH*. (1920) Pat. 261. 1 Pat. L. T. 582 : 58 I C 489

O 34, R. 1—Parties—Omission to implead—Sale in execution—Suit for redemption—Form of.

If a person interested in the mortgaged property has not been joined as a party to the suit on the mortgage and he comes in before foreclosure or sale he has all the rights of redemption that his interest in the property gives him. In a suit for sale under a mortgage the mortgagee failed to effectively implead certain persons interested in the mortgaged property. A decree was passed and the mortgaged property was sold under it and was purchased by the mortgagee. In a suit by the persons who should have been impleaded for a declaration that their right to redeem was not extinguished.

Held, that after the sale had taken place the mortgagee held as purchaser and was entitled to raise all the defences that belonged to him as such, and that unless the claim to set aside the sale were made in a properly constituted action and properly raised the Court could not interfere with the possession which had been given him by the purchase. (*Lord Moulton*) *GANPAT LAL v. BINDBASINI PRASAD NARAYAN SINGH*.

39 M. L. J. 108 :

24 C. W. N. 954 : (1920) M. W. N. 382 : 28 M. L. T. 330 :

18 A. L. J. 555 : 12 L. W. 59 : 56 I. C. 274 : 47 I. A. 91. (P. C.)

O. 34, R. 1—Parties—Redemption suit—Persons claiming independently of mortgage.

Under O. 34, R. 1 C. P. C. in a suit for redemption of a mortgage only those parties should be joined who claim an interest in the mortgage security or in the right to redeem others who claim a title to the property independently of the rights of the mortgagor and the mortgagee need not be made parties (*Macleod, C. J.*) *SATAGUDA APPANNA v. SATAPPA DARI GAUDA*. 44 Bom. 698 : 22 Bom. L. R. 815 : 57 I. C. 577.

O. 34, R. 1—Prior and pu'sne mortgagees—Suit on pu'sne mortgage impleading

C. P. CODE (1908), O 34, R. 2.

prior mortgagee—Priority not attacked—Subsequent suit on prior mortgage not barred. *See RES JUDICATA, MORTGAGE SUIT.*

47 I. A. 11.

O. 34, R. 1—Prior and Subsequent mortgage—Suit by first mortgagee for sale impleading third mortgagee but not second—Sale—Distribution of proceeds—Right of second mortgagee. *See T. P. ACT, SS 58 AND 100*

12 L. W. 674.

O. 34, R. 1—Prior and subsequent—Suit by first mortgagee without impleading second mortgagee—Subsequent suit by second mortgagee—Redemption on payment of first mortgagee's decree amount. *See C. P. CODE, O. 34, RR. 3 (3) AND 8 (3).* 47 I. A. 71.

O 34, R 1 Explanation—Prior and subsequent mortgages—Mortgage suit—Parties—Decision in suit by subsequent mortgagee if binding.

Under O. 34, R. 1 of the C. P. Code a prior mortgagee is not at all a necessary party. A paramount title cannot be drawn into controversy in action for foreclosure or sale, the chief object of which is only to cut off rights subsequent to the mortgage and not prior to it.

If the prior mortgagee is, however, made a party the purpose of making him a party should be clearly stated, but if no purpose is given in the plaint or provided for in the decree, the prior mortgagee will not be affected by the judgment in the suit brought by the pu'sne mortgagee, as no investigation as to the validity of the prior mortgage can be made.

Unless relief is claimed against the prior mortgagee, the latter does not set up his prior mortgage, and his subsequent suit on the prior mortgage, will not be barred under S. 11 of the C. P. Code particularly when no issue is raised and the question as to the prior mortgage is expressly left undecided. 31 Cal. 428 ; 15 C. L. J. 411, 9 C. L. J. 78 discussed 1 C. L. J. 337, 4 C. W. N. 297 and 9 C. L. J. 78 rel. (*Coutts and Sultan Ahmad, JJ.*) *LACHMI NARAIN MARWARI v. CHAUDHURI BHAGWAT SINGH*. 1 P. L. T. 629 : 58 I. C. 33.

O 34, Rr 2 and 3—Foreclosure—Preliminary decree—Extension of time—Application for—Sufficient cause.

An application to extend the time fixed by a preliminary decree for foreclosure made after the expiry of that time is entertainable. The question of the sufficiency of cause for granting an extension is a question of fact to be decided according to the circumstances of each particular case. (*Kotwal, A. J. C.*) *KANHAI SINGH v. KARU.* 54 I. C. 860.

O 34, Rr. 2, 3, 4 and 5—Lease to mortgage—Equity of redemption—Transfer of—Preliminary decree on mortgagee—Suit by transferee for rent due.

In a suit on a mortgage the amount claimed is calculated only up to the due date fixed in the preliminary decree, and a suit to recover

C. P. CODE (1908), O. 34, R. 3.

the amount which becomes due after the due date is not barred 30 All. 36 diss. 26 Bom. 661 dist.

Where the mortgagee took a lease of the mortgaged property from the mortgagor and subsequently obtained a preliminary decree on the mortgage, held, that a suit by the transferee of the equity of redemption for rent accruing due subsequently to the due date fixed in the preliminary decree was maintainable 12 C. L. J. 620 appr. (*Coutts and Sultan Ahmad, JJ.*) **TARA CHAND MARWARI v BROJO GOPAL MUKHERJI**, 5 P. L. J. 595: 58 I. C. 180

O. 34, R. 3 (3) and 8 (3)—Transfer of Property Act, S. 89—Mortgage—Decree for sale—Extinguishment—Mortgagee—Mortgagee purchaser.

A decree made under S. 89 of the Transfer of Property Act 1882 for the sale of mortgaged property substitutes the rights under the decree of those under the mortgage.

A first mortgagee of property subject to a second mortgage obtained a decree for sale the second mortgagee not being made a defendant and bought the property at the auction sale. The second mortgagee afterwards sued for a decree for sale under his mortgage.

Held, that the condition upon which the second mortgagee was entitled to a sale decree was the payment to the decree-holder of the amount due under the decree not the amount which would have been due under his mortgage 17 I. A. 201 dist (*Sir John Edge*) **MATRU MAL v. DURGA KUNWAR**. 42 All 364: 38 M. L. J. 419.

11 L. W. 529 : 22 Bom. L. R. 553 : 32 C. L. J. 121 : 55 I. C. 969 : 47 I. A. 71 (P. C.)

O. 34, Rr. 4 and 5 Mortgage suit—Compromise decree—final decree unnecessary before execution—O. 34, Rr. 4 and 5 subject to O. 23, R. 3 C. P. Code. See C. P. CODE O. 23 R. 3 AND O. 34 RR. 4 AND 5.

58 I. C. 299.

O. 34, Rr. 4 and 5—Mortgage suit—Preliminary decree—Incapable of execution without a final decree under O. 34, R. 5 C. P. C. See C. P. CODE O. 23, R. 3 AND O. 34 RR. 4 AND 5.

58 I. C. 299.

O. 34 Rr 4 and 5—Preliminary and final decree—Interest—Calculation of.

Where a preliminary mortgage decree awarded the plff. interest at the bond rate up to the date of realisation and the final decree merely made the preliminary decree absolute without mentioning the interest, held, that the Court must be presumed to have refused interest and the decree holder therefore was not entitled to any interest after the expiry of the days of grace. 34 Cal. 150 approved. 26 Cal. 39 dist. 27 C. L. J. 576 and 35 Cal. 221 ref (*Coutts and Sultan Ahmad, JJ.*) **TEKAIT KRISHNA PRASAD v. SURENDRA MOHAN KUNDU**. 5 P. L. J. 598: 58 I. C. 223

C. P. CODE (1908), O 34, R 6.

O. 34, R 5—Mortgage suit—Application for final decree—Appeal—Court fee.

The Court-fee payable on an appeal against an order rejecting an application for a final decree under O 34, R 5 C. P. Code is an *ad-valorem* fee calculated on the amount claimed. (*Tudball and Sulaiman JJ.*) **MUSSAMMAT MATHURA KUAR v. LAL SINGH**. 57 I. C. 67.

O. 34, R. 5—Mortgage suit—Final decree—Sale not held—Right of mortgagor to redeem.

The mere passing of a final decree in a mortgage suit does not extinguish the mortgagor's right to redeem, until a sale has actually taken place in pursuance of the decree. (*Mears, C. J. and Bancrji, J.*) **SYED SHAH MAHDI HASAN v. ISMAIL HASAN**.

42 All 517: 18 A. L. J. 622: 56 I. C. 172.

O. 34, R 6—Decree on mortgage—Instalment—Whole amount becoming due on failure to pay two instalments—No personal liability.

A decree passed in a mortgage suit directed that the defts. should pay a certain amount to the plff. in fixed annual instalments; in default of the payment of any two instalments, the plff. was at liberty to recover the whole amount then due by the sale of the mortgaged property. The defts. fell into arrears; and the plff. applied to execute the decree not only of the sale of the mortgaged property, but also by attaching other property belonging to the defts:

Held, that the plff. was not entitled to proceed simultaneously against the other property of the defts. since there must be a decree made personally against the defts. before it could be executed against property other than the mortgaged property.

Per Macleod, C. J.—O. 34, R. 6 of the C. P. Code, contemplates that if the mortgaged property has been sold, and there is a deficiency, then the Court will proceed to consider whether the balance can be recovered personally from the mortgagor, and if it thinks it can, then it passes a final decree personally against the mortgagor for the amount of the deficiency. Such a decree will be passed in the original suit, so that a fresh suit need not be filed. (*Macleod, C. J. and Heaton, J.*) **JANARDAN v. KRISHNAJI**. 22 Bom. L. R. 953: Shaukar. 58 I. C. 377.

O. 34, R. 6—Decree for sale not executed—Personal decree—Right to.

A mortgagee who obtains a decree for sale, but fails to execute it is not entitled to apply under O. 34, R. 6 C. P. C. to obtain a decree over, as that rule contemplates that the property should be put to sale in execution of the decree before an application under its

C. P. CODE (1908), O. 34, R. 6

provisions can be made (*Tudball and Sulaiman, JJ.*) **DARBARI LAL v MOOLA SINGH**

42 All 519 :

18 A. L. J. 628 : 56 I C 139

—**O. 34, R. 6—Mortgage decree—Assignment of original decree if includes supplemental decree under O. 34, R. 6**

An assignment of the original mortgage decree includes an assignment of the decree passed under O. 34, R. 6, even though the latter be not expressly mentioned in the deed of assignment

Where the assignee of a mortgage decree executed the decree on 21—6—1917 against non-mortgaged properties and on the judgment debtor's objection, the High Court ultimately held that a decree under O. 34, R. 6 was necessary and it subsequently appeared that a decree under O. 34, R. 6 was on the record having been passed on 9—7—1915 and the assignee executed this decree on 20—5—1919, and the judgment debtor pleaded limitation :

Held, that the decree holder assignees were entitled to the benefit of S. 14 of the Limitation Act as they prosecuted their first application for execution in good faith and in a Court which was held by the High Court to have no jurisdiction to execute the decree without a decree under O. 34, R. 6. (*Coutts and Sultan Ahmad, JJ.*) **KARIMULLAH SAH v MIRZA MAHOMED REZA.**

1 P. L. T. 612:

58 I. C. 40

—**O. 34, R. 6—Mortgage by father—Personal debt—Suit on—Conditional decree against whole ancestral property including son's share. See HINDU LAW, DEBT.**

38 M. L. J. 203.

—**O. 34, R. 6—Mortgage—Personal decree—Application for, maintainability—Condition—Omission to proceed against portion of mortgaged property—Effect. See (1919) Dig Col. 282 **ARUNACHALA VELAN v VENKATARAMA AIYAR.****

38 M. L. J. 93.

—**O. 34, R. 8—Applicability of—suit for sale on puisne mortgage—Decree conditional on payment within certain time to purchaser at prior sale—Extension of time—jurisdiction,**

O. 34, R. 8 C. P. C. applies to redemption suits only and time for payment fixed by decree cannot be extended under that Rule where the decree is not one for redemption

Two mortgages were created on the same property one in 1871 and the other in 1876. The prior mortgagee sued for sale on his mortgage without impleading the puisne mortgagee, obtained a decree and sold the property which was purchased by the appellant. The puisne mortgagee then brought a suit upon his mortgage impleading the prior mortgagee/purchaser. The Court decreed the suit conditionally upon the plaintiff's paying within a certain time a certain sum of money to the prior mortgagee and a certain sum to the purchaser. The purchaser appealed claiming the whole amount and the appeals were decreed. The payment

C. P. CODE (1908), O. 34, R. 14

were not made within the time fixed and there was no extension of time by the Appellate Court. The decree-holder subsequently transferred the decree to the respondent who applied out of time for a final decree for sale and offered to pay the amount decreed for the purchaser. The Court gave him a fortnight to pay. *Held*, that as the decree was not one for redemption (the prior mortgage having merged in decree which had been executed and satisfied) the Court was not competent to extend the time for payment under, O. 34, R. 8. (*Tudball and Sulaiman, JJ.*) **NANDKUNWAR v. SUJAN SINGH**

18 A. L. J. 771 : 57 I. C. 1006.

—**O. 34, R. 8—Conditional decree for possession on payment within a fixed period—No power to extend time. See C. P. CODE Ss. 148 AND 151.**

18 A. L. J. 826.

—**O. 34, R. 8—Mortgage—Redemption—Preliminary decree—Execution of not permissible—Payment after expiry of period fixed but before final decree—Effect of.**

O. 34, R. 8 C. P. Code provides for an extension of time for good cause shown. Ordinarily where a mortgagor decree-holder wishes to pay in the redemption money after the time specified but before the final decree the correct course for him is to apply for an extension of time. The Court may however treat the application to pay in the money as tantamount to an application for extension of time. But the Court is not absolved from the necessity for passing a final decree and there is no provision for the execution of the preliminary decree before it has been made final. (*Pratt, J. C.*) **MAUNG TUN MAUNG v. MA YWE.**

54 I. C. 507.

—**O. 34, R. 14—Applicability of—Suit for sale on mortgage—Simple money decree.**

In a suit for sale on a mortgage the Court held the mortgage enforceable as such and passed only a simple money decree. The decree holder attached and sought to sell the property which had been the subject of the mortgage in execution

Held, that O. 34, R. 14 of the C. P. C. did not apply to the facts of the case, as the mortgage having been held to be unenforceable there was no longer any subsisting and effective mortgage for the enforcement of which a separate suit could be brought. (14 A. L. J. 902,) *appr.* (*Tudball and Sulaiman, JJ.*) **SURAJ NARAIN SINGH v. JAGBALI SHUKUL.**

42 All. 566 : 18 All. L. J. 677 :

57 I. C. 14.

—**O. 34, R. 14—Claim arising under the mortgage—T.P. Act, S. 99—Sale in contravention of—Purchase by mortgagee—Leave to bid—Presumption—Evidence Act S. 144—Mortgagee/purchaser if trustee for mortgagor—Mortgagor if may sue to recover—Limitation Act, S. 10 and arts 120 and 148.**

C. P. CODE (1908), O 34, R. 14.

Held by the Full Bench.—Where a mortgagee in contravention of S. 99 of the Transfer of Property Act has attached the mortgaged property and brought it up to sale and purchased it himself the mortgagor or the transferee cannot successfully maintain a suit for redemption of the property without first getting the sale set aside.

Per Mookerjee, J.—The right to redeem is not a personal right; it is an interest in the property mortgaged, so that when the equity of redemption was sold away in contravention of S. 99 of the T. P. Act and no application was made under S. 244 C. P. Code (Act XIV of 1882), the mortgagor could no longer exercise his right of redemption.

Assuming that upon purchase by the mortgagee himself of the equity of redemption in contravention of S. 99 Transfer of Property Act, the mortgagee merely became a trustee for the mortgagor in respect of it.

Held, by the majority, that the mortgagor's right to recover the property cannot be enforced by a suit for redemption within Art. 148 of the Lim. Act.

Per Sanderson, C. J.—A suit appropriately framed for that purpose would be governed by Art. 120 of the Lim. Act.

Per Woodroffe and N. R. Chatterjee, JJ.—S. 10 of the Limitation Act would not apply to such a case.

Per Mookerjee, J.—The rule that a mortgagee purchasing the equity of redemption in contravention of S. 99 of the Transfer of Property Act becomes a trustee in respect of it, for the mortgagor, was modified by S. 99 of the T. P. Act.

Held, by the majority that when a mortgagee has purchased the equity of redemption in contravention of the provisions of S. 99 of the T. P. Act it should not be presumed under S. 114, Evidence Act, in the absence of evidence, that the court granted leave to bid.

In this case the mortgagee being in possession gave the mortgaged property in lease to the mortgagor, it being stipulated that the rent payable under the lease would be taken in lieu of interest. The equity of redemption having been sold in execution of a decree for arrears of rent obtained by the mortgagee on the basis of this lease and purchased by the mortgagee;

Held, that the sale was not in execution of a decree for the satisfaction of a claim arising under the mortgage (Sanderson, C. J., Woodroffe, Mookerjee, Chatterjee and Newbould, JJ.) UTTAM CHANDRA DAW v. RAJ KRISHNA DALAL 47 Cal. 377 : 24 C. W. N. 229 : 31 C. L. J. 98 : 55 I. C. 157. (F. B.)

O 34, R. 14—Instalment decree—Default in payment of instalment—Whole amount due on default—Application to sell a

C P CODE (1908), O 34, R 14.

part of the mortgaged property to recover unpaid instalment.

A mortgage decree, which was made payable in instalments, provided that if any two instalments remained unpaid up to six months from the date of the second of such instalments, the whole amount of the decree then remaining due became payable at once. The first instalment was paid in time. On the 2nd instalment, which became due under the decree on August 1917, not having been paid, the decree holder applied in July 1918 to recover the amount of the second instalment by sale of a part of the mortgaged property.

Held, that the application was premature, inasmuch as the terms of O. 34, R. 14 showed that where a mortgagee had obtained decree for payment of money in satisfaction of a claim arising under the mortgage, he would not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage. (Shah and Hayward, JJ.) HANMANT TIMAJI DESAI v. RAGHAVENDARA GUBURAO DESAI.

22 Bom. L. R. 650: 58 I. C. 221.

O. 34, R. 14—Usufructuary mortgage—Lease by mortgagee to mortgagor—Sale of equity of redemption in execution of decree for arrears of rent

Where a usufructuary mortgagee in possession of the mortgaged property granted to the mortgagor a lease of the said mortgaged property and the mortgagor having failed to pay the amounts due under the lease, the mortgagee instituted a suit for their recovery and obtained a decree and in execution of it sought to bring to sale the mortgagor's equity of redemption in the mortgaged property:

Held, that the sale was not barred by the provisions of O. 34, R. 14 C.P.C. The claim on the basis of the lease was not a claim arising under the mortgage and the suit out of which the decree is sought to be executed was a suit by a landlord for rent against his tenant and not that of a mortgagee against his mortgagor. The suit was brought not for the recovery of interest but for rent. The mortgage and the lease must be regarded as separate transactions. 47 Cal. 377; S.C. 24 C. W. N. 229; 31 C. L. J. 93; (F. B.) foll. 23 All. 34; 23 All. 338; I. L. R. 27 All. 313; 50 I. C. 134 diss. (Coutts and Adam, JJ) RAMNARAYAN SINGH v. BISHEVNATH MISSIR. (1920) Pat. 250: 1 Pat. L. T. 694: 57 I. C. 384.

O. 34, R. 14—Usufructuary mortgage—Mortgagor in possession as lessee—Decree for rent—Sale of equity of redemption—Separate suit if necessary.

At the time of executing a usufructuary mortgage the mortgagor passed a rent note to the mortgagee and remained in possession. The rent not having been paid the mortgagee obtained a decree for rent which was transferred

C. P. CODE (1908), O. 34, R. 14.

to a third party. The assignee having applied to execute the decree by sale of the mortgagor's equity of redemption in the mortgaged property:—

Held, that the assignee was not competent to have the mortgaged property sold in execution of the decree owing to the provisions O. 34, R. 14 C. P. C. in as much as the agreement whereby the mortgagor agreed to pay rent was passed at the same time as the mortgage and was therefore part of the mortgage transaction 16 A. 415, 19 A. 496 Ret. The assignee was not in this respect in a better position than his assignor the mortgagee (*Macleod, C. J.*) IBRAHIM GOOLAM v. NIGHALCHAND WAGHUMAL.

44 Bom. 366 :

22 Bom. L. R. 113 : 55 I. C. 536.

—O. 34, R. 14—*Usufructuary mortgage—Mortgagor in possession under rent-note—Decree for arrears of rent—Sale of equity of redemption—Auction purchaser—Stranger—Sale voidable—Limitation for application.*

The plaintiff mortgaged his house with possession to defendant No. 1 in 1910 but continued in possession under a rent-note passed at the same time to defendant No. 1. The rent having fallen into arrears, defendant No. 1 obtained a decree against the plaintiff for possession of the house and arrears of rent. In execution of the decree, the plaintiff's equity of redemption was sold at a Court sale to defendant No 2 in January 1916: the sale was confirmed in March of the same year. The plaintiff brought a suit in January 1917 to set aside the decree and the sale held in execution of it.

Held, that defendant No. 1's claim for possession and rent arose under the mortgage, and that the sale of the house was in contravention of O. 34, R. 14, of the C. P. C. 1908.

(2) that the sale held in contravention of the provisions of rule 14 was not void but voidable at the instance of the mortgagor (plaintiff).

(3) that the proper remedy of the plaintiff to set aside the sale was an application under S. 47 C. P. C. and not a separate suit; and (4) that the suit to set aside the sale might be treated as an application under S. 47, but that it was barred under Art. 166 of the Limitation Act, 1908, not having been brought within thirty days from the date of the sale. (*Shah and Hayward, JJ.*) BHAICHAND KIRPARAM v. RANCHHODDAS MANCHHARAM.

22 Bom. L. R. 670 : 58 I. C. 231.

—O. 37, R. 3—*Negotiable instrument—Summary suit—Leave to defend—Practice.*

Where in a suit on a promissory note filed under O. 37, the defendant by his affidavits shows that he has a real defence to the suit, but the sincerity of which may be open to

C. P. CODE (1908), O. 39, R. 1.

doubt, the proper course is to give the defendant leave to defend on his bringing the suit money into Court, 6 Beng. L. R. 64 App.

L. R. 2 Ex. 56 Referred to. (*Wallis, C. J.* and *Hughes, J.*) G. CHAKRAPANY CHETTIAR v. KAMALAVALLI AMMAL.

12 L. W. 712.

—O. 38, Rr. 5 and 6—*Attachment before judgment—Order conditional—Notice to show cause.*

A conditional order of attachment before judgment under O 38, R 6 of the C P Code cannot be passed until after the deft. has either failed to show cause why he should not furnish security or has failed to furnish security. A conditional order of attachment before judgment under O. 38, R 5 (3), C P. C. cannot be made without an accompanying order under Cl. (1) directing the deft. to furnish security or to show cause (*Newbould and Panton, JJ.*) ABDUL KARIM DHALI v. NUR MAHOMED.

57 I. C. 907.

—O. 38, Rr. 5 and 10—*Attachment before Judgment—Security for raising attachment—Liability of the properties given as security to satisfy decree.*

Where money is deposited in Court to the credit of a suit or security given by which certain properties are earmarked for a particular suit, the person who gets the security is entitled to a preferential right and can levy execution against the property so earmarked. (*Seshagiri Aiyar and Moore, JJ.*) JANAKI NAGASWAMI AIYAR v. RAMASWAMI IYENGAR.

11 L. W. 6 : 56 I. C. 267.

—O. 38, R. 10—*Attachment before judgment—Rival decree-holder attaching and carrying away the money—Right to sue—Laches—Dismissal of suit—Revision—No interference.* See C. P. CODE, S. 115 and O. 38, R. 10.

22 Bom. L. R. 1407.

—O. 39, R. 1—*Contract of sale—Specific performance—Temporary injunction—Alienation of property—Concealment of facts.*

Plff. sued for specific performance of a contract for sale of a certain property and prayed for temporary injunction restraining debts from selling the same property to a third person *pendente lite*. Some of the owners of the property were minors and permission to sell their interest at a certain price was obtained by their guardian from the District Judge. It appeared, however, that if certain facts had been brought to the notice of the District Judge, he would not have granted permission to sell at that price which was inadequate; Held, that on these facts the plff. was not entitled to the temporary injunction prayed for in the suit (*Teunon and Beachcroft, JJ.*) MANARANJAN SADHUKHAN v. BIRENDRA-NATH DUTT.

57 I. C. 847.

C. P. CODE (1908), O. 39, R. 1.

—**O. 39, R. 1**—Injunction to restrain marriage of woman already married. *See (1919) Dig. Col. 281. MAHOMED YAMIN v. RAZIA BEGAM.*

42 ALL 134 :
54 I.C. 223

—**O. 39, R. 1**—*Temporary—Temporary—Effect of stay order—Execution sale in contravention of injunction—Irrregularity.*

A prohibitory order by way of injunction can be issued so long as the property in dispute is in danger or being wrongfully sold in execution of a decree, but once it is sold no such order can be passed.

The rule that a stay order issued by an Appellate Court suspends the power and jurisdiction of the executing Court to conduct further proceedings from the moment the order of the superior Court is passed cannot be extended to the case of an injunction passed under O. 39, R. 1 C. P. C.

A sale held in ignorance of an order by way of injunction staying the sale is an irregularity but the sale will not be set aside unless the Judgment-debtor has sustained substantial injury by reason of such irregularity (*Mittra and Prideaux, A. J.C.*) DHARAMCHAND v. MITSUI BUSSAN KAISHA AND CO..

54 I.C. 928

—**O. 39, R. 1**—*Temporary injunction—Deft. in possession under claim of title—Claim if must be bona fide—Irreparable injury—Nature of—Injunction not to be lightly granted—Principle that immoveable property must be kept in *statu quo*—Balance of convenience. See (1919) Dig. Col. 288. MRS. BEGG DUNLOP AND COMPANY v. SATIS CHANDRA CHATTERJEE.*

54 I.C. 862.

—**O. 39, R. 2**—*Temporary injunction—Grant of—Principles governing—Arbitration—Reference to—Injunction restraining arbitration proceeding when given.*

A temporary injunction should not be granted unless the applicant satisfies the Court that its interference is necessary to protect him from irreparable or at least serious injury before the legal right can be established at the trial. If there is any other remedy open to the applicant by which he can protect himself from the consequences of the injury apprehended a temporary injunction will not be granted.

Where one party to a contract alleges a breach and refers the matter to arbitration and the other party brings a suit for a declaration that he is not liable upon the contract, then if the existence of the contract itself is denied, no temporary injunction should be granted restraining the arbitration proceedings but if the contract is impeached on grounds of equity such as fraud or misrepresentation, a temporary injunction should readily be granted. (*Abdul Raof, J. FIRM OF SOHANLAL CHIMAN LAL v. JAI NARAIN BABU LAL.*

54 I.C. 546.

C. P. CODE (1908), O. 40, R. 1.

—**O. 39, R. 2 (1) and (3)**—Injunction—Disobedience to—Contempt—Order of single Judge of the High Court—Order delivered in the presence of counsel but not served on parties—Effect of. *See (1919) Dig. Col. 289. RAM PRASAD SINGH v. BENARES BANK LTD.*

42 ALL 98 :
58 I.C. 600.

—**O. 39, R. 2 (1)**—*Temporary injunction—Grant of “Injury” meaning of.*

The word ‘injury’ in O. 39, R. 2 (1) C. P. C means an act which is contrary to law.

To justify a temporary injunction plaintiff, must show irreparable injury or inconvenience likely to result to him before the disposal of the suit, if the opposite party were not restrained by injunction. (*Shadi Lat and Martinca, JJ. FIRM OF MANOHAR LAL MAHABIR PERSHAD v. FIRM OF JAI NARAIN BABU LAL.*

2 Lah. L.J. 283 : 55 I.C. 403.

—**O. 40, R. 1, O. 41, R. 5, (3) (c) and O. 43, R. 118**—*Receiver—Appointment of—Appeal against order—Stay of proceedings by appellate court ex parte and without taking security—Effect of—Receiver—C. P. Code S. 155. See (1919) Dig. Col. 290. MUL CHAND SINGH v. TARINI PRASAD.*

(1920) Pat. 40 : 54 I.C. 222.

—**O. 40, R. 1**—*Receiver—Appointment of—Grounds for—Discretion of Court.*

Before appointing a receiver in any particular case the Court must take the whole circumstances of the case into consideration and then decide whether it would be just and convenient to appoint a receiver.

Primarily the discretion is to be exercised by the court in which the case is pending and to which the application is made. That Court has full discretion to appoint or remove a receiver and the Appellate Court will not as a rule when the first Court has acted after considering all the circumstances interfere with the exercise of that discretion. (*Raoof, J. HAJI KADIR BAKHSH v. GHULAM MOHAMMED.*

55 I.C. 50.

—**O. 40, R. 1**—*Receiver—Appointment of—Joint family property—Practice.*

The Court will not appoint a receiver in a partition suit between members of a joint family except by consent and especially where the family property consists of land. Thus, in order that a receiver should be appointed of joint family property in a partition suit special circumstances will have to be proved before the court will be entitled to appoint a receiver.

When an application is made to the Court to take the property into its hands by appointing a receiver the plaintiff must prove that *prima facie* he has a very excellent chance of succeeding in establishing the case made out in his plaint, and in the next place he must satisfy the Court that the property in possession

C. P. CODE (1908), O. 40, R. 1.

of the opposite party is in danger of being wasted. The mere fact that there is a dispute is no reason whatever for appointing a receiver (*Macleod, C J and Heaton, J*) *GOVIND NARAYAN RAO DESAI v. VALLABHRAO NARAYAN RAO DESAI*. **22 Bom L R. 217:**
55 I. C 827

—**O. 40, Rr. 1 and 4, and O. 43, R. 1 (S)**—*Receiver—Liability to account—Order directing submission of accounts—Appeal—Revision—Interference—C. P. Code S. 115.*

On 23-9-1916 a receiver was appointed at the instance of the deft. in a title suit and a writ was issued by which he was directed to take possession of the crops on the lands in dispute. On 29-11-1916 the suit was disposed of. In 1917 the receiver and the opposite party both applied for the discharge of the receiver and the former submitted his account for 1916. In 1918 the first court held that the receiver had to submit accounts for 1916 only.

Held, that no appeal lay from the order and that the High Court had power to set aside the order of the lower appellate court on the ground that it was made without jurisdiction.

A receiver is not liable to account for any period other than that for which he is appointed. *4 P. L. J. 636* and *5 C. W. N. 223* ref. (*Sultan Ahmed, J*) *SAMHAUTTA SINGH v. BHAGWATI SINGH*: **5 P. L. J. 97:**
(1920) P. 121 : 55 I. C. 15,

—**O. 40, R. 1—Receiver—Mortgagee's suit—Right to profits—First and second mortgage—Purchase of equity of redemption—Effect of.**

A receiver may be appointed at the suit of a first mortgagee when there is reason to apprehend that the property was insufficient to pay the incumbrances thereon *3 Ir. Ch. 270 (274)* referred to

Whether the mortgagee is or is not entitled to possession, he may invite the Court to appoint a receiver, if the demands of justice require that the mortgagor should be deprived of possession.

A receiver can be appointed at the instance of a mortgagee who holds a simple mortgage.

A receiver who was appointed in the presence of the mortgagor and the second mortgagee at the instance of the first mortgagee, holds the property for his (first mortgagee's) benefit alone and is bound to make over to him the entire income for the satisfaction of his dues. The order for the appointment of the receiver was binding upon the mortgagor and the second mortgagee. The fact of the second mortgagee's obtaining a decree on his mortgage in the absence of the first mortgagee and purchasing the equity of redemption in execution of that decree, did not alter his position in relation to the receiver at the instance of the first mortgagee (*Mookerjee and Pantin, JJ.*) *MAHARAJA SIR RAMESWAR SINGH BAHADUR v. CHUNI LAL SHAHA.* **31 C. L. J. 385:**
58 I. C. 839.

C. P. CODE (1908), O. 40, R. 1.

—**O. 40, Rr. 1 and 4 and O. 43, R. 1 (s)**—*Receiver—Order declaring receiver liable to account, if appealable—Receiver's right to remuneration after giving up possession of estate—Remedy by suit—Order of High Court continuing receiver appointed by lower court—Receiver so appointed if subject to control of High Court See (1919) Dig. Col. 291. BABU GANESH LAL v. KUMAR SATYANARAIN SINGH.*
(1920) Pat. 35 : 54 I. C. 207.

—**O. 40, R. 1 (a)**—*Receiver—Appointment of—Pendente lite—Discretion—Receiver after decree.*

Under the old Code of Civil Procedure when a suit had been decreed the court had no power to appoint a receiver but under the present Code the power of appointment of a receiver has been extended and the Court has power under O. XL, R. 1 (a) to appoint a Receiver of "any property whether before or after the decree." This however refers only to the appointment of a Receiver in respect of the property in regard to which litigation is pending that is to say as long as a suit before the Court remains *lis pendens* the functions of the receiver will continue until he is discharged by the order of the Court.

Where, a receiver had been appointed during the pendency of a suit and after the dismissal of the suit an order was passed continuing the appointment of the Receiver and the order of the continuance was passed merely for the sake of convenience it was held that the order was tantamount to the appointment of a fresh receiver.

The appointment of a person as a receiver of the property in regard to which no litigation is pending before the court either in the form of a suit or in the form of an execution proceeding is entirely without jurisdiction.

If in this case the receiver had merely been continued until his accounts have been examined and disposed of, there would have been no objection to the order. (*Coutts and Sultan Ahmed, J*) *CHANDESHWAR PRASAD NARAIN SINGH v. BISHESWAR PRATAP NARAYAN.*
5 P. L. J. 513 : 1 P. L. T. 643:
(1920) Pat. 231 : 58 I. C. 405.

—**O. 40, R. 1 (2)—Scope of—Right to dispossess stranger—Mere suit for declaration without possession—Appointment of receiver.**

O. 40, R. 1 of the Code prevents the Court from ejecting a person not a party to the suit unless one or other of the parties to the suit has such a right. But the Court has always the power to appoint a receiver to take possession of the properties from the parties to the suit itself and this has nothing to do with the fact that plff. even if he succeeds can only get possession and does not seek to eject the debtors. *Per Spencer, J.* The words "any person" in O. 40, R. 1 (2) are not confined to persons who are not parties to the suit. A plff. who does

C. P. CODE (1908), O. 40, R. 4.

not sue and is not entitled to eject the deft. could not through an interlocutory application for appointment of a receiver deprive the defendant of his possession of the lands in suit. (*Sadasiva Aiyar and Spencer, J.J.*) KUMARASWAMI PILLAI v. PASUPATHIA PILLAI

12 L. W. 254

—**O. 40, R. 4**—Receiver—Liability to account confined to period for which he was in office. See C. P. CODE, O. 40, R. 1 ETC.

5 P. L. J. 97

—**O. 41, R. 1**—Appeal—Court fee Overpaid—Refund—Memorandum of appeal

Where in an appeal to the High Court the memorandum of appeal is overstamped, that Court has no power to direct a refund of the amount paid in excess. Such a refund can only be granted by the Collector of the district on an application to him made in this behalf. (*Banerji and Tudball, J.J.*) *In re LALTA PRASAD v. SHEORAJ SINGH.* **57 I C 26**

—**O. 41, Rr. 1 (2) and 3**—Appeal—Memorandum of—partly in English and partly in vernacular—Amendment—Power of court to allow.

An appeal consisted of two documents—one in Urdu and the other in English; that in Urdu was on a stamp paper with the title of the case written thereon and that in English containing the grounds of appeal. The grounds were not set out in the vernacular document but it mentioned that they were entered in the English "Chitha." The vernacular document was signed by the appellant's pleader, but not the English one. Held, that the vernacular memorandum and the document attached to it containing the grounds of appeal in English must be taken together as constituting the memorandum of appeal.

Even if the vernacular memorandum alone could be regarded as the appeal the omission in it could be supplied under O. 41, R. 3 by amendment. (*Martineau, J.*) KARMAN v. BISHNA.

2 Lah. L. J. 507:55 I. C. 24

—**O. 41, R. 1**—Appeal—Presentation of, without copy of decree appealed against—See (1919) *Dig. Col.* 292. BIAN SINGH v. GOKAL CHAND. **1 Lah 83**

—**O. 41, R. 1**—Appeal—Presentation of without copy of decree, invalid.

A petition of appeal filed without a copy of the decree appealed against is not valid as an appeal. (*Adami, J.*) CHATURBHUIJ SAHAY v. MUHAMMAD HABIB. **54 I. C. 36**.

—**O. 41, R. 1**—Appeal—Two cases decided by one judgment—Separate appeal.

Where two separate cases are finally decided and disposed of in one judgment two separate appeals should be filed. (*Scott Smith and Wilberforce, J.J.*) DEVI DITTA MAL v. OFFICIAL LIQUIDATOR, AMRITSAR BANK.

1 Lah. 368: 56 I. C. 69.

C. P. CODE (1908), O. 41, R. 5.

—**O. 41, R. 1 (J)**—Execution sale—Setting aside for failure to deposit under O. 21, R. 84 C. P. Code—No appeal. See C. P. CODE O. 21, RR. 84 AND 92. **58 I. C. 597.**

—**O. 41, R. 2**—Appellate Court—New ground not raised in memorandum of appeal when entertained.

An appellate court is not bound to consider a contention not put forward in the memorandum of appeal unless (1) there can be no reasonable doubt on the record that the evidence on the new point raised had been completely given on both sides (2) the decision on the new point is a pure question of law and (3) it is expedient in the interests of justice to consider and decide it though it was not mentioned in the memorandum of appeal to the Lower Appellate Court (*Sadasiva Aiyar, J.*) VEMI REDDI v. NALLAPPA REDDI.

11 L. W. 611: 57 I. C. 800.

—**O. 41, Rr. 4, 22 and 33**—Scope of—Appeal by one deft. against plff.—Cross—Appeal by deft.—Respondent when appeal by him barred—Power of court to grant relief.

Where one of several debts against whom a decree is passed has allowed the period for appealing to elapse O. 41, R. 22 C. P. C. was not intended to revive his right merely because a co-defendant has instituted an appeal against the plaintiff on entirely different grounds.

O. 41, R. 22 (1) in so far as it related to a cross-objection, was provided to meet the case where a respondent, although the decree is not entirely in his favour, is content to let the matter rest provided his opponent does not appeal, but who may not be willing to run the risk of having the findings in his favour varied or reversed without an opportunity of appealing against the findings which are adverse to him.

The rule should ordinarily be confined to cases of cross objections urged against the appellant, but O. 41, R. 33 gives the court a wide discretion where justice requires it, that cross-objections against a co-respondent should be heard. 38 Mad. 705 not followed. 43. Cal. 790. 28 C.L.J. 123; 15 C.L.J. 61. referred to.

The rule should not be invoked to enable a litigant to avoid the provisions of other statutes such as the Limitation Act or the Court-Fees Act. (*Dawson Miller, C. J. and Coutts, J.*) THE OFFICIAL TRUSTEE OF BENGAL v. CHARLES JOSEPH SMITH. **5 P. L. J. 328: (1920) Pat. 161: 1 Pat. L. 434: 56 I. C. 262.**

—**O. 41, Rr. 4 and 33**—Scope of—Powers of Appellate Court. See (1919) *Dig. Col.* 293.) DEBENDRA v. NARENDRA.

54 I. C. 636.

—**O. 41, R. 5**—Stay of execution—Appeal not filed—Powers of Appellate Court—Vacation preventing filing of appeal—Powers of single judge.

Under O. 41, R. 5 of the Civil Procedure Code an Appellate Court has no jurisdiction

C. P. CODE (1908), O. 41, R. 5.

to grant a stay of execution in a matter of which it is not already seized in appeal; during the period before an appeal is filed, the court which passed the decree alone has jurisdiction to grant such stay.

Where an appeal from a decree is pending in the High Court a single vacation Judge has jurisdiction under chapter 1 R 3 of the High Court rules to grant a stay of execution of the decree.

A stay order properly obtained, and granted within jurisdiction, is good as far as it goes and as long as it lasts and cannot, if it is subsequently discharged be treated as having been no effect.

The proper way for a judge to cancel an order which he has already passed is by writing out a fresh order stating that the previous order was cancelled.

The practice of scratching out or attempting to obliterate a previous order condemned (*Walsh and Gokul Prasad, JJ.*) PARSHOTTAM SARAN v. HARGU LAL. 18 A. L. J. 1121.

O. 41, R. 5—Stay of execution by appellate court on appellant furnishing security within time fixed to the satisfaction of the first court—Security tendered in time but not tested and found sufficient—Effect of—Power of first court to extend time. See C. P. CODE O. 45, R. 13. 24 C. W. N. 265.

O. 41, R. 5 and 6—Stay of execution by appellate court—Sale by first Court—Mere irregularity.

An order by an inferior court to a superior court to stay a sale does not take away the jurisdiction of the latter Court to sell, especially where an appeal lies to the superior Court from that order. (*Mittra and Pridcaux, A. J. C.*) DILARAMCHAND v. MESSRS. MITSUI BUSSAN KAISHA AND CO.

54 I C. 923.

O. 41, R. 5—Stay of execution—Furnishing of security, order for.

Under O. 41, R. 5 C. P. C. a stay of execution cannot be granted unless the judgment-debtor gives security, but if the decree is secured on the property it is unnecessary to require him to furnish security for that amount (*Shadi Lal and Martineau, JJ.*) SAGAR CHAND v. DEWAT RAM. 2 Lah. L. J. 330.

O. 41, R. 5—Stay of execution—Grounds for—Duty to furnish security—Execution of decree complete—Effect of.

A court cannot stay execution of a decree upon a mere speculation of a vague character. A judgment-debtor is not entitled to have an order for stay of execution when the security required by law has not been given. It is the duty of the judgment-debtor to ask the court to fix the amount of security which he has to furnish in order to get a stay of execution of the decree. No order for stay of execution can be made after the decree has been executed.

C. P. CODE (1908), O. 41, R. 10.

(*Abdul Raof, J.*) GAULAM MUSTAFA KHAN v. GHULAM NABI. 58 I C 442.

O. 41, R. 5—Stay of execution—No execution application pending

No order for stay of execution can be made where there is no application for execution of the decree under appeal pending before any court. 25 B. 283 foll. (*Dundas, J.*) NARAIN SINGH v. ANUP SINGH. 58 I C 302.

O. 41, R. 10—Demand of security—Ground—Mere poverty of appellant not sufficient.

Mere poverty of the appellant is no ground for demanding security; it must be shown that he is merely a puppet in the hands of others and that he is merely a nominal party on behalf of others, who are keeping themselves behind the scene (*Das and Adami, JJ.*) MAHANTH RAGHUNATH DASS v. SHEO KUMAR MISHER. 1 P. L. T. 114: 55 I. C. 835.

O. 41, R. 10 and O. 44, R. 1—Pauper appellant—Security.

It is competent for an Appellate Court to call for security from a pauper appellant under O. 41 R. 10 of the C. P. Code. 3 Mad. 66 and 17. M. L. T. 583 fol; +2 Bom 5 not fol. (*Ayling and Krishnan, JJ.*) SALDANHA v. HENRY HART. 43 Mad. 902. 12 L. W. 333: (1920) M. W. N. 534 58 I. C. 794.

O. 41, R. 10 (2) and O. 43, R. 1 (w) and O. 47, R. 1—Appeal—Security for costs—Failure to furnish—Rejection of appeal—Review—Restoration—Power of Court.

An appeal pending before a Subordinate Judge was rejected under O. 41, R. 10 (2) C. P. C. for failure to furnish a security for costs. Upon application by the appellants the court reviewed its order of rejection and granted further time for furnishing the security. The security was furnished and thereupon the Court passed an order re-admitting the appeal on to the pending file. Against this order an appeal (and by way of alternative remedy) a revision were filed.

Held, (*Piggott, J.*) on the appeal, that the right of appeal given by O. 43 (1) (w) was subject to the conditions laid down by O. 47, R. 7, and the present appeal did not come within the four corners of that rule.

On the revision that the order passed by the lower court re-admitting the appeal was not wholly without jurisdiction and was otherwise just and proper.

The decision in 8 All. 315 P. C. is authority for the proposition that the High Court has power to consider upon cause shown an order rejecting an appeal under O. 41, R. 10 (2) and there is no reason for holding that such a power is not inherent also in subordinate Court of appeal.

Per *Kankatiya Lal, J.* Although there is an absence in O. 41 R. 10 of a specific provision

C. P. CODE (1908), O. 41, R. 10.

similar to that contained in O. 25 R. 2 (2) yet a court which has rejected an appeal for default of filing security for costs is competent to take action in review of its order of rejection and to discharge that order and grant further time for filing the security. 8 All 315 (P.C); 30 All 143; M.L.J.R. 504 (*Piggot and Kanhaiya Lal, JJ.*) SUNDAR v. HIBAB CHICK. 42 All 629: 18 A.L.J. 838.

—O. 41, R. 10, (2)—*Security not furnished in time—Dismissal of appeal.*

Where security is not furnished within the time fixed by the Court the appeal should be rejected.

That the whereabouts of the client were or are not known as he is a *fakir* and is wandering about, is not sufficient for not following O. 41, R. 10 (2) C. P. C. which is imperative.

Per *Chevris, A.J.C.* :—It is the duty of every litigant to keep in touch with his case, and not to go wandering around the country at large without giving any address where a communication from the Court or from his counsel can readily find him. (*Chevris, and Martincau, JJ.*) PARMA NAND v. RAM PARKASH

2 Lah. L.J. 391.

—O. 41, R. 17—*Appeal—Non-appearance of appellant—Duty of court.*

An Appellate Court has power in an appeal in which the appellant has failed to appear, to enter into the merits of the case and to decide the appeal upon the merits. (*Sultan Ahmed, J.*) DAULAT SINGH v. SRINIVAS PRASAD.

57 I.C. 75.

—O. 41, R. 17—*Dismissal for default—Appellant present but pleader absent—Dismissal—Duty of court to accommodate litigants to a reasonable extent.*

If an appellant is appearing through a pleader and on the day fixed for hearing the pleader is absent but the appellant is present in court and states that his pleader is engaged elsewhere, the mere presence of the appellant is not an appearance within O. 41, R. 17 C.P.C. 3 Pat. L.J. 355; 30 M. 274; 45 I.C. 189, followed.

It is desirable, if possible, to accommodate litigants to some extent if their pleaders happen to be absent in another court and have a chance of attending within a short time so as not to disturb the business of the court, but the court is not bound to wait. (*Dawson Miller, C.J. and Foster, J.*) RAMDHAN TEWARI v. BISHUN PRAGASH NARAIN SINGH

5 P.L.J. 17: 1 P.L.J. 156:
54 I.C. 715

—O. 41, R. 17 (2)—*Non appearance of respondent—Duty of court to record judgment—Irregularity—Revision.*

The absence of the respondent on the date fixed for hearing an appeal is no justification by itself for decreeing the appeal. The court has to record a judgment, and its failure to do so amounts to a material irregularity within

C. P. CODE (1908), O. 41, R. 20.

the meaning of S. 219 of the U.P. Land Revenue Act. (*Ferard, J.M.*) MUSSAMMAT RANI v. RAM KISHORE. 56 I.C. 386.

—O. 41, R. 19—*Appeal—Dismissal for default—Dismissal for deficiency in Court fee.*

—No right to apply under O. 41, R. 19—Remedy by review. See C.P. Code, O. 47, R. 1.

55 I.C. 502.

—O. 41, R. 19—*Dismissal for default—Restoration—Practice.*

An application for restoration of an appeal dismissed for default should not be rejected without giving the applicant an opportunity of substantiating the facts on which he relies. (*Teunon and Chaudhuri, JJ.*) HEMANTAKUMAR BOSE v. PUNCHANAN CHAKRAVARTHI.

57 I.C. 762.

—O. 41, R. 20—*Action under—Discretionary—Abatement of appeal—Failure to implead respondent's heirs.*

The power of the Court to take action under O. 41, R. 20 of the C.P. Code is discretionary and should not be exercised in all cases.

A suit was decreed by the first court but dismissed on appeal. The plaintiff filed a second appeal to the High Court. During the pendency of the case in the lower appellate Court M, one of the defendants, died and his widow S, was brought on the record as legal representative. But the appeal to the High Court showed M as a respondent. The mistake was not discovered till eight months afterwards.

Held, that this was not a case in which action under O. 41, R. 20 of the C.P. Code could rightly be taken and S could not be made a respondent at this late stage.

The case against all the respondents stood on a joint footing and the appeal could not proceed against the respondents leaving out S, and, therefore, abated *in toto*. (*Chevris, J.*) RAUSHAN RAM v. SHERAN KHAN.

2 Lah. L.J. 520: 57 I.C. 259.

—O. 41, Rr. 20 and 22—*Co-respondents—Cross-objections—Addition of Co-respondent at the instance of sole respondent for the purpose of preferring cross objections—Procedure if valid.*

Plts. and defts. 1—4 members of a joint Hindu family sued to enforce a mortgage executed by the defendant who was father of defts. 3 and 4 and uncle of 2nd deft. The first Court gave a decree against the share of defts. 1, 3 and 4 only. Defts. 3 and 4 appealed making plff. alone party respondent. Plff. afterwards applied to add 2nd deft. and preferred a memo of cross objections against him asking for a decree against his share also.

Held, that the Appellate Court had jurisdiction under O. 41, R. 20 to add the 4th defendant as party to the appeal and that the procedure adopted was not irregular even though the 4th defendant was not interested in

C. P. CODE (1908), O. 41, R. 22.

the original appeal. 38 Mad. 705 (F. B.) (*Oldfield and Krishnan, JJ.*) PONNUSWAMI ASARI v. PALANIANDI MUDALI.

11 L. W. 602 : 27 M. L. T. 266 :
56 I. C. 612.

—O. 41, R. 22—*Applicability of Letters patent appeal*

O. 41, R. 22 of the Civil Procedure Code is not applicable to an appeal under cl. 15 of the Letters Patent and a memorandum of cross-objection cannot be entertained in these appeals (*Mookerjee, C. J. and Fletcher, J.*) BROJENDRA CHANDRA SARMA v. PROSANNA KUMAR DHAR,

24 C. W. N. 1016 : 32 C. L. J. 48.

—O. 41, R. 22—*Cross objections—Absence of Findings favourable to appellant—Power to disturb*

In the absence of cross-objections an Appellate Court has no power to disturb so much of the original decree as is favourable to the appellant so as to place the latter in a worse position. 11 Atl. p. 35 foll. (*Lindsay, J.*) RAM MANOHAR PRASAD v. MOHAMMAD MAHMUD ALAM. 23 O. C. 110 : 57 I. C. 555.

—O. 41, R. 22—*Cross objections—Right of one respondent to file against Co-respondent*

O. 41, R. 22, C. P. C. allows one respondent in an appeal to claim relief against a co-respondent by way of a memorandum of cross-objections, 38 M. 705, followed. (*Lyle, A. J. C.*) JAGANNATH v. HANUMAN SINGH.

54 I. C. 332.

—O. 41, R. 22—*Cross-objections—Co-respondent*

As a general rule cross-objections can be urged only against the appellant and not against a co-respondent. No cross-objections can be filed against a defendant who has not filed any appeal from the decree passed against him. (*Scott-Smith and Abdul Raof, JJ.*) SANTRAM v. KIDARNATH.

56 I. C. 469

—O. 41, Rr. 22 and 23—*Cross objections—Persons not parties to the appeal—Power of Court to give relief.*

Plffs. sued two defts. for recovery of moneys alleged to be due on accounts and obtained a decree against 2nd deft alone who appealed impleading plffs. alone as respondents. The plffs. filed cross-objections and in their memorandum of objections impleaded deft. No. 1 also among the respondents. No notice was, however, issued to him.

Held, that as defendant No. 1 was no party to the appeal no cross objection under O. 41 R. 22 C. P. C. could be entertained against him and the lower Appellate Court was not justified in passing a decree against him. 39 I. C. 662 Ref. (*Abdul Raof, J.*) ILAHI BAKSH v. JAWINDRAMAL.

1 Lah. 396 :
54 I. C. 971.

C. P. CODE (1908), O. 41, R. 23.

—O. 41, R. 22—Memorandum of objections if can be heard when appeal incompetent and therefore not pressed. See (1919) Dig Col 295. VENKATA PERUMALLA PILLAI v. VENKATASWAMI NAIDU. 54 I. C. 506.

—O. 41, R. 22—*Respondent—Right of, to urge objections to decree without filing memo of objections—Right to support decree on other grounds.*

Though a person who has not appealed from a decree cannot question its correctness he can support the decree on reasons not given by the lower court under O. 41, R. 22 (2) C. P. C. (*Miller, C. J. and Coutts, J.*) RAJ KUMAR JAGANNATH PRASAD SINGH v. MIRZA EKBAL BAHDUR. 5 P. L. J. 239 : 1 P. L. T. 65 : 55 I. C. 214.

—O. 41, R. 23—*Decision not on preliminary point—Further investigation—Direction for by appellate court.*

Where the court of first instance after considering the evidence adduced by the parties decided the suits, the lower Appellate Court demanded them to the Court of the first instance with directions to re-admit the suits and determine them after getting a local investigation made according to the directions given in his judgment and allowing the parties to adduce additional evidence if they wished to do so upon a preliminary objection taken in second appeal on the ground that as the court of first instance did not decide the cases on a preliminary point no appeal under O. 41, R. 23 lay against the order of remand.

Held, that the order made by the Lower Appellate Court purported to be and was in form and substance an order under O. 41, R. 23, although the Court ought not to have remanded the case under the provisions of that rule, and that therefore an appeal lay.

Held, also that the order remanding the case to the trial Court was erroneous. If the lower appellate Court thought that the investigation was wrong and that there should be further investigation or that it was necessary to take additional evidence in order to enable it to pronounce judgment, it might direct such investigation or take such additional evidence, retaining the appeals on its file (*Chatterjee and Pantin, JJ.*) PROSANNO CH. CHATTOPADHYA v. BAIDYA NATH MISTRY.

24 C. W. N. 708 : 31 C. L. J. 360.

—O. 41, R. 23—*Disposal on a preliminary point—What is.*

The expression "disposed of the suit on a preliminary point" in O. 41, R. 23 C. P. C. means disposed of the whole suit on the preliminary point only. (*Sadasiva Iyer, J.*) VEMI REEDI v. NALLAPPA REEDI.

11. L. W. 611 : 56 I. C. 516.

—O. 41, Rr. 23 and 25—*New case on appeal—Remand—Omission to ask for Second appeal.*

C. P. CODE (1908), O. 41, R. 23.

Where in the Court of first appeal a plaintiff knows exactly the case he has to meet, and considers that sufficient opportunity has not been given to him to meet that case, he should in that court apply for a definite issue to be framed and for a remand to the trial court for the purpose of determining that issue and if he omits to do so he is not entitled in the second appeal to have this done. (*Teunon and Newbould, JJ.*) BANGA CHANDRA PAL v KAILASH CHANDRA PAL. 58 I.C. 189

O. 41, R. 23 and O. 43, R. 1 (a)—Order of remand—Preliminary point, what is.

O. 41, R. 24 C. P. C. Contemplates a case where the Court from whose decree the appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed on appeal, and not a case decided upon the whole evidence and upon all the issues which were raised. If in the latter case an Appellate Court thinks that the burden of proof has been cast on the wrong party and remands the case for re-trial in the light of the evidence already taken and authorises the taking of fresh evidence, the rule has no application and consequently the order of remand is not appealable. (*Miller, C.J. and Coutts, J.*) BRIJ MOHAN PATHAK v. DEOBHANJAN PATHAK.

1 Pat. L.T. 509 : 55 I.C. 484

O. 41, R. 23—Remand—Findings of Appellate Court—Second finding different from prior one if justifiable.

Plff. sought to recover possession of certain lands on the strength of a Patni Settlement in his favour. His suit was dismissed on the ground that the Patni was a *benami* transaction. The Appellate Court however found that the Patni was not a *benami* transaction. Deit. appealed to the High Court which remanded the case for a finding whether the Patni fell within the class of tenures described in S. 71 (b) of the Assam Land and Revenue Regulation. The Lower Appellate Court found that the Patni was not *bona fide* and therefore did not come under the foregoing section. The plaintiff objected that that Court, having already found that the Patni was not *benami* had no power to arrive at a contrary finding.

Held, that the finding was justified inasmuch as in arriving at its previous finding the Court apparently had not taken all the facts into consideration. (*Chatterjea and Panton, JJ.*) JITENDRA KUMAR PAL CHOWDHURI v. MUKS-HODA CHANDRA DAS. 58 I.C. 1001.

O. 41, R. 23—Remand—Inherent power—Appeal.

Where a Subordinate Judge on appeal decided the main question in the suit, *viz.*, the right of the plaintiff to collect the water-tax from the defendants and remanded the suit to the District Munsiff for disposal on the remaining issues.

Held, that the order of remand must be treated as one not coming within O. 41, R. 23.

C. P. CODE (1908), O. 41, R. 23.

but within S. 151, of the Civil Procedure Code, 1908 10 L.W. 359; 22 M.L.J. 409; Pat. L.J. 253; 44 Cal. 929 Foll. (*Sir Abdur Rahim and Olfield, JJ.*) PONANGI VENKATA SUBBARAYADU v. SREE RAJAH LAKSHMI VENKATA NARAMMA RAO, BAHDUR. 12 L.W. 667.

O. 41, R. 23—Remand—Inherent power—Defective trial—Neglect of parties—Not a ground for exercise of inherent power.

56 I.C. 834.

O. 41, Rr. 23 and 25—Remand—Inherent power in cases not coming within. See C. P. CODE S. 151 and O. 41, Rr. 23 and 25.

5 P.L.J. 146.

O. 41, Rr. 23 and 25—Remand—New issues—Inconsistent pleas not permissible on second appeal.

Plff. claimed a right of way based on immemorial user and failed to establish such right. He could not in second appeal obtain a remand for a re-trial on issues of an implied grant or an easement of necessity especially where these issues were not raised in the Courts below. (*Newbould, J.*) NOOR BIBI v. ASHANULLA.

55 I.C. 485.

O. 41, Rr. 23 and 25—Remand—Order in a writ—Subsequent judgment of trial Court.

Where an order of remand is made by a single Judge or the High Court under inherent power it is not appealable under the Letters Patent but can be questioned in the appeal from the judgment after remand. If the order of remand is held to be invalid the subsequent judgment after remand will also be held to be invalid. (*Jwala Prasad, J.*) MAHANTH RAM ASIS PURI v. MUNSHI LAL.

58 I.C. 538.

O. 41, Rr. 23 and 25—Remand—Powers of appellate court.

The powers of an Appellate Court as regards remand are not restricted to the case specified in O. 41, Rr. 23 and 25, of the Civil Procedure Code; an Appellate Court may, in the exercise of its inherent powers under S. 151 of the Code, remand a case if it considers it necessary for the ends of justice to do so. (*Sultan Ahmed, J.*) BRIJMOHAN PATHAK v. DEOBHANJAN PATHAK.

5 P.L.J. 146 : 58 I.C. 664.

O. 41, Rr. 23 25 and 27—Reward—Case not decided on preliminary point—Procedure.

Where a trial Court has decided a case not upon a preliminary point, but after taking all the evidence and trying all the issues it is improper for an Appellate Court to remand the case for trial a fresh under O. 41, R. 23 C. P. C. In making an order under the rule however the Court cannot direct the omission of one of the essential issues in the case. If the Court is of opinion that a fresh local investigation should be made or that fresh evidence is

C. P. CODE (1908), O. 41, R. 25.

necessary on any point, its order should be one under O. 41, Rr. 25, 27 and 29 C.P.C (*Teymon and Beachcroft, JJ.*) SADAK ALL v. SAFAK ALI SUFANI. 56 I.C. 984.

—O. 41, R. 25—Appellate Court—Remand for findings—Entire appeal is open for consideration at the final hearing. See (1919) *Dig. Col.* 298 THE OFFICIAL ASSIGNEE OF THE CALCUTTA HIGH COURT v. VIDYASUNDARI DASL. 54 I.C. 700

—O. 41, R. 25—High Court—Power to remit fresh issues.

Where the lower appellate court has omitted to determine a question of fact which appears essential to the right decision of the suit on the merits the High Court can frame the necessary issues and refer them for trial under O. 41, R. 33 C.P.C. (*Sir Lawrence Jenkins*) SETHURATNAM IYER v. VENKATCHALA GOUNDAN. 43 Mad. 527

38 M.L.J. 476:
18 A.L.J. 707: 27 M.L.T. 102:
11 L.W. 399: 22 Bom. L.R. 578:
(1920) M.W.N. 61. 56 I.C. 117:
47 I.A. 76 (P.C.)

—O. 41, R. 25—Remand—Decision of lower appellate court based on irrelevant evidence—Remand—Propriety of. See EVIDENCE ACT SS. 5, 32 AND 167.

5 P.L.J. 410.

—O. 41, R. 27—Additional evidence—Admission of, on appeal—Consent, what amounts to—Waiver,

An Appellate Court would not be justified in allowing plff. an opportunity of adducing evidence which he has discovered since the institution of the suit in the Court of first instance. The proper procedure in such a case is for plff. to apply for review of the judgment of the first Court.

The legitimate occasion for the use of the provision contained in O. 41, R. 27 C.P.C. is when on examining the evidence as it stands some inherent lacunæ or defect becomes apparent, and not where a discovery is made outside the Court of fresh evidence and the application is made to import it.

The mere fact that when one party applies for additional evidence being received the other side also requests permission to let in additional evidence does not amount to waiver of his right to object in second appeal to the procedure of the Appellate Court. (*Das, J.*) UCHANT AHIR v. BASAWAN AHIR. 57 I.C. 226

—O. 41, R. 27—Additional evidence—Appellate Court—Power to take.

O. 41 R. 27 C.P.C. does not mean that in order to enable the Appellate Court to pronounce judgment in favour of a particular party additional evidence should be admitted in appeal. It only means that where there is a lacuna in the evidence which precludes the Appellate Court from pronouncing judgment on

C. P. CODE (1908), O. 41, R. 30

the evidence which is already on the record, additional evidence should be allowed to be adduced, (*Coutts and Sultan Ahmad, JJ.*) BAIJNATI MANJHI v. DIP LAL MANDER.

57 I.C. 843.

—O. 41, R. 27—Additional evidence—No power to take when party could have adduced in lower court if he had been diligent. See C.P.CODE S. 115 AND O. 41, R. 27

1 P.L.T. 701.

—O. 41, R. 27—Additional evidence—Power of Appellate Court to take.

O. 41, R. 27 (v) C.P.C. does not mean that in order to enable an Appellate Court to pronounce judgment in favour of a particular party, additional evidence could be admitted in appeal but it means only that where it is impossible to pronounce judgment at all on the evidence the Court may call for additional evidence (*Adami, J.*) JHINGUR JHA v. BADRI SAHU.

54 I.C. 666.

—O. 41, R. 27—Admission made in court—Applicability.

O. 41, R. 27 does not apply to an admission made in court. (*Lord Shaw*) GANPAT v. LALAMIYA.

16 N.L.R. 59:

12 L.W. 574. 5 6. I.C. 673 (P.C)

—O. 41, R. 27—Appellate Court—Additional evidence—Attestation—Proof of.

Semblé: An Appellate court is not competent to examine an attesting witness who by inadvertence has not been called in the first court. (*Mullick and Sultan Ahmad, JJ.*) GAYA SINGH v. NAME SINGH. 5 P.L.J. 263:

56 I.C. 983.

—O. 41, R. 27—Appellate court—Production of additional evidence—Examination of parties. See (1919) *Dig. Col.* 301. JANG BAHDUR RAI v. PARWATI KUNWAR.

42 All. 48.

—O. 41, R. 27—Appellate Court—Subsequent events—Evidence of admissible.

Public documents coming into existence subsequent to the filing of second appeals may be admitted in evidence in the High Court.

A Court cannot shut its eyes to the events that came into existence during the pendency of any suit or proceeding. 20 C.W.N. 109. Ret. (*Mullick and Jwala Prasad, JJ.*) JAMES HENRY GEORGE HILL v. SATAN SINGH.

(1920) Pat. 4.

—O. 41, R. 30—Appeal—Death of appellant before hearing—Appellate court dismissed appeal on merits.

I'm not aware of any obtained a decree in the first Court the defendant appealed to the district judge, and the appeal was heard on the 13th December 1915 and dismissed on the 20th of that month. The appellant had died on the 13th December 1915 before the appeal was heard by the District Judge and the fact of the appellant's death was not known at the time.

C. P. CODE (1908), O 41, R. 31.

Held, that the District Judge was not competent to proceed with the appeal and the order dismissing the appeal was without jurisdiction (*Shadi Lal and Broadway, JJ. NARAIN DAS v. KALU RAM*). **2 Lah L.J. 144.**

—O. 41, R. 31—Appellate Court—
Judgment of—Reasons for reversal to be stated.

An Appellate Court in arriving at a conclusion different from that of the Court of first instance, should state its reasons for the same in order to enable a Court of second appeal to see whether the conclusion has been legally drawn. (*Woodroffe, and Chatterjee, JJ.*) **R. J. MOHAN DAUPI v. HARENDRA CHANDRA MUKHO PADYA.** **56 I.C. 816.**

—O. 41, R. 31—Appellate judgment—
Contents of—Omission to consider—Relying on document not admitted in evidence

Where an Appellate Court fails to consider or decide a question which is specifically raised and put in issue, its decision is liable to be set aside in second appeal. Where an Appellate Court bases its judgment upon a document which is not, and never was, on the record at the first hearing of the case and was neither mentioned nor relied on and which has not been proved, or placed on the record, it commits an error of law (*Petman, J.*) **JOKANI v. JOWHARA.** **91 P.L.R. 1919 : 58 I.C. 67.**

—O. 41, R. 31—Judgment—Inconclusive statement—Not proper.

A judgment which is based on an indefinite conclusion e.g., "there is much force in the contention" is not in accordance with law and is liable to be set aside. (*Coutts and Sultan Ahmed, JJ.*) **JUGDEO NARAIN SINGH v. BHAGWAN MAHTON.** **1 P.L.T. 27 : 54 I.C. 672.**

—O. 41, R. 33—Appeal by one deft. only—Others not impleaded—Decree in favour of defendant not a party—Jurisdiction.

A suit for profits under S. 165 of the Agra Tenancy Act was decreed partly aga'inst K, and partly against J. and M. J and M preferred an appeal, without impleading K as a party to it. K did not appeal and no appeal or cross-objection was filed by the plaintiffs against J. and M. The Appellate Court held that K was not liable at all for any sum. It dismissed the appeal of J. and M. and at the same time modified the decree by exempting K, and decreeing the whole amount as against J. and M. On second appeal by J. and M. held, that the Lower Appellate Court had jurisdiction to modify the decree as it did, although K was not a party in the appeal and that it had exercised its jurisdiction properly. **34 All 32 (F.B.) Ref, (Sulaiman and Gokul Prasad, JJ.) JAWAHAR BANO v. SAJJAT HUSAIN BEG.** **18 A.L.J. 925.**

—O. 41, R. 33—Appellate Court—
Powers of—party not impleaded—Decree against.

C. P. CODE (1908), O 43, R. 1.

The powers given by O. 41, R. 23—C. P. C. are discretionary and no court would be justified in making use of that rule to pass a decree in favour of a litigant who has failed to avail himself of the ordinary remedy by way of appeal. (*Abdul Raof, J.*) **ILAHI BAKHSH v. JAWINDRA MAL.** **1 Lah. 396 : 54 I.C. 971.**

—O. 43, R. 1 (A)—Appeal—Order returning memorandum of appeal to proper court—Revision.

No appeal lies from the order of the Additional District Judge returning a memorandum of appeal for presentation in the High Court.

47 I.C. 16 toll.

14 M 365 not foll.

A petition for revision is competent. The value of the land assessed to revenue for purposes of Court-fees and jurisdiction is ten times and thirty times respectively of assessed land revenue and it's incorrect for the Lower Appellate Court to adopt the market value as the correct value for these purposes. (*Scott-Smith, J.*) **KARM ILAHI v. HAKIM SHAH.** **2 Lah. L.J. 366 : 56 I.C. 865.**

—O. 43, R. 1 (a) and O. 41, R. 23—
Remand otherwise than under O. 41, R. 23—
Order not appealable. See (1919) **Dig. Col. 306.** **MOHENDRA NATH CHAKRAVARTHI v. RAMRATAN BANDOPADHYA.** **31 C.L.J. 357 : 55 I.C. 96.**

—O. 41, R. 1 (a) (4)—Order returning plaint for presentation to proper court—
Appeal—Remand—Order of remand appealable.

No appeal lies from an order passed in appeal under O. 43, R. 1 (a) of the C. P. Code setting aside an order under R. 10 of O. 7, returning a plaint to be presented to the (proper Court) and remanding the case for trial on merits. **33 All. 479 and 101 P.L.R. 1913 toll (Broadway, JJ.) THE FIRM OF BHAWANI SAHAI KANSHE RAM v. THE FIRM OF HARBANS SINGH GOPAL DAS.** **2 Lah. L.J. 587.**

—O. 43, R. 1 (j)—Execution sale—
Order setting aside sale—No second appeal—
Revision—Interference when proper. See (1919) **Dig. Col. 306.** **JIWAN SINGH v. SAWAN MAL.** **2 Lah. L.J. 41 : 54 I.C. 941.**

—O. 43, R. 1 (j) and O. 50, R. 1 (2)—Order under O. 21, R. 92. (c) in execution of small cause decree transferred to original side—Appealability. See (1919) **Dig. Col. 306.** **KANDASWAMI ASARI v. SWAMINATHA STAPATHI.** **(1920) M.W.N. 151 : 27 M.L.T. 130.**

—O. 43, R. 1 (s) and O. 40, R. 1—
Order for appointment of receiver but not actually appointing one—Appealability.

An order following an application for the appointment of a receiver without actually appointing any one to that office is not appealable. O. 40, R. 1, C. P. C. contemplates an order

C. P. CODE (1908), O. 43, R. 1.

appointing a receiver. (*Tudball and Ryves, JJ.*)
SYED MOHAMMED ASKANI v. NISAR HUSAIN

42 All 227 : 54 I.C. 520

O. 43, R. 1 (s)—Order directing submission o. accounts—Not appealable. See C. P. CODE O. 43 R. 1 ETC. 5 P. L. J. 9

O. 43, R. 1 (u)—Order of remand—No appeal from order, if no second appeal from decree.

There is no appeal from an order of remand by the appellate court in a suit of a small cause nature. (*Tudball and Ryves, JJ*) AMBA PRASAD v. MUSHTAQ HUSSAIN

42 All 200 : 18 A.L.J. 167 : 54 I.C. 432

O. 43, R. 1 (u)—Remand—Inherent power—No appeal. See C. P. CODE O. 41, R. 23
12 L.W. 667

O. 43, R. 1. (u)-Remand-Inherent power—Appeal against decree.

Where the decree of the lower court is reversed on appeal and the Appellate court, in the exercise of its inherent power, remands the case to the Trial Court for a fresh decision, no appeal lies against the order of remand as such. The order does not fall within O. 43, R. 1 (u) C.P.C. but an appeal lies from the decree of the Appellate Court reversing the decree of the Trial Court. (*Jwala Prasad J.*) NANHU LAL v. RAM CHANDRA RAO

58 I.C. 909

O. 43, R. 1 (u)—Remand—Suit of Small Cause nature—Order of remand not appealable. See C. P. CODE S. 102 and O. 43, R. 1. 54 I.C. 432

O. 43, R. 1 (w) and O. 47, R. 7—Appeal—Review—Grounds for—C. P. Code O. 43, R. 1 (w)—Subject to provisions of O. 47, R. 7 C. P. C. See C. P. CODE, O. 41, R. 10 (2) ETC. 18 A.L.J. 838.

O. 45. R. 4—Privy Council—Valuation—two Suits between the Same parties Consolidation—Separate Judgments in original Court—Decided together by High Court—Leave granted.

Two suits between the same parties in which the same questions were raised were decided by separate judgments in the original court. In appeal in the High Court the evidence in the two suits was considered as a whole at the request of the parties and on that evidence a decision was arrived at, by which the decree of the Lower Court was set aside. Leave to appeal to the Privy Council was granted in one of the suits. In the other suit,—Held, that although the valuation of that suit and of the appeal to the Privy Council therefrom was below Rs. 10,000 and there was no question of law involved, it was a proper case to which the procedure sanctioned by O. 45, R. 4 should be applied and leave granted. (*Mears, C. J. and Gokul Prasad, J.*) BHAGWAN SINGH & BHAWANI DAS. 18 A.L.J. 1119

C P CODE (1908), O. 45, R. 13.

O. 45, R. 8 (b)—Rehearing—Application for—Respondent aware of admission of appeal though not notified regarding admission of appeal no ground for rehearing. See PRIVY COUNCIL. 22 Bom. L.R. 550.

O. 45, R. 13—Preliminary decree—Appeal to Privy Council—Application for stay of proceedings in Court below—Maintainability of.

In a suit for partition the High Court reversing the decree of the Subordinate Judge passed a preliminary decree for partition and sent the case back to the lower court to prepare a final decree. Defts. appealed to the Privy Council and applied to the High Court to stay the proceedings in the lower court pending the decision of the Privy Council. Held, that the further proceedings were not proceedings in execution and the present application for stay was not justified by O. 45, R. 13, C. P. C. 9 C, L.J. 56 Ref (*Mears, C. J. and Banerji J.*) RAM NARAIN v. HARNAM DAS.

42 All. 170 : 18 A. L. J. 142 : 54 I.C. 561.

O. 45, R. 13—Stay of execution pending appeal to Privy Council—Security directed to be furnished within a time—Power of lower court to extend time—Revision—No Interference—C. P. Code. S. 115.

The High Court ordered that execution of a decree be stayed pending the disposal of appeal therefrom to His Majesty in Council upon the appellant giving security to the satisfaction of the Subordinate Judge for a certain sum by the 20th September 1919, and that in default of the said security being given by the 20th September the application for stay of execution was to stand dismissed and the sale to be proceeded with. In pursuance of the said order security was offered on the 16th September and the matter was referred to Commissioners for investigation of its sufficiency. The Subordinate Judge on 20th September upon an application by the Appellants gave the Commissioners time up to the 10th November for submitting their report after the completion of the enquiry and on the 22nd September postponed the sale till the 1st December. The Respondents moved the High Court against the orders of the Subordinate Judge dated the 22nd September as having been made without jurisdiction:

Held—that in the special circumstances of the case, the High Court should refuse to interfere under S. 115 of the Civil Procedure Code.

The Commissioners having later on found the security to be sufficient and objections having been or being about to be made by the Respondents to the Commissioners' report, the Respondents would not be prejudiced if, on the hearing of the objections, it turned out that the security was sufficient; on the other hand if the security was held to be insufficient,

C. P. CODE (1908), O. 45, R. 13.

execution should not be stayed and the sale should take place.

It will be advisable in the future for the Court to specify definitely the time within which the security, which it is desired to offer, must be tendered and to give such further directions as may be necessary to ensure the intention of the Court being carried out. (*Sanderson, C. J. Mookerjee and Fletcher, JJ.*) KKDAR NATH SANYAL v MATI LAL DAS

24 C. W. N 265 : 57 I. C. 382.

O. 45, R. 13 (d)—Privy Council appeal pending — Power of High Court to appoint a receiver. See (1919) *Dig. Col.* 308. RAJAWAZIR NARAIN SINGH v RANI JAGADAMBA KUER.

(1920) *Pat 184*

O. 45, R. 15—Execution of Privy Council decree—Application by some—Decree in ignorance of death of one of the parties—Effect of

Under O 21 R. 15 C P Code, some of the decree-holders who have obtained permission under O. 45, R. 15 can execute the Privy Council decree on behalf of all the decree-holders.

Where one of the appellants to His Majesty in Council died before the passing of the Privy Council decree, and no substitution was passed.

Held, that the Privy Council decree could not be held void by the Courts in India. (1920) 1 P. L. T. 325 followed. (1899) 20 N. S. W. R. 337 relied upon.

The failure to substitute would have rendered the decree void, only in so far as it was in favour of the deceased appellant.

Where different persons were entitled to costs of the Trial Court, High Court and the Privy Council, and the decree holders filed three separate execution applications in respect of the costs awarded by the said three courts

Held, that the execution was not irregular, the Privy Council decree alone was being executed but to avoid confusion three applications had been filed (*Coutts and Adami, JJ.*) RAI BAHADUR BAIJNATH GOENKA v SIR RAVANESHWAR PRASAD SINGH

1 P. L. T. 426 : 58 I. C. 212.

O. 46, R. 1—“Court” Meaning of—Collector executing decree transferred under S. 68 C. P. C.—Reference to the High Court

The word “Court” in O. 46, R. 1, P. C. must be taken to mean a Court of Civil jurisdiction. The functions of a collector in execution of a decree transferred to him under S. 68 of the Code though treated as judicial under S. 71, do not make him such a Court as to empower him to make a reference. (*Stuart and Kanhaiya Lal, JJ.*) ALI BAHADUR KHAN v. BISHESHAR SINGH.

22 O. C. 319 : 54 I. C. 584.

O. 47, and O. 21, R. 2—Question relating to execution—Arrangement prior to decree to treat it as in-executable.

C. P. CODE (1908), O. 47, R. 1.

An arrangement prior to decree to treat the decree to be passed as in part inexecutable as distinguished from an arrangement merely to postpone execution cannot be gone into in execution proceedings 19 Mad 210 d ss 40 Mad. 233. (*Oldfield and SeshaGiri Aiyar, JJ.*) ARUMUGAM PILLAI v KRISHNASAMI NAIDU.

43 Mad. 725 : 39 M. L. J. 222
12 L. W. 41 : 58 I. C. 976.

O. 47, R. 1—Review—Application for—Subsequent appeal—Effect of

The subsequent presentation of an appeal against the decree of a Court does not take away the jurisdiction of the Court to hear an application for review already filed. But the hearing of the appeal must be stayed until the disposal of the application for review. (*N. R. Chatterjee and Panton, J.*) SASHI BABU BERA v. RAGHUNATH MANDAL.

57 I. C. 785.

O. 47, R. 1—Review—Cases not cited on prior occasion.

The production of an authority which was not brought to the notice of the Judge at the first hearing and which lays down a view of the law contrary to that taken by the Judge is not a sufficient ground for granting a review. (*Coutts and Adami, JJ.*) SHEIKH ADDUL AZIZ v. MUNRO.

1 P. L. T. 561 : 57 I. C. 147.

O. 47 Rr. 1, 4 and 7—Review—Discovery of new and important matter or evidence—Allegations to be strictly proved—Appellate Court—Powers of interference.

Before a Court can exercise a jurisdiction vested in it to grant an application for review on the ground of new and important matter or evidence it is incumbent on the Court to be satisfied with the allegation of the applicant that the evidence in question constituted new and important evidence within the meaning of O. 47, R. 1 of the Code of Civil Procedure. The Court must further have strict proof of the allegation that the evidence was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or order made.

If a Court without adjudication of the allegation that the evidence which the applicant seeks to produce was not within his knowledge or could not be produced by him at the time when the decree was passed or order made allows an application for review the order is contrary to the provisions of R. 4 of O. 47 of the Code.

It is competent to an Appellate Court to finally deal with the matter on the materials on the record. Per *Sanderson, C. J.*—The new evidence must be such that if adduced it would be practically conclusive; that his evidence is of such a class as to render it probable almost beyond doubt that the decision or judgment would be different.

Per *Sanderson, C. J. and Mookerjee, J.*—The effect of the expression discovery of new

C. P. CODE (1908), O. 47, R. 1.

matter or evidence in clause (b) of the proviso to R. 4 O. 47 of the Code of Civil Procedure is the same as if the word used had been "new and important matter or evidence".

When an application for review has been granted it is open to the appellant to impeach the propriety of the order on the ground of contravention of the provisions of clause (b).

Per *Mookerjee, J.*—A litigant who invokes the jurisdiction of a court to grant a review must allege the discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made. When an application has been made on this ground it may be granted under R. 4 sub-rule (2) of O. 47 of the Code of Civil Procedure if the Court is of opinion that the application for review should be granted. This rule is subject to proviso to R. 4.

The jurisdiction of the Court to grant a review depends upon the circumstances mentioned in R. 1 of O. 47 of the Code of Civil Procedure and R. 4, does not prescribe a different test.

Strict proof means proof according to the formalities of law. But proof according to the formalities of law does not imply merely an allegation in accordance with the formalities of law that the facts contemplated by R. 1 exist. The Court must be convinced that the materials placed before it in accordance with formalities of law do prove the existence of the facts alleged, 42 Cal 830 referred.

Applications for review on the ground of discovery of new and important matter of evidence should be considered by Courts with great caution.

Though R. 4, O. 47 states that when the Court is of opinion that an application for review should be granted, it shall grant the same the opinion of the Court must be according to law. (*Sanderson C. J. Mookerjee and Fletcher, JJ.*) *CHIRANJILAL KAMLAL v. TULSI RAM JANKIDASS.*

47 Cal: 568 : 31 C. L. J. 134.
56 I. C. 734.

O. 47, R. 1—Review—Dismissal of appeal for deficient Court fee—Not a dismissal for default.

An order dismissing a memorandum of appeal as being insufficiently stamped is open to review under O. 47, C. P. Code and no application for restoration of the appeal can in such a case be made under O. 41, R. 19. The proper procedure is by way of application for review bearing Court fees prescribed for such applications (*Mullick and Thornhill, JJ.*) *SIRDAR SINGH v. CHRISTIAN.* 55 I. C. 502.

O. 47, R. 1—Review—Ex parte decree—Application for review on grounds comprised in O. 9, R. 13 C. P. C.—Maintainability. See C P CODE O. 9, R. 13 ETC.

11 L. W. 217.

C. P. CODE (1908), Sch. II, para. 1.

—O. 47, R. 1—Review—*Grounds for—Error of law—Omission to raise question of law at the hearing, if sufficient ground.*

The mere fact that a point of law which might have been raised was not raised during the trial is not necessarily in itself sufficient to support an application for review.

Quaere—Whether an omission to raise a point of law which, had it been raised, might and probably would have brought about a different result is necessarily a mistake or error apparent on the face of the record for which a review can be claimed.

20 C. W. N. 1099 doubted, 13 Cal. 62 Ref. (*Dawson Miller, C. J. and Conuits, J.*) *KAMILA PRASAD CHOWDHRY v. KUNJIBEHANI.*

5 P. L. J. 344 : 1 P. L. T. 625 : 57 I. C. 11.

—O. 47, R. 1—Review—*Grounds for—Grounds not urged in memorandum of appeal—Not to be considered.*

Grounds taken in an application for review of an order dismissing an appeal which were not urged in the memorandum of appeal as originally filed, cannot be urged in support of the appeal after its re-admission upon the application for review. (*Fletcher and Cuming, JJ.*) *SASADHAR BHATTACHARJEE v. ARUN KUMAR BHATTACHARJEE.* 54 I. C. 681.

—O. 47, R. 1—Review—*Grounds for Sufficiency of*

It is not a sufficient reason for granting a review that if another opportunity is given to the applicant he would satisfy the court that its previous order was wrong (*Prideaux, A. J. C.*) *MANWARSHAH v. NIZAMALIKHAN.*

57 I. C. 145.

—O. 47, R. (2)—*Application for review—Filing of appeal—Effect of.*

It is competent to a court to entertain an application for review and to dispose of it on the merits even though subsequently an appeal is filed against the decree originally passed. Where however the first court dismisses the application for review on the ground that an appeal had been filed the High Court refused to interfere in revision against the order of the first court as the judge had dismissed the appeal. (*Rafiq and Pigott, JJ.*) *RAM PARSHAN UPADHYA v. NAGESHAR PANDE.*

42 All 135 : 18 A. L. J. 135 : 54 I. C. 764.

—O. 47, R. 7. Review — Order — Granting—*Appealability—Grounds for.*

In an appeal from an order granting a review the only grounds that can be taken are those mentioned in O. 47, R. 7. C. P. C. (*Spencer and Krishnan, JJ.*) *CHOKKLINGAM CHETTY v. LAKSHUMANAN CHETTY.* 38 M. L. J. 224 : (1920) M. W. N. 228 :

11 L. W. 217 : 55 I. C. 444.

Sch. II, Paras. 1 and 17 and O.

23, R. 3—*Arbitration—Reference to—Award*

C. P. CODE (1908), Sch. II, para. 1.

—Adjustment or compromise of the suit—Decree in terms of award—Practice.

After plaintiffs had failed, in a suit against the debtors, the matters in dispute were referred to arbitration. Plaintiffs attended the first meeting held before the arbitrator, and subsequently wrote to the arbitrator, before the second meeting was held, that they revoked his authority as arbitrator and cancelled the submission. The arbitrator notwithstanding made his award. The plaintiffs then moved for an *ex parte* decree on the ground that the debtors had not filed their written statement in the suit. The Court of first instance gave time to the debtors to enable them to file the award. The debtors then moved the Court that the award should be recorded as an adjustment or compromise of the suit and a decree should be passed in terms thereof. The Court dismissed the motion on the ground that the award could not be recorded as an adjustment or compromise of the suit and a decree should be passed in terms thereof. The Court dismissed the motion on the ground that the award could not be recorded as an adjustment under O. 23, R. 3 and, as the agreement to refer had been made without the intervention of the Court, the application could not be made under the second schedule of the C. P. Code. On appeal.

Held, (1) that, although the award was made in a reference by parties to the suit without the intervention of the Court the Lower Court should have tried the issue whether the award was not binding on the parties under the general principles of the law of contract by proceeding under O. 23, R. 3 and (2) that the order giving time to the debtors to file the award was wrong, and that the proper order should have been to order the debtors to file their written statement pleading the award.

Per Macleod, C. J. Parties in a suit, who enter into an agreement to refer the matter in dispute in the suit or part of it to arbitration, may make the agreement an order of the Court and then paras. 1 to 16 of the second schedule of the C. P. Code will apply.

If they do not make the agreement an order of Court,

(a) they cannot ask for the agreement to be filed under para. 17.

(b) they cannot ask for the award, if made, to be filed under paras. 20 and 21;

(c) if an award is made and both parties accept it they can apply for a consent decree in terms thereof, and there will be no need to apply for an order recording the terms of the adjustment;

(d) if the plaintiff disputes the award for any reason and proceeds with the suit the debtors can plead the award and have the case set down for hearing on the issue whether the award is binding as an adjustment.

(e) if the debtors dispute the award, the plaintiff can set the case down for trial on the lines

C. P. CODE (1908), Sch. II, para. 12.

whether the adjustment should be recorded; and

(f) either party can file a suit to enforce the award and apply for a stay of the original suit.

Per Fawcett, J. —Paras 20 and 21 of Sch. II of the C. P. Code do not apply to cases where the matters referred to arbitration are already the subject matter of a suit between the parties to the reference.

If parties to a suit agree to refer the matters in dispute to arbitration without the intervention of the court, and an award is made on such permission, prior to the decision of the suit, the submission and award can be recorded under O. 23, R. 3 of the C. P. Code as an agreement adjusting or compromising the suit, and a decree passed in terms of the award.

If O. 23, R. 3 cannot be availed of, either party who wishes to enforce the award can file a suit to enforce the award, and apply for a stay of the original suit. A debt can under O. 8, Rrs. 8 and 9 with the leave of the court, plead the award in bar of the action on the original demand.

In the mufassal, the requisite proceedings for having such an award considered by the Court can be taken on a mere application to have the alleged agreement recorded under O. 23, R. 3 and a formal pleading of the award under O. 8, R. 9 is unnecessary (*Macleod, C. J. and Fawcett, J.*) *MANILAL v. GOKULDAS*.

22 Bom. L. R. 1048.

Sch. II, Para 1—Arbitration—Reference to—Consent of all parties interested essential—Want otherwise invalid.

A court has no jurisdiction to make an order of reference under Sch. II, para. 1, C. P. C. without the consent of all the parties including the party who does not appear interested. If an order be made without the consent of such non-appearing party it is illegal, and an award made on such reference is also illegal. (*Sanderson C. J. Fletcher and Mookerjee, JJ.*) *LADURAM NATHMULL v. NANDALAL KARURI*.

47 Cal. 555 : 31 C. L. J. 150 : 55 I. C. 747.

Sch. II, para. 8—Arbitration—Award—Omission to submit in time—Procedure—Supersession of arbitration.

If the arbitrators fail to submit their award within the time prescribed, Sch. II cl. 8 C. P. C. applies and it is within the discretion of the Court after hearing both the parties to the suit to make an order under that article superseding the arbitration and proceeding with the suit (*Teuon and Newbold, JJ.*, *HRISHIKESH DAS v. LAL MOHAN DAS*. 57 I. C. 890).

Sch. II, para 12—Arbitrator—Dissolution of partnership—Power to award interest on sums due.

In a suit for dissolution of partnership and for accounts, plaintiff claimed interest which the defendant denied. The matter in dispute

C. P. CODE (1908), Sch. II, para. 12.

was referred to arbitration one of the points referred being whether the defendant was liable for any money and, if so, the amount due. Held, that it was not an error on the part of the arbitrator to include in his award the sum payable by the defendant as interest both on sums advanced to the firm and on those advanced to debt, for his personal use, and also for the period before and after the suit and up to the date of the award. (*Tcunon and Beachcroft, J.J.*) **JAHARMAL DEBI DUTTA v. BINNCHI BHUSAN NANDI.** 56 I C. 941.

Sch. II, paras. 12 and 16—Arbitration—Reference by Court—Award—Application to the court for correcting arithmetical errors—Second reference—Award—Commissioner—Appointment of, to take accounts—Decree on report—Ilegality—Reversion.

On a reference by the Court, the arbitrators prepared their award and submitted it to the Court. Both parties filed objections to the award for clerical errors. The Court remitted the award to the arbitrators for the rectification under para 12 of the second Schedule of the C. P. C. 1908. The arbitrators considered the objections and submitted their opinion regarding the alleged error. The Court, however, appointed two Commissioners to examine the accounts prepared by the arbitrators in order to see if they involved arithmetical or clerical error. The Commissioners did so and made a report which supported the opinion of the arbitrators. When the report came up before the Court, it reversed the report on certain disputed items and asked the Commissioners to re-calculate on the basis of its judgment. On the report finally made by the Commissioners the Court passed its decree. The plaintiff having applied:—

Held, reversing the decree and passing a decree in terms of the arbitrators' award, that from the very commencement the Court had followed an absolutely wrong procedure, under para. 12 of the second Schedule to the C. P. C., since it could neither be said that the Court had amended an obvious error which could be amended without affecting such decision, nor could it be said that the court had rectified a clerical mistake or an error arisen from an accidental slip or omission. (*Macleod, C. J., and Fawcett, J.*) **GOPAL DINKAR v. GANESH NARAYAN.** 22 Bom. L. R. 1416.

Sch. II para. 15—Award—Arbitrator deciding on personal knowledge—Misconduct.

When an expert is appointed as an arbitrator to decide the matter in dispute which can alone be decided on the strength of his expert knowledge, he may be justified in refusing to hear the evidence tendered by either of the parties. But an arbitrator is not justified in deciding an arbitration on his own personal knowledge, which the parties had no opportunities of testing, especially where the parties

C. P. CODE (1908), Sch. II, para. 16.

did not intend that the arbitration should be decided without the examination of the evidence of the parties. An award given by an arbitrator on his own personal knowledge and without evidence is, bad in law and the Court will be perfectly justified in refusing to file an award. (*Drake Brockman, J.C.*) **MUSSAMMAT BARI SAHU v. PRATAP SINGH.**

57 I C. 604.

Sch. II. Para 15 (1)—Arbitrator—Misconduct—Decision without taking evidence.

Where, in the absence of any agreement that an arbitrator should decide a dispute upon his own knowledge of the facts and without taking any evidence, an arbitrator does so decide a dispute his act is fatal to the award on the ground of misconduct. (*Lindsay, J.*) **LACHMI NARAIN v. SHEO NATH PANDEY.**

42 All. 185 : 18 A. L. J. 78 : 54 I. C. 443.

Sch. II, para. 16—Arbitration—Award—Covenant in—Binding nature of on parties to suit—No decree on award—Effect of—Indemnity clause—Breach—Cause of action—Lim. Act, Art. 83—Assessment of damages—Principle of.

1st defendant who along with the 2nd defendant one N. formed a joint Hindu family sold his share in the family property to a person who instituted a suit against all of them for the recovery of the share purchased by him. The matters in dispute in that suit were referred to an arbitration and an award was given in 1900 which, besides directing that the purchaser was to be put in possession of the share of 1st defendant provided that the second defendant was himself to bear all the debts alleged to have been incurred by him for family purposes and that the other defendants were to have nothing to do with those debts. A decree was passed upon the award in regard, to the purchaser's claim, the rest of the award being simply recorded. The purchaser obtained possession of the share decreed to him and sold it to plaintiff in 1901 who in his turn sold it to one V in 1902. Meanwhile in 1901 one K instituted a suit upon a mortgage bond alleged to have been executed in his favour by the 2nd defendant for a family debt, obtained a decree and purchased the mortgaged property in execution. Subsequently he instituted against the 2nd defendant and V a suit for the delivery of the one-third share of his mortgagor D, obtained a decree in 1909 and obtained possession in April 1911 from V. Thereupon V sued the plaintiff for damages for breach of covenant, obtained a decree and recovered damages from plaintiff in 1915. In a suit brought in 1916 by plaintiff against *inter alia* the 2nd defendant for damages for breach of the obligation imposed upon him by the award and for damages caused to the plaintiff by being obliged to compensate V.

C. P. CODE (1908), Sch. II, para. 16.

Held, (1) there was a cause of action to the plaintiff against the 2nd defendant.

(2) the covenant in the award by the 2nd defendant was in the nature of an indemnity clause that the plaintiff became entitled to sue for reparation only in 1915 when he actually suffered damages and the suit brought within 3 years from that date was not barred under Art. 83 of the Limitation Act.

(3) the plaintiff was entitled to recover by way of damages no. only the amount of debt and the interest thereon which the 2nd defendant had undertaken to pay but also the costs of the suit brought by V against himself.

The award was binding on the parties to the reference if it were a decree of Court the second defendant had submitted himself to the covenant therein referred to above and that covenant enured to the benefit not only of the 1st defendant but of all persons claiming under him. (*Seshagiri Aiyar and Moore, JJ.*) *KALVAKOLNU SEETAMMA v. NARAYANA-MURTHI.*

38 M. L. J. 470
57. I. C. 982.

Sch. II, para. 16—Award—Decree without allowing time for objections—Appeal

Where the Court receives an award, and instead of allowing time to parties to make objections to it, passes immediately a decree in terms of the award, no appeal can lie from the decree so made; but the Court can, under S. 115 of the Civil Procedure Code, set aside the decree and send the case back to the first Court to enable the parties to file their objections to the award, (*Macleod, C. J. and Fawcett, J.*) *RAVJIBAI KASHIBAI v. DAHYABAI ZIVREBIAI PATIL.* 22 Bom. L. R. 1454.

Sch. II, para. 16 (2)—Appeal—Award—Decree or—Suit to set aside.

There is no appeal from a decree passed on an award except in so far as the decree is in excess of or not in accordance with the award of the arbitrators.

No suit can be brought to set aside an award which has been followed by a decree (*Twomey C. J. and Robinson, J.*) *SHWE HPAN v. MA CHIT NYEIN.*

13 Bur. L. T. 34 : 56 I. C. 677.

Sch. II, Para. 17—Arbitration—Agreement to refer—Minor—Mother acting as guardian—Effect of.

Under the Mahomedan Law, a mother who has not been appointed guardian of the properties of her minor children by the District Judge under the Guardians and Wards Act is not competent to bind the minors by an agreement to refer to arbitration disputes between the minors and other persons regarding their moveable and immovable properties. Such an agreement is not for the manifest advantage of the minors and does not amount to an acceptance on their behalf of an unburdened bounty and cannot be fixed in court under Sch. II para. 17 of the C. P. Code.

C. P. CODE (1908), Sch. II, para. 17.

The assent of one of two persons appointed guardian of the properties of a minor by the District Judge under the Guardians and Wards Act subsequently given to the agreement to refer and his participation in or assent to an application under Sch. II para. 17 of the C. P. Code cannot validate the agreement which forms the basis of that application. (*Teunon and Bachroft, JJ.*) *MOASENUDDIN HAMED v. KABIRUDDIN HAMED.* 47 Cal. 713: 57 I. C. 945.

Sch. II, Para. 17 Arbitration—Private reference—Death of party—Refusal to proceed with arbitration—Effect of.

During the pendency of the arbitration proceedings on a private reference one of the parties died and the arbitrator thinking that he had no power to bring the representatives of the deceased on the record refused to go on with the arbitration. On an application for filing the agreement referring the matters to arbitration held that the court could not order the arbitrator to carry on the arbitration proceedings (*Lindsay and Ryves, JJ.*) *AHMAD NOOR KHAN v. ABDUL RAHIM KHAN.*

42 All. 191 : 18 A. L. 76 : 54 I. C. 366.

Sch. II, Paras 17 and 18—Arbitration—Reference outside Court—Subsequent institution of suit for a part—Munsif directing arbitrator to proceed—Jurisdiction of arbitrator.

The parties referred certain matters to arbitration but new disputes arising between them the arbitration did not progress. Two of the parties then filed a suit in the Court of the Munsif in respect of a part of those matters; the value of the whole subject of reference was beyond the Munsif's jurisdiction. The opposite party pleaded in bar the submission to arbitration. The Munsif ultimately passed an order staying the suit and formally referred the matter to the arbitrators and directed them to proceed with the arbitration. All the parties then appeared before the arbitrators and litigated their case fully before them. An award was made which the applicants now sought to challenge on the ground of want of jurisdiction. In revision, held, that the parties having accepted the decision of the Munsif and having appealed and fully prosecuted their case before the arbitrators could not afterwards challenge it on the ground of jurisdiction the award made by the tribunal chosen by themselves. 41 Mad. 115, 12 A. L. J. R. 757

42 All. 661 : 18 A. L. J. 844.

Ref (*Piggott and Kanhaiya Lal, JJ.*) *SUKH-NATH RAI v. NEHAL CHAND.*

Sch. II, Para 17 (4)—Reference to arbitration—Lapse of owing to inaction of parties—Agreement to refer if can be filed.

Held that the conduct of the parties coupled with the long and unexplained delay of six years amounted to a cancellation of the agreement to refer their disputes to arbitration and

C. P. CODE (1908), Sch. II, para. 18.

that therefore the agreement could not be filed. (*Prideaux, A. J. C.*) **MADHO KASHINATH v. SAMBEASHIVA.**

54 I. C. 126.

Sch. II, Para. 18—Reference to arbitration—Suit if can proceed

Where the subject matter of a suit is referred to arbitration and the arbitrators make an award, the existence of the award is a bar to the decision of the suit by the Court, unless award is set aside by the decree of a competent Court. (*Pratt, A. J. C.*) **MA HLA YE v. MAUNG TUN MAUNG.**

57 I. C. 894

Sch. II, Para 20—Applicability of Award, loss of."

When an award has been reduced to writing and has been lost, the special procedure provided by Sch. II, para. 20 C. P. C. cannot be resorted to and the parties should be referred to a regular suit. **12 Mad 331; 66 P. R. 1913 ref. to. (Broadway J.) MUSSAMMAT KHODEJA v. GHULAM NABI.** **1 Lah. 45: 55 I. C. 845.**

Sch. II, Para. 20—Arbitration—Award—Separate suit to enforce not barred.

An award was made on arbitration out of court. The plaintiff applied to file the award under para. 20 of the 2nd Schedule of the Civil Procedure Code. The application was numbered as a suit, but it was summarily rejected, without trying the validity of the award, on the ground that treated as a suit it was time barred. The plaintiff next filed a regular suit to enforce the award, it was objected to as having been already barred by res judicata:—

Held overruling the objection, that bar of res judicata did not apply. (*Norman Macleod, C. J. and Fawcett, J.*) **RAJMAL GIRDHARLAL MARWADI v. MARUTI SHIVRAM**

22 Bom. L. R. 1377.

Sch. II, paras. 20 and 21—Arbitration without intervention of Court—Application to file the award—Refusal of application—Subsequent suit to enforce award—Res judicata—Misconduct—Matters settled among parties before award—Effect of.

The refusal of an application under para. 20 of Sch. II of the C. P. Code to file an award does not operate as *res judicata* in respect of a subsequent suit brought to enforce the award.

The enactment in the present Code of Civil Procedure and of cl (f) to sub-section (2) of S. 104 has not made any material or subsequent innovation in the law over what it was under the Code of 1882.

A party wishing to avail himself of an award in an arbitration effected without the intervention of a Court is not bound to apply to a Court, within six months, to file the award; and failure to do so does not make the award void and ineffectual. S. 89 has not the effect of making such an application the only course open to him.

C. P. CODE (1908), Sch III.

Where several matters were submitted to an arbitrator for decision and one of them was, to the knowledge of the arbitrator, settled by agreement between the only two parties whom it concerned, without objection by the parties, so that by the time when the arbitrator came to make his award that matter was no longer in controversy requiring his decision, and he did not record any finding about it in his award, *held*, that the award was not vitiated by misconduct by reason of the omission to determine one of the matters referred. **13 C. L. J. 399 and 13 C. L. J. 181 ref. (Mears, C. J. and Ryves, J.) HARAKH RAM JANI v. LAKSHMI RAM JANI.**

18 A. L. J. 960.

Sch. II, Para 20—Award—Illegality apparent on the face—Arithmetical error.

A member of a joint Hindu family appointed an arbitrator for the purpose of dividing the joint properties between them. On an application made under Sch. II, para. 20 C. P. C. to file the award it was contended that the award was bad as (1) the arbitrator had allocated funds or property to a person not parties to the reference, (2) the arbitrator had first allotted the residential houses to one party and payment of compensation to another and then changed his decision; (3) the award purported to divide the houses in equal shares though it was clear on the face of the award that he had done so and had awarded compensation to one party much in excess of its proper share. *Held*, that the award was good and was not vitiated by any illegality apparent on the face of the award. The arbitrator had not travelled outside the reference and what looked like an arithmetical error in the award did not render the award invalid. **10 Bom. H. C. R. 391 and 27 All 526 ref. (Piggott and Walsh, JJ.) SHYAM LAL v. PARSHOTAM DAS.** **42 All. 277: 18 A. L. J. 241: 58. I. C. 585.**

Sch III—Execution by Collector—Sale of ancestral land—Powers of Collector.

Where execution proceedings for the sale of ancestral property are transferred to a Collector, the Collector has full power to proceed with the sale or to adopt any of the methods laid down in Schedule III C. P. C. for the satisfaction of the decree.

If he fails in effecting a sale of the property it is open to him to return the papers but it is equally open to the court which passed the decree to send back the papers, if the reason which prevented the sale was not such as to operate as a complete impediment to the execution of the decree. In sending back the papers to the Collector the court merely enforces what it has already ordered and no fresh application for execution is necessary. (*Kanhaiya Lal, A. J. C.*) **LAL BASANT SINGH v. LAL SRIPAT SINGH.** **55 I. C. 485.**

C. P. CODE, (1908) Sch. III.

Sch. III.—Revenue paying estate—Decree for joint possession—Duty of Collector to allot—Reference to Civil Court.

Where a Civil Court passes a decree for joint possession of a revenue paying estate it is for the Collector not only to make allotment but to complete the portion by delivery of possession. Where he refers the parties to the Civil Court for this purpose he fails to exercise a jurisdiction vested in him by law.

After the allotment has been made, the parties cannot claim to be joint owners of the property even though the partition proceedings have not been completed according to law. (*Mitra, Offg J C*) **MUNAWAR ALI v. TAIYABALI.** 56 I C 306

Sch. III, Para. 11. (3)—Exclusion of time whether applicable to Cases under S. 43 C. P. Code, See (1919) Dig. Col 317 SHIAM CHARAN v. COLLECTOR OF BENARES.

42 All. 118.

CO-MORTGAGEES—Payment to one not a discharge of the entire debt See CONTRACT ACT, Ss 38 and 43. 5 P. L. J 376.

Release by one—Not a discharge of the entire debt. See CONTRACT ACT, S. 45.

1 P. L. T. 102

COMPANY—Articles of Association—Allotment of shares by managing director—Validity—Power of allotment, delegation of—Ratification—Right of renovation when excised

Where there is no valid delegation to the managing director of the power of allotting shares which power was reserved to the Board of Directors by the Articles of Association, the allotment of shares is invalid.

It is open to the applicant to revoke his application for the allotment of any shares before any valid allotment or ratification by the Board of Directors. (*Scott Smith and Dundas, JJ*) **BANK OF PESHAWAR LTD. v. MADHOB RAM** 1 Lah L J. 1.

Voluntary liquidation—Power of liquidator to order public examination of director. See COMPANIES ACT, Ss 215, and 196

22 Bom. L R 219.

Winding up—Dissolution—Disposal of books and papers—Form of order.

Greaves, J. delivered judgment indicating form of order, under the Indian Companies Act, 1913, for the dissolution of a Company in compulsory liquidation, undistributed assets remaining in the hands of the liquidator. (*Greaves, J.*) **In re SHRAGERS, LTD.,** 47 Cal. 620.

COMPANIES ACT (VI of 1882) S. 68—Explanation—Company—Charge in favour of Secretary—Omission to register—Effect of—Appeal—Time for—Implied extension—Interpretation—Statute—Proceedings of the legislature.

Under S. 68 explanation of the Companies Act when a charge specifically affecting pro-

COMPANIES ACT (1882), S. 150.

perty of a company has been granted in favour of an officer of the company he cannot avail himself of it unless it is registered in accordance with S. 68 even though he has ceased to be an officer.

The appellant, the secretary of a company, registered under the Indian Companies Act, was granted by the Company a charge upon unpaid calls in consideration of money advanced. The charge was not registered. In the winding up of the Company the appellant upon a petition, opposed by the liquidator, obtained in April 1912 an order recognizing the validity of the charge although not registered. In September 1913 the appellant petitioned for an order enforcing his charge and the respondents debenture-holders intervened and opposed. The District Judge made the order, but it was set aside by the High Court on the ground that the charge was not registered. The order of 1911 had not been appealed against and the time allowed therefore had expired.

Held, the appellant could not avail himself of the charge, and that the High Court be taken to have impliedly extended the time to appeal against the order of April 1912. To ascertain the meaning of the words used in the explanation to S. 68 a reference to the proceedings in the Legislative Council upon its enactment was not permissible. (*Viscount, Finlay*) **KRISHNA AYYANGAR v. NALLAPERUMAL PILLAI.** 43 Mad. 550 : 38 M. L. J. 444 : 18 A. L. J. 489 : 22 Bom. L. R. 568 : 28 M. L. T. 28 : (1920) M. W. N. 419 : 12 L. W. 92 : 56 I. C. 163 : 47 I. A. 33.

Ss 147 and 169—Company Liquidation—Bankruptcy rules—Applicability of—Separate cases decided by same Judgment—Several appeals.

A company in liquidation became solvent as soon as it had paid off its liabilities existing at the date of the winding up order.

Ordinary bankruptcy rules are applicable to companies in liquidation and when the liabilities existing at the date of the winding up order have been discharged, creditors, when debts carry interest, are entitled to subsequent interest. (*Scott Smith and Wilberforce, JJ*) **DEVI DITTA MAL v. THE OFFICIAL LIQUIDATOR OF THE AMRITSAR BANK, LTD.** 1 Lah 368 : 56 I. C. 69.

Ss. 150 and 169—Ex parte order—Rehearing of—Order for payment if a decree—Setting aside—Inherent power—C.P. Code O. 9, R. 13.

The re-hearing of any order made in the matter of winding up of a company can only take place before a Court of appeal.

But an order which has been obtained *ex parte* or which is in truth a nullity may be discharged by the court which made it.

S. 169 of the company's Act, 1882 has no application to petitions for the setting aside of *ex parte* decrees.

COMPANIES ACT (1882), S. 153.

The court under the Companies Act being a court of civil jurisdiction, is governed by the general provisions of the Civil Procedure Code as made applicable by S. 141. The court should in dealing with *ex parte* orders proceed under O. 9, R. 13 *mutatis mutandis*. (*Scott Smith and Wilberforce, JJ.*) HINDUSTAN BANK LTD v. MEHRAJ DIN.

1 Lah. 187 : 2 Lah. L. J. 291 :
55 I. C. 820.

—S. 153—Company—Compromise or arrangement with creditors—Sanction of court—Date from which compromise or arrangement sanctioned by court becomes binding. See (1919) *Dig. Col.* 320. RAGHUBAR DAYAL v. BANK OF UPPER INDIA, LTD.
13 Bur L. T. 31.

—Ss. 162 and 163—Company winding up—Application for stay of proceedings—Order on, if a "judgment" within Cl 15 of the Letters Patent—Demand in writing—Company's neglect to pay in 3 weeks—Petition presented with ulterior object. See (1919) *Dig. Col.* 322.) THE COMPANY v. SIR RAMESHWAR SINGH.
58 I. C. 561.

—S. 169—Appeal Order of liquidation judge reducing remuneration of employee.

S. 169 of the Companies Act of 1882 is not applicable to an order of the liquidating judge reducing the remuneration of an employee of the official liquidators sanctioned by the predecessor of the Judge, and consequently no appeal from such an order can be entertained. (*Beran-Petman, J.J.*) GHANSHAM DAS v. HINDUSTAN BANK, LTD.

1 Lah. 73 : 55 I. C. 928

—(VII of 1913)—Company—Liquidation—Winding up—Company turning out to be solvent—Interest if payable to creditors

If a company is, or ultimately turns out to be solvent, interest is payable upon any debts which carry interest or upon which a right to interest has been acquired out of the surplus assets remaining after payment of principal and interest up to the date of the winding up order.

The solvency of a Company is established if after payment of the principal and interest up to date of winding up there are some assets which may be realized and will be available to meet the liability on account of interest which accrued due after the commencement of the liquidation.

The creditor is not debarred from claiming the interest merely because he did not ask for it when proving his claim originally.

(1905) 1 Ch. D. 307, per Buckley, J. Ref. (*Shadi Lal, J.*) GHANSHAM DAS v. PUBLIC BANKING AND INSURANCE COMPANY.

1 Lah. 154 : 2 Lah. L. J. 558 :
56 I. C. 251.

COMPANIES ACT (1913), S. 158.

—Company—Winding up—Temporary suspension of business—Dead lock among directors.

Where there has been a suspension or business of a Company incorporated under the Indian Companies Act the power of the Court to wind up the company will be exercised only when there is a fair indication that there is no intention to carry on the business; if the suspension is satisfactorily accounted for and appears to be due to temporary causes, the order may be refused.

(1867) 17 L. T. 148 ; (1880) 14 Ch. D. 104 ; (1882) 21 Ch. D. 209 referred to.

Quare, there are ample indications that it is possible to carry on the business of the company, it is not possible to hold that there is a complete deadlock which must be got rid of by compulsory winding up. The Act creates as between shareholders a domestic tribunal and unless a clear case is made out the Court will be slow to withdraw from it the decisions whether the company's business shall or shall not be carried on

(1916) 2 Ch. 426 ; (1917) referred to.

Where the subjects of a company as set out in the Memorandum of Association can be fulfilled in other ways or by the employment of other agencies, it cannot be rightly held that the substratum was gone, and the Court will not grant an application for winding up. (1882) 20 Ch. D. 151 (1882) 20 Ch. D. 169 referred to. (*Mookerjee and Fletcher, JJ.*) MURALIDHAR ROY v. THE BENGAL STEAMSHIP COMPANY, LTD.
47 Cal. 654.

—S. 33—Register—Power to rectify discretionary.

The power to order rectification of the register of a company is entirely a matter of discretion for the court. It ought not to be exercised when the only object of the application is to save the expense of taking out letters of administration and of a legal transfer of the shares to the applicant's name. (*Robinson, J.*) G. M. ARIFF v. SURATEE BARA BAZAAR CO. LTD.
12 Bur. L. T. 194 :
55 I. C. 751.

—S. 76 (1)—General meeting—Default in holding of—Effect of.

Under S. 76 of the Companies Act there is no difference between a general meeting and an extraordinary general meeting of the company. Where, therefore, an extraordinary general meeting of a company was held within fifteen months of the last general meeting it was held that no offence had been committed under S. 76 (1) of the Act. (*Ryves, J.*) LACHMI NARAIN v. EMPEROR.
54 I. C. 494 :
21 Cr. L. J. 94.

—Ss. 158 and 269—Contributory—Suit against—Leave of Court if required—Dismissal of suit for default—Application by official liquidator.

The term "contributory" as defined in S. 158 of the Indian Companies Act includes any

COMPANIES ACT, (1913) S. 162.

person alleged to be a contributory S. 269 of the Companies Act is intended to apply not to a suit or other legal proceeding brought by a Company, but to a suit or proceeding brought by a third person against either the Company or a contributory of the Company. A suit brought by the Company may proceed in spite of an order for winding up made after the commencement of the suit. Where a suit by the voluntary liquidator of a Company against a person for the recovery of a certain sum of money said to be due by him to the Company by reason of his being a shareholder, is dismissed for default, an application by the official liquidator for placing the same person on the list of the contributories of the Company is barred by O. 9, R. 9 of the C. P. Code (*Shadi Lal, J.*) **RUP RAM v FAZAL DIN.**

1 Lah. 237: 57 I. C. 223

S. 162—Winding up—Powers of Court—Internal management—Interference with, not justified.

S. 162 (6) of the Companies Act is not to be construed as being *cujusdem generi* with clauses (1) to (5) but gives the Court power to order the winding up of a company if it is of opinion that such order would be just and equitable. A court has no jurisdiction to interfere with the internal management of a company acting within its powers. (1902), A. C. 83 Ref.

Winding up a company is an extraordinary remedy to be resorted to only in extreme cases. Internal fraud, or unconscious conduct of the directors in managing the affairs of the Company is no ground for the winding up order at the instance of minority of the share holders (*Rutledge, J.*) **B COWASJI v NATH SINGH OIL COMPANY, LTD** **13 Bur L T 51**

Ss. 164 and 200—Winding up—Reference to District Court—Contributories resident within jurisdiction of different High Courts—Procedures.

An order for the winding up of a company was made by the Punjab Chief Court. Under S. 164 of the Companies Act subsequent proceedings were taken in the Court of the District Judge of Lahore against contributories residing in districts within the jurisdiction of the Allahabad High Court. An application was made to the Allahabad High Court for enforcing these orders. Held that the High Court had jurisdiction to enforce the orders by proceedings in execution before itself or to authorise the official Liquidator to apply to the various District Courts in respect of each of the persons against whom orders for contribution had been passed. However as the balance of convenience was in favour of the latter course the Official Liquidator was authorised to proceed accordingly. (*Piggott and Dalal, JJ.*) **IN THE MATTER OF THE NATIONAL INSURANCE AND BANKING COMPANY, LTD., IN LIQUIDATION.**

54 I. C. 384

COMPROMISE.

—**Ss 215 and 196—Company-Voluntary Liquidation—Power to order public examination of director.**

A Voluntary liquidator is entitled to come to the Court and ask the Court, under S. 215 of the Indian Companies Act, 1913, to make an order for the public examination of directors &c. which the Court may make on the application of an official liquidator under S. 190 of the Act. (*Macleod, C. J. and Heaton, J.*) **NOWROJI PUDUMJI v. LAXMAN.**

44 Bom 459: 22 Bom. L. R 219: 55 I. C. 831.

—**Ss. 284 and 171—Winding up commenced under former Act—Application for leave of court for suit against company—Procedure under S. 136 of former Act—Companies Act 1882 S. 136**

An order for the voluntary winding up of a company was passed under S. 191 of Act VI of 1882, before the commencement of Act VII of 1913. In the course of the winding up, the Official Liquidator sued one Ali Akbar for the balance due from him on account of the price of the shares purchased by him, and obtained an ex parte decree. In 1918 Ali Akhtar instituted a suit against the company contesting his liability for the said balance. An objection was taken to the maintainability of the suit on the ground that the leave of the court required by the Indian Companies Act for instituting the suit had not been obtained. Thereupon, Ali Akhtar applied, in 1919, to the High Court under S. 171 of Act VII of 1913 for leave to proceed with the suit.

Held, that by reason of the provisions of S. 284 of Act VII of 1913 the application for leave of the court in respect of the suit was governed by S. 136 of Act VI of 1882 and not by S. 171 of Act VII of 1913 and did not therefore lie in the High Court. (*Knox, J.*) **ALI AKHTAR v. THE PEOPLES INDUSTRIAL BANK LTD.** **18 A. L. J. 296: 58 I. C. 607.**

COMPROMISE—Decree—Execution—Compromise—Not incorporated in the decree—Effect of.

During the course of the execution of a money decree the parties effected a compromise the terms of which, however were not incorporated in the decree. But the parties and the court treated the compromise as a decree.

Held, that although the compromise was not a decree, yet as the court and the parties had treated it as one, it must be considered as a decree and treated accordingly. (*Stuart, A. J. C.*) **NANKU v. JADU NATI.**

57 I. C. 591.

—**Decree—Suit on, not maintainable—Remedy by execution. See (1919) Dig. Col. 327.** **KAUNSHI RAM v. TAGRA**

2 Lah L J. 125.

—**Disputed claim—Strangers, right of, how affected.**

The widow of the last male owner adopted B, as son and bequeathed her properties to

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plff B instituted a suit against plff. for possession of C's estate but compromised the suit whereby B executed a sale in favour of the plff. of all his rights as an adopted son of C. Plff. sued to recover from the debt upon three bonds executed by him in favour of C. The debt pleaded that he had adjusted the claim by payment to B. Held that the sale in favour of plff. contained no reservation the giving of a discharge to debtors by B would be recognised and as there was no admission by the plaintiff that B had any right to C's estate as adopted son, B had no right to give a discharge to the debt. and consequently the adjustment with him could not be set up against the plff. (*Kotval, A. J. C.*) RAMLAL v. DATTU. 55 I.C. 418

—Plader—Power to compromise does not include power to withdraw suit. See PLEADER AND CLIENT. 11 L.W. 225.

Setting aside—Fraud—Collusion.

Apart from fraud or collusion or any vitiating circumstance, a question settled by a compromise cannot afterwards be revived in Court for judicial determination, 32 Ch. D. 266; 34 C. 70; (P. C.) (*Richardson and Shams-ul-Huda JJ.*) BEJOY SINGH HAZARI v. MATHURAYA DEBYA. 56 I.C. 97

COMPROMISE DECREE—Construction—Clause for forfeiture—Power of Court to relieve against.

A suit to obtain a declaration that a deed which was in the form of a sale-deed was in reality a deed of mortgage and to redeem the mortgaged property, terminated in a consent decree which provided that if the plaintiff paid a certain amount to the defendant within a month from its date the defendant should deliver possession of a field after harvesting the crop in February 1918. and that if the payment was not made in time, the defendant would become its owner. The payment was not made within due date, which was, 4th October 1917; but it was made on the 26th November 1917. The defendant contended that as the payment was not made within time he had become owner of the field:—

Held, overruling the contention that it was open to the Court to relieve against the default of the plaintiff on certain terms, for although the plaintiff might have paid the amount decreed within the month allowed, he would not have got possession until the February following and that evidently was the important date considered by the Court and by the parties when they arranged the compromise. 16 Bom. L.R. 668 commented on.

8 Bom. L.R. 813, F.B. expl. (*Macleod, C. J. and Heaton, J.*) SUPDU DHODU GUJAR v. MADHAV RAO JIVRAM GUJAR.

44 Bom. 544: 22 Bom. L.R. 780: 57 I.C. 584.

—Penalty—Relief against forfeiture—Power of court.

CONTEMPT.

It is open to the execution Court to consider what the rights of the parties, equitable or otherwise, are which follow from the contract embodied in a compromise decree.

The relation of landlord and tenant having been created in this case by the compromise decree, the principle of the case in 31. Bom. 12 was applicable to the case, and the executing Court had erred in refusing relief to the defendant on the ground that the contract had "crystallised into a decree" 16 Bom. L.R. 668 Ref. In the circumstances of the case, the High Court held that the defendant should not be ejected for failure to execute the agreement within two months from the date of the compromise decree and should be given some time within which to execute it (*Chatterjee and Pantun, JJ.*) SURENDRA NATH BANERJEE v. THE SECRETARY OF STATE FOR INDIA

24. C. W. N. 545: 57 I.C. 643.

CONTEMPT—Of inferior Court—Jurisdiction of High Court to protect. See.

22 Bom. L.R. 368.

—Insolvency—Disobedience to order of Official assignee to attend—Verbal order Procedure. See PRES. TOWNS INS. ACT S. 33 ETC. 47 Cal 58.

Pending case—Publication of proceedings before case comes on for hearing.

All proceedings in cases pending before a Court of Justice are privileged, and they must not be published until the case comes on for hearing before the Court. (*Macleod C. J. and Heaton, J.*) IN RE KALIDAS JHAVERI.

44 Bom. 443: 22 Bom. L.R. 31: 58 I.C. 462: 21 Cr. L.J. 782.

Publication of proceedings pending in court without leave of court—Comments on proceedings—Jurisdiction of High Court in respect of contempt of inferior courts—Practice

Comments on or extracts from any pending proceedings before a court cannot be published unless the leave of the Court be first obtained.

Any act done or writing published calculated (a) to obstruct or interfere with the due course of justice or the lawful process of the Court or (b) to bring a court or a Judge of the Court into contempt or to lower his authority is a contempt of the Court. (1900) 2 Q.B. 36, 40, followed.

The High Court has power to protect in a proper case Courts in the mofussil over which it exercises supervision against contempt. (1903) 2 K.B. 432 and (1908) 1 K.B. 32 followed.

The District Judge of Ahmedabad submitted in a letter to the High Court for its determination certain questions regarding the conduct of two barristers and three pleaders who had taken Satyagraha pledge i.e., a pledge "to refuse civilly to obey the Rowlett Act and such other laws as a committee to be thereafter

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appointed may "think fit." The opponents, Editor and Manager of a weekly newspaper published the letter with comments while proceedings against those barristers and pleaders under the disciplinary jurisdiction of the High Court were pending:—

Held, (1) that the opponents were guilty of contempt of court in publishing the letter pending the hearing of the proceedings;

(2) that the comments made on the letter were of a particularly intemperate and reprehensible character and constituted a serious contempt of Court. (*Marten, Hayward and Kajiji, JJ.*) *In Re MOHANDAS KARAMCHAND GANDHI*

22 Bom. L. R. 368 :

58 I. C. 915

CONTRACT—Breach—Goods to be delivered under contract were goods to be manufactured and delivered by a mill—Contract conditional and not absolute—No implied warranty to get goods from the mill and supply them non-fulfilment—Parties if released—Damages. See **DAMAGES**.

22. Bom. L. R. 343.

—*Breach*—Party committing breach cannot set up a defence which he could have pleaded in a suit for damages.

If a buyer without any jurisdiction cancels the contract, he is disabled from setting up any defence which he might otherwise have done to an action for damages by the seller. *Braith Waite's Foreign Hardwood Company* (1902) 2 K. B. 543, foll. (*Macleod, C. J.*) *RUSTAMJI v. HAJI* 22. Bom. L. R. 1165.

—*Breach of— Subsequent variation—Measure of damages.*

The plaintiffs entered into a contract with M to purchase twenty-five bales of Dhoties at Rs. 11-2-0 per piece. The plaintiffs thereafter entered into a contract with the defendants to sell the said bales to them at Rs. 11-3-0 per piece. The defendant in their turn entered into a contract with M to sell the said bales back to M at Rs. 11-12-0 per piece. It was subsequently agreed upon between the plaintiffs and the defendants that the latter should pay M direct against delivery and should get M to give credit to the plaintiffs for the amount the plffs. had to pay to M. M did not carry out his contract with the defendants. The plaintiffs filed a suit against the defendants for breach of contract in not taking delivery of the bales, claiming damages the difference between the price at which they had sold the bales to the defendants and the market price at the time of the breach. The Court of first instance passed a decree in favour of the plaintiffs at the rate of 0-6-0 per piece, On appeal.

Held, confirming the decree of the lower court that as the term of the plaintiffs contract with defendants regarding delivery was subsequently varied and there was to be no delivery to defendants there could not be a breach of contract on the part of the defendant by reason of their not taking delivery.

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(2) that the correct measure of damages would be such as would put the plaintiffs in the same position as if their contract with the defendants as varied had been carried out;

(3) that the plaintiffs were therefore entitled only to the difference between Rs. 11-8-0 and Rs. 11-2-0 which would be 0-6-0 per piece. (*Heaton and Marten, JJ.*) *HIRALAL AMBALAL v. GOPALJI KALLIANJI*

22. Bom. L. R. 338.

—*Consideration—Acknowledgement of liability*

A rusu khata is a mere acknowledgment of the correctness of an account, and if unsupported by evidence of a contemporaneous oral agreement founded on consideration, its mere existence is not sufficient to form the basis of a fresh contract. Oral evidence is not admissible to vary the terms of a registered mortgage deed (*M. Mitra, A. J. C.*) *JETHMAL v. SAROO*.

58 I. C. 380.

—*Construction — Agreement to buy goods of a particular description when received—Arrival of goods or a particular description a condition precedent—Tender of goods of a different description on arrival—Agreement at end for non-fulfilment of condition—Liability of vendor—Damages.* See (1919) *Dig. Col.* 329. *TRIBHUVANDAS v. NAGINDAS*.

54 I. C. 233.

—*Construction — Broker—Employment of under-broker for fixed term—Broker's employment, termination of in the meantime—Dependent contract—Under broker not entitled to damages.* See **DAMAGES**.

11 L. W. 551.

—*Construction — Completion of—Intention to reduce terms to formal documents.*

The question as to when a contract should be viewed as complete and when not is one to be decided in each case on its own facts. If a consensus *ad litem* has been reached between the parties on all the proposed and disputed terms there is a contract but if some terms are left unsettled even though they are minor terms there is no contract. Where however all the terms are agreed to, any stipulation to embody those terms in a formal document will not affect the contract except when there is a further stipulation, express or implied, that the contract shall not be treated as complete till the formal document is drawn up and signed. (*Spencer and Krishnan, JJ.*) *KAMALAMBAL v. DORAI SAMI CHETTIAR*. 11 L. W. 179:

56 I. C. 26.

—*Construction — Condition avoiding contract—Not coming into existence—Liability on original contract.*

A contract for the purchase of alizarine was entered into between parties in India. The contract had a reference to certain syndicate rates and provided that if there should be any fluctuation in the syndicate rates, the

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conditions laid down in the latter will be void. These rates were apparently issued by a syndicate composed of an important German firm of alizarine producers and an English member or members. There was a considerable stock of alizarine in India when the war broke out, and deliveries continued for some time and then ceased. The purchasers brought the suit for damages for breach of a contract to continue the deliveries.

Held, that as there was no fluctuation or alteration in the syndicate rates by reason of the syndicate not being operative the conditions avoiding the contract if there was such fluctuation never came into operation and the original obligation of the sellers remained untouched and they were liable in damages (*Viscount Haldane*). *TOOLISIDAS TEJPAL v VENKATACHELLAPATHY AIYAR*.

25 C. W. N 26 :
(1920) M. W. N. 557 (P. C.)

—Construction—Force Majeure clause
—Meaning and effect—Contract between local buyers and sellers — Usual terms—"Office Dhara" Meaning—Late shipment liability for—Delay due to government requisition—Commission, Issue of—Propriety—Fact probable by production of well recognised publications. See (1919) *Dig. Col. 331. FIRM OF GOVIND RAM v. FIRM OF KHUSHALDAS* 56 I. C. 885.
—Construction—Offer and acceptance
—Acceptance of money sent with offer—Implied acceptance. See CONTRACT ACT Ss. 78, AND 9. 18 A. L. J. 73.

—Construction—Time for performance of, a holiday—Right to perform on the day following.

In the absence of statutory provision or trade custom or usage to that effect the fact that the performance of a contract fails due on a holiday, does not alter the rights of the parties by suspending the transaction of private business.

A seller is bound to establish that he was entitled to perform the contract on the day following the holiday, by reason of the existence of a valid usage which is deemed to have been incorporated in the contract between the parties. He must not only prove the existence of a trade usage, but also to establish that the usage when read into the written contract does not make it insensible or inconsistent. The mere fact that the usage varies the apparent contract is not of itself sufficient to exclude the evidence. The test is, whether the incident if expressed in the written contract would make it insensible or inconsistent or unreasonable.

The written contract between the parties states explicitly that the due date of delivery of goods sold, is ninety days from the 29th July, 1918 that is, Sunday the 27th October, 1918.

Held, that the usage, that if such date falls on a Sunday the due date will be the day

CONTRACT ACT, S. 8.

following though varies the contract is sensible and self-consistent and is not open to the objection of repugnancy. (*Mookerjee, C. J. and Fletcher, J.*) *KASIRAM PANIA v. HURNUNDROY FULCHAND.* 32 Cal. L. J. 140: 58 I. C. 396.

—Implied contract—Inference in course of dealing—Agreement to pay enhanced interest See EVIDENCE ACT, S 92. 47 I. A. 17.

—Right to sue—Stranger to the contract when entitled to enforce it—Relation of trustee and cestuique trust—Part performance. See (1919) *DIG. COL. 332. KHERODE BEHARI GOSWAMI v. NARENDRA LAL KHAN*.

55 I. C. 310.

CONTRACT ACT, (IX of 1872) S. 2
—Contract—Construction—Correspondence—Subsequent negotiations—Effect of.

Though when a contract is alleged to be contained in letters, the whole correspondence should be looked at, yet if once a definite offer has been made and accepted without qualification, and it appeared that the letters of offer and acceptance contained all the terms agreed on between the parties at the date of acceptance, the complete contract then arrived at cannot be affected by subsequent negotiations. When once it is shown that there is a complete contract, further negotiations between the parties cannot without the consent of both get rid of the contract already arrived at. (*Mittra A. J. C.*) *THE MILL STORES, TRADING CO. v. MATHURADAS.* 57 I. C. 636.

—Ss 7, 8 and 9—Offer and acceptance—Proposal to purchase goods at a specified price—Price credited by seller to account of purchaser—Acceptance if complete.

The acceptance of a proposal must be unqualified. A person making a proposal cannot impose on the party to whom it is addressed the obligation to refuse it under the penalty of imputed assent or attach to his silence the legal result that he must be deemed to have accepted it. Acceptance of a proposal may be made without express communication by the conduct of the acceptor. (*Lindsay, J.*) *BISHUN PADU HALDAR v CHANDI PRASAD & CO.* 42 All. 187 : 18 A. L. J. 73 : 54 I. C. 437.

—Ss. 8 and 9—Offer and acceptance—Implied acceptance—Receipt of money—Effect of.

Plaintiffs asked deft to quote the price of cocaine and defendant quoted the price at Rs. 20 per ounce but "without engagement" meaning thereby that as the market rate was varying from day to day he was unable to quote definite price.

Plaintiff sent a money order which deft accepted and sent no reply for sometime but afterwards refused to supply at the rate quoted.

Held, that the conduct of the defendant in receiving the money and crediting it to his account amounted to a definite acceptance of the proposal. (*Lindsay, J.*) *BISHUN PADU*

CONTRACT ACT, S. 11.

HALDAR v. CHANDI PRASAD v. Co. 42 All 187 : 18 A. L. J. 73 : 54 I. C. 437.

—**S. 11**—Minor—Contracts by guardian for purchase of land—Not enforceable by minor on attaining age. See MINOR.

38 M. L. J. 77.

—**S. 11**—Minor—Contract void—Counter Claim—Costs.

Under the Indian Contract Act where a minor purports to contract, his alleged contract is void and not merely voidable; he is a person who is not competent to contract.

A counter claim in a suit can only be made by a person who is a defendant to the suit.

Costs allowed against a person not a party making such a counter claim. (*Sir John Edge*) MA HNIT v. HASHIM EBRAHIM METER.

38 M. L. J. 353 : 18 A. L. J. 335 : 32. C. L. J. 214 : 27 M. L. T. 190 : 22 Bom. L. R. 531 : 55 I. C. 793. (P. C.)

—**S. 11**—Minor—Execution of promissory note by—Enforceability—Person more than 18 years old—Guardian appointed by court—Majority Act, S. 3.

A promissory note executed by a person for whom a guardian of person has been appointed by the Court before he attained 18 years is a void contract if it was executed by him before he attained 21 years 30 C. 529 Ref.

The fact that a person has attained 18 years and would be a major but for the Court's order appointing a guardian will not relieve a plff. suing upon a document executed by him before he completed his age of twenty one years from the necessity of proving fraud or misrepresentation said to have been committed by that person. 25. Cal. 616 foll. Estoppel cannot overrule a plain provision of law or form the basis of a cause of action for a suit upon a contract when the contract itself is void. 37 Mad (?) 38 Mad. 1071 Followed.

Per Spencer, J.—Once a guardian of a minor is validly appointed by Court the minor's age becomes fixed by law at 21 and nothing which may subsequently transpire can have the effect of reducing it again to 18. (*Spencer and Bawell, JJ*) JAMBAGATHACHI v. RAJAMANNAR-SWAMI NADALWAR. 11 L. W. 596 : 57 I. C. 678.

—**S. 11**—Minor—Sale by guardian—Minor if bound by covenant in sale—Liability in damages for breach.

A guardian of a minor cannot personally bind the minor by covenants entered into on his behalf.

The 2nd defendant as guardian sold properties alleged to belong to the minor 1st defendant. The vendee was subsequently dispossessed and it was found that the 1st defendant had no right to the property. In a suit by the vendee for damages for breach of the covenant for title.

Held, that the minor was not liable but that the guardian must be deemed to have entered

CONTRACT ACT, S. 16.

into the covenant personally and hence liable 19 C. 507 foll. (*Seshagiri Aiyar and Moore, JJ*) SRINIVASA THATACHARLU v. NEELAMMA. 11 L. W. 246 : 55 I. C. 436.

—**S. 15**—Cocrcion—Unlawful detaining or threatening to detain property.

Detaining property is unlawful within S. 15 of the Contract Act even though the person detaining may have some right to the property if the detention is not authorized by law. (*Towncy, C. J. and Maung Kin, J.*) HLA MAUNG v. MA-TOKE. 12 Bur. L. T. 195 : 55 I. C. 741.

—**S. 16**—Undue influence—Dominating position—Proof of—Onus.

A person who sets up that a document was brought about by undue influence must, to start with, establish that there was active confidence between the person executing a document and the person under whose influence the document is said to have been executed. (*Abdur Rahim, O. C. J. and Odgers J.*) RAMAKRISHNA PRABHU v. NARAINA. 11 L. W. 112.

—**S. 16**—Undue influence—Plea of—Adult male—Capacity to transact business.

The plea of undue influence is not open to a man who, at the time of the transaction in dispute, was of mature age and of some intelligence and who, for some years previously managed his own affairs (*Viscount Cave*). LAL JAGDISH BAHDUR SINGH v. MAHABIR PRASAD SINGH.

42 All. 422 : 24 C. W. N. 529 : 23. O. C. 54 : 47 I. A. 116 : 58 I. C. 845. (P. C.)

—**S. 16**—Undue influence—Proof of—Dominating position—Use of, to obtain unfair advantage essential.

Undue influence is not established by proof of the relations of the parties having been such that the one naturally relied upon the other for advice and that the other was in a position to dominate the will of the first in giving it.

To render influence 'undue' it must be established that the person in a position of domination has used that position to obtain unfair advantage for himself, and so to cause injury to the person relying upon his authority or aid.

It is only when the bargain is with the influence or brought about by him and is in itself unconscionable that the burden is thrown upon the influencer to establish affirmatively that the other party was scrupulously kept separately advised in the independence of a free agent. (*Lord Shaw*) POOSATHURAI v. KANNAPPA CHETTIAR. 43 Mad. 546 : 38 M. L. J. 349 : 18 A. L. J. 344 : 27 M. L. T. 316 : 13 Bur. L. T. 28 : 55 I. C. 447 : 47 I. A. 1 (P. C.)

—**Ss. 16 and 71**—Undue influence—Mortgage—High rate of interest—Hardship—Relief when allowable.

If a contract to pay compound interest was brought about by undue influence on the part of the creditor or if he had unduly taken advan-

CONTRACT ACT, S. 16.

tage of his position in the matter, he could be deprived of the compound interest stipulated to be paid, but not otherwise. The fact that the borrower failed to realise what the rate of compound interest would work out to in a few years or that he entered into an improvident bargain (unless it is an unconscionable one) would not entitle him to relief from a Court of justice on the ground of hardship (*Chatterjee and Panton, JJ.*) HARENDR A KUMAR ROY v DEBENDRA KUMAR DAS. 54 I C 558.

Ss. 16 and 74—High rate of interest—Relief against when granted—Unconscionable bargain. See ('919) *Dig Col* 335. P.N.E.M SUKHI DAS v. RAM BHUJHAWAN MAHTO.

1 P. L. T. 34.

Ss. 16 and 74—Interest—High rate—Purdanashin lady.

Nine and half per cent interest though on such a large sum of Rs. 250,000 is not a penal rate.

In respect of a transaction by a purdanashin lady it must be shown that the lady had independent advice and had sufficient intelligence to understand the relevant and important matters that she did understand them as they were explained to her, that nothing was concealed, and that there was no undue influence or misrepresentation. (*Sir Jhon Edge*) MATI LAL DAS v. THE EASTERN MORTGAGE AND AGENCY CO. LTD.

28 M. L. T 351 : (1920) M. W. N. 631 : 47 I. A. 265 (P. C.)

Ss. 16 and 74—Of Interest—Penalty—Relief against.

Where there is no evidence that the landlord of a raiyat at fixed rates took any undue advantage of his position, a stipulation by the raiyat in his kabuliyat for payment of interest at the rate of 75 per cent per annum on arrears of rent is not unenforceable on the ground that the rate of interest is penal and unconscionable (*Teuon and Chaudhuri, JJ.*) BHUT NATH CHATTERJI v. MATHURA MOHAN NASKAR.

57 I. C. 1004

Ss. 16 and 76—Mortgage—High rate of interest—Unconscionable bargain—Power to relieve.

Where in a contract of mortgage interest is stipulated to be paid at the rate of 240-2 in the absence of coercion or undue influence there is no reason why the rate of interest stipulated should not be allowed.

The law relating to hard and unconscionable transaction has been codified in the Contract Act and a court cannot go outside the statutory provisions and follow some rules or supposed rules that have been applied in certain cases by the courts of equity in England (*Fletcher and Cuming, JJ.*) HARIS CHANDRA NANDI v. KESHAR CHANDRA DAS.

54 I. C. 785

Ss. 16 and 74—Mortgage—Interest—Hard and unconscionable bargain—Power of court to reduce.

CONTRACT ACT, S. 23.

In a suit on a mortgage executed by a Hindu lady which provided for interest at 15 per cent with quarterly rests the trial court allowed interest at 12 per cent up to date of suit only;

Held that unless it can be shown that undue advantage had been taken the court ought not to come to the conclusion that the transaction was hard and unconscionable.

On appeal the High Court allowed interest at the contract rate up to the date fixed for payment and thereafter at 6 per cent (*Chaudhuri and Cuming, JJ.*) BEJOY KUMAR ADDYA v. SATISH CHANDRA GHOSH.

24 C W. N. 444 ; 56 I. C. 1007.

Ss 16 and 74—Undue influence—Onus of proof—Unconscionable bargain—Test—Compound interest—High rate.

An agreement to pay interest at a stipulated rate does not become unconscionable merely because there is a stipulation to pay compound interest at the same rate in the event of their being a default in the payment of the simple interest agreed upon.

There is nothing inherently wrong or oppressive in a lender's securing for himself compound interest after the borrower has for a considerable time neglected to pay the debt or the interest accruing due upon it which he has contracted to pay. It is the state of affairs at the time when the bargain was struck that has to be considered and not the ultimate claim made. (*Shadi Lal and Broadway, JJ.*) RAM DAS v. ABBAS.

56 I. C. 74.

S 19—Misrepresentation—Contract when voidable.

A misrepresentation should in fact materially induce the contract in order to give a right of avoidance. (*Sanderson, C. J. Mookerjee and Fletcher, JJ.*) G. M. BIRLA AND CO. v. JOHUR MULL PREMSUKH.

31 C. L. J. 158 :

55 I. C. 817.

Ss. 20 and 65—Mistake—Effect on contract.

Where in an agreement of sale, both parties are under a mistake as to a matter of fact essential to the agreement, the provisions of S. 20 of the Contract Act would govern the case and render the agreement void and the seller would in such a case be liable under S. 65 of the Act to make compensation. (*Lindsay, J. C.*) FATEH CHAND v. LACHHMI NARAIN.

57 I. C. 481.

S. 23—Agreement not to bid at auction—Not contrary to public policy.

An agreement between two or more persons not to bid against one another at a public auction is not unlawful or against public policy. (*Twomey, C. J. and Ormond, J.*) NAGAPPA CHETTY v. AH FOKE.

12 Bur. I. T. 241 :

56 I. C. 963.

S. 23—Bond in the name of the mother of creditor's concubine—Enforcement of.

Where a bond executed for payment of a loan is taken by the creditor in the name of his

CONTRACT ACT, S. 23.

concubine's mother, the debtor is not entitled to plead that the consideration for the bond is tainted with immorality and that the bond is therefore unenforceable.

The mother and her assignee is entitled to sue as such *benamidár* and it cannot be treated as involving the enforcement of an immoral contract between the executant and his creditor (*Spencer and Krishna v. JJ.*) PONNAMBALA MUDALY v. VASUDEVA PILLAI.

56 I C. 616

S. 23—Champerty—English law—Not applicable.

The English law of Champerty is not in force in India and fair agreements to share property in litigation with others is consideration of their supplying the funds for carrying on suits are not opposed to public policy and such agreements should receive effect except when, extortionate or inequitable. 20 Cal. 145 P.C. 15 All. 35 P. C foll (*Scott-Smith and Martineau, JJ.*) INDAR SINGH v. MUNSHI

1 Lah. 124 : 56 I. C. 272

S. 23—Contracts against public policy—Meaning of—Speculative forward dealings in gold currency—Contracts to buy and sell sovereigns whether opposed to public policy. See (1919) DIG. COL. 338. SHRINIVAS DAS v. RAMCHANDRA. **44 Bom. 6**

S. 23—Contract—Public policy—Bribe to public officers.

It is contrary to public policy to induce public officers, for money or other valuable consideration, to use their position and influence to procure a benefit: 21 C. L. J. 537; 43 Cal. 115. (1918) 2 K. B. 241 (*Mookerjee, C. J. and Fletcher, J.*) MAHARAJAH MANINDRA CHANDRA NANDI v. ASWINI KUMARI ACHARYA

32 C. L. J. 168.

S. 23—Alleged contract—Agency—Collateral contract.

Plff. one of several judgment-debtors, asked the deft. to take an assignment of the decree on his behalf and to execute the decree against the other judgment-debtors. The arrangement between the plff. and the deft. provided that the deft. will submit accounts to the plff. of the amount spent in collecting the decree amount and of the moneys realized and after deducting 20 per cent for his trouble pay over the balance to the plff. The deft. realized the amount of the decree in execution. In a suit by the plff. to recover the balance due after deducting expenses and commission:

Held, that the contract between the plff. and the deft. was one of agency and was not affected by the unlawful object of the collateral contract (to execute the decree against the other judgment-debtor) and that the plff. was entitled to sue for the recovery of the amount. (*Abdur Rahim and Oldfield, JJ.*) PALANIAPPA CHETTIAR v. CHOCKALINGAM CHETTIAR.

39 M. L. J. 692 : 12 L. W. 609 : (1920) M. W. N. 776.

CONTRACT ACT, S. 25.

S. 23—Illegal and opposed to public policy—Promise to indemnify surety who stands bail and executes bond.

A bail bond having been forfeited owing to the failure of the accused to appear, the surety sued a third person who had agreed to indemnify the surety for recovery of the amount forfeited.

Held, That the contract to indemnify was illegal and could not be enforced 12 C. W. N. 329 Rei. (*Walsmley, J.*) BAUPATI CHANDAY v. GOLAM EHIBAR CHOWDRY

24 C. W. N. 368 : 56 I. C. 539.

S. 23—Public policy—Benami purchase by police officer—Contravention of executive orders of Government. See. (1919) DIG. COL. 340. SETH BALKISAN v. DEBI SINGH.

16 N. L. R. 25.

Ss. 23 and 24—Contract—Transfer of property—Consideration—Past cohabitation

Past cohabitation is not good consideration for a transfer of property *Macleod, C. J. and Heaton, J.* KISANDAS LAXMANDAS BIRAGI v. DHONDU TUKARAM. **44 Bom. 542 : 22 Bom. L. R. 762 : 57 I. C. 472.**

Ss. 23 and 65—Illegal purpose—Not carried out—Effect of.

The rule in *pari delicto melior est conditio possidentis* debars a plaintiff from succeeding, unless he can show that the illegal purpose to which both parties were privies did not go beyond the stage of intention.

(1903) 4 Nag. L.R. 26 (1906) I.L.R. 33 Cal. 967, at 979 followed. (*Mitra, JJ.*) SHEIKH ISMAIL v. WASUDEO **16 N. L. R. 129.**

S. 25 (2)—Bond—Consideration received during minority of executant—Interest, right to.

An agreement made by a person of full age to compensate a promissee who has already voluntarily done something for the promisor at a time when the promisor was a minor falls within S. 20 clause 2 of the Contract Act and is enforceable but no interest can be recovered upon such an agreement. (*Scott-Smith, J.*) PRABH DILAL v. SHAMBHU NATH.

54 I. C. 436 : 20 P. L. R. 1920.

S. 25 (2)—Consideration—Promise to defend a suit—Contract of sale.

The promise of the vendee to defend a suit to be brought by collateral of the vendors constituted a legal consideration for the contract of sale.

The promise referred to above comes within the definition of consideration in the Contract Act and the contract of sale cannot therefore be regarded as *nudum pactum*.

The fact that the collateral did not bring any suit and the vendee was consequently not called upon to expend any money on behalf of the evidence does not make any difference so far as the validity of the contract is concerned.

CONTRACT ACT, S. 26.

(*Shadilal and Martincau, JJ.*) MUHAMMAD UMAR v. WALL. 2 Lah. L. J. 306.

—S. 26—Custom—Payment of bride price.

A custom by which a person marrying a girl *Sui juris* is bound to pay her relatives a sum of money as bride price is immoral, in restraint of marriage and is opposed to the principle of S. 26 of the contract Act, (*Scott Smith and Dundas, JJ.*) *ABbas KHAN v. RASIL*.

1 Lah. 574 : 58 I.C. 167.

—S. 30—Pakka Adatia—Wagering contracts.

Where contracts between a Pakka Adatia and his constituents are shown to be wagering contracts, they cannot gain validity by the mere fact that the other contract with the Pakka Adatia has entered into with third parties to cover the first-named contracts have not been shown to be wagering contracts. (*Shah and Crump, JJ.*) *MOTICHAND MAGANDAS v. KESHAV APPAJI KULKARNI*

22 Bom. L. R. 406 : 57. I.C. 129.

—Ss. 30 and 65—Wagering contract—Money deposited as security—Suit for recovery of—Maintainability.

A certain sum of money had been paid by plif. to deit. by way of deposit or security with the object that the deit. should enter into *Satta* transactions or wagering contracts on behalf of plif. In a suit to recover the money, held, that S. 65 of the Contract Act did not apply and that the suit was not maintainable. (1885) I. L. R., 9 Bom. 358, followed. (*Rafiq, J. C. HANGA MAL v. SHEO PRASAD*.)

42 All 449 : 18 A. L. J. 513

—S. 30—Wagering contract—Pakka adatia—Status of—Contracts for sale and purchase of Cotton—Agreements to pay differences—Delivery not to be given or taken Effect.

The pliffs. were employed in Bombay as pakka adatias by the defts.; who carried on business in the Berars, for the sale and purchase of cotton. The pliff. entered into various transactions of sale and purchase of cotton on behalf of the defts. and submitted the account of the transactions to the defts. from time to time. According to the pliff's account the defts. became indebted to them to the extent of Rs 20,272-7-3. The pliffs. brought a suit to recover that amount from the defts. The defts. contended *inter alia* that the transactions were gambling and wagering transactions and that it was understood that no delivery was ever to be given or taken in respect of them. The Court of first instance passed a decree in favour of the pliffs. holding that the transactions were not wagering transactions. On appeal:—

Held, reversing the decree of the Lower Court (1) that from the correspondence between the parties it was clear that the defts. were gambling and not speculating;

(2) that from the evidence in the case it could be reasonably concluded that the parties

CONTRACT ACT, S. 38.

had entered into contracts knowingly to further or assist the entering into or carrying out agreements by way of wagering;

(3) that, if the correspondence between the plifs. and the defts. could be considered as amounting to contracts of sale and purchase the evidence in the case showed that there was a secret understanding that cotton should never be called for or delivered and that differences should only be dealt with;

(4) that if the plifs. were employed for reward there was evidence to show that the plifs. knew that the defts. were only dealing in differences and that there was an understanding that whatever the plifs. might do on the instructions the transactions as between themselves were to be settled by paying differences; and

(5) that the evidence pointed to an understanding not only between the plifs. and the defts. but also between the plifs. and the persons with whom they dealt that all transactions should be closed either before or at the Voids by payment of differences.

Held, further, in respect of the contention of the plifs. that the greater part of their claim related to differences resulting from cross contracts that where the Court finds that there is a secret understanding when the contract is entered into that only differences are to be paid and received, it does not matter much if the parties before the Voids agree to fix their losses or gains rather than wait until the Voids.

Per Macleod, C.J.—If the contract between a pakka adatia and his constituent is a contract of employment, such a contract can by its very nature come within the definition of a wagering contract and the pakka adatia must win unless the constituent can bring the contract within the provisions of Bombay Act III of 1865.

The only difference between the relationship of a pakka adatia and his constituent on the one hand, and that of a broker personally liable on the contract he enters into on orders received and his client on the other, is that in the latter case the broker enters into the contract as agent for client, he himself being personally liable to the person with whom he contracts, while the adatia does not make the contracts with third parties as agent, but as principal, the constituent having no right to be brought into contract with the third parties. (*Macleod, C.J., and Fawcett, J.*) *MANALAL v. RADHAKISON.*

22 Bom. L. R. 1018.

—Ss. 38 and 43—Co-mortgagors—Payment to one, if a discharge of the entire debt.

Payment to one of two mortgagees is not discharge of the mortgagor's liability to the other.

Unless the contrary is shewn mortgagees must be regarded as having a separate interest in the money advanced by them although they take a joint security and must be treated as in the position of tenants in common and not joint tenants 20 M. 416; 36 M. 544 not followed.

CONTRACT ACT, S. 43.

L. R. 22 Q. B. D. 507; (1901) 2 Ch 160; I. L. R. 38 C. 342; 21 C. L. 570; followed.

S. 38 (3) of the Contract Act, relates to joint promisees and not to co-mortgagees whose interests are several. (*Dawson Miller, C J and Coutts, J.*) **SYED ABBAS ALI v. MISRI LALL**
5 P. L. J. 376 : 56 I. C. 403.

—**S. 43—Co-debtors—Agreement between creditor and one of several joint debtors to realize whole of joint debt from other debtors.**

Although a creditor is at liberty to realize the whole of his dues from one of his several joint judgment-debtors, he cannot bind himself not to proceed against one of them to realize the whole of his dues from the other debtors. An agreement between one of several co-debtors and their creditor that the latter would proceed against the other co-debtors and absolve him from liability on condition of his helping the creditor to recover his dues from the others, and refund a certain sum of money deposited by the debtor with the creditor if his dues are so realized from the other debtors is one which should not be enforced by the Courts. (*N. R. Chatterjee and Punton, JJ.*) **HARENDRAB CHANDRA SAHA v. ISWAR CHANDRA SAHA**

57 I. C. 844.

—**S. 43—Co-mortgagees—Payment to one a discharge of the entire debt.** See CONTRACT ACT, Ss. 38 AND 43. 5 P. L. J. 376.

—**Ss. 43 and 45—Partnership—Payment of debt to one of the partners—Discharge of liability.**

A payment to one of two partners constituting a firm operates as discharge of liability (*Rattigan, C. J.*) **HODI v. NIDHA**.

54 I. C. 273.

—**S. 45—Mortgage debt—Jointly payable to three brothers—Release by one not a full discharge.**

A release given by one of the co-mortgagees is not a discharge of the entire mortgage much less a release given by one of the heirs of a deceased mortgagee the mortgage subsisting to the extent of the shares of the others who are entitled to get a mortgage decree to the extent of their proportionate shares. (*Jwala Prasad and Adami, JJ.*) **PANAMALI SAT-PATHI v. TALUA RAMHARI PATTI**.

5 P. L. J. 151 : 1 P. L. T. 102 : 55 I. C. 841.

—**S. 55—Contract—Time, when essence of the Contract—Date fixed for performance and penalty for breach—Laches—Party guilty of—Rights and liabilities of.** See (1919) Dig. Col. 345 **MAHADEO PRASAD AGARWALA v. NARAIN CHANDRA CHAKRAVARTHI**.

24 C. W. N. 330.

—**S. 56—Contract—Difficulty of performance—Effect of.**

Mere difficulty in performing a contract or the need to pay exorbitant prices does not bring a case under S. 56 of the Contract Act.

CONTRACT ACT, S. 65.

and render the contract impossible of performance 40 Bom 301 foll (Mitra, A. J. C.) **THE MILL STORES TRADING CO. v. MATHURADAS.** 57 I. C. 636.

—**S. 56—Contract—Impossibility of performance—Damages.**

Where the parties were fully aware of the restriction imposed by Government on the supply of railway waggons on account of the war and contract was entered into for the sale of goods and delivery thereof in the manner stipulated in the contract on the assumption that by the time the goods would become deliverable under the contract the said restriction would be removed.

Held, that the contract was void being impossible of performance and the buyer was not entitled to recover any compensation from the seller who was excused from the performance of the contract, (*Rankin, J.*) **KUNJILAL MANOHAR DAS v. DURGAPROSAD DEBIPROSAD.**

24 C. W. N. 703 : 58 I. C. 761.

—**S. 62—Failure of substituted contract—Original contract revived.** See (1919) Dig. Col. 347. **DURAISWAMI AIYAR v. KRISHNAIER.**

54 I. C. 318.

—**S. 65—Applicability of—Illegal contract—Right to recover moneys advanced.**

S 65 of the Contract Act has no application where the contract embodies a purpose known to be illegal to which both sides are parties. (*Drake-Brockman J. C.*) **BHURE v. SHEOGOPAL.**

54 I. C. 794.

—**S. 65—Becomes void—Meaning of.** The express on "becoming void" in S. 65 of the Contract Act presupposes enforceability and that which is not enforceable cannot become void. (*Kotwal, A. J. C.*) **BHOIRAJ v. DULAEA.** 57. I. C. 680.

—**S. 65—Contract—Receipt for advance—Material alteration of contract—Right to recover advance.**

A document containing the terms of a contract between the plff. and the deft. was materially altered by plff. without the knowledge of the deft. The payment of advance was acknowledged on the same piece of paper by the deft. and the defendant committed breach of the contract. In a suit by plff. for damages and return of the advance.

Held, that the plaintiff though he cannot recover damages under the contract, is entitled to recover that advance under S. 65 of the Contract Act treating the contract as void. (*Spencer and Krishnan, JJ.*) **KANDREGULA ANANTHA RAO PANTULU v. SURAYYA.**

43 Mad. 703 : 38 M. L J. 256 : (1920) M. W. N. 187 : 11 L. W. 390 : 27 M. L. T. 134 : 55 I. C. 697.

—**S. 65—Insurance—Default in payment of premia—Lapse—of policy—No right to recover premia actually paid.** See INSURANCE, LIFE.

38 M. L. J. 135.

CONTRACT ACT, S. 65.

—S. 65—Joint Hindu family—Mortgage by manager—Not valid and binding—Suit for refund of consideration—S. 65 not applicable.—Personal remedy barred after six years.
1 P. L. T. 535

—S. 65—Mortgage of joint family—No legal necessity—Subsequent suit for money.

Where a suit by the mortgagees for foreclosure on the basis of a mortgage by conditional sale was resisted by the sons of the mortgagor on the ground that the property mortgaged was ancestral joint family property and that there was no legal necessity for the loan taken, and was dismissed, on which the mortgagee brought another suit for simple money decree, held, that, whether or not there was a personal covenant in the bond, the mortgagee is entitled to relief under S. 65 of the Contract Act. (*Lindsay, J. C.*) SHAMBHU v NAND KUMAR. 23 O. C 284: 58 I. C. 963

—S. 65—Sale of debt's mortgage rights in execution—Pending confirmation sale to plff. by debt—Sale confirmed—Right of purchaser at private sale to refund of money—Refusal of advantage received See (1919) Dig Col. 348. MAHABIR PRASAD PANDE v GANGA DEHAL RAI. 42 All. 7.

—S. 65—Void agreement—Minor—Liability to restore advantage.

S. 65 of the Contract Act starts from the basis of there being an agreement or contract between competent parties; it has no application to the case of a minor contracting party where there never was and never could have been any contract. 30 C. 59 P. C Ref. (*Macleod, C. J. and Fawcett, J.*) MOTILAL MANSUKHRAM v. MANEKLAL DAYABHAI.

22 Bom. L. R. 1195

—S. 65—Wagering Contract—Money deposited as security—Suit for recovery o., not maintainable—S. 65 of the Contract Act inapplicable. See CONTRACT ACT, Ss. 30 AND 65. 18 A. L. J. 513

—S. 69—Contribution—Co-defendants—Decree for costs—Revenue sale—Rights under—Sale set aside by Civil Court.

Where the plaintiffs and the defendants were purchasers at a revenue sale, and their possession had been confirmed by the Commissioners, but the suit to set aside the revenue sale was decreed, and the appeal preferred to the Privy Council had been dismissed, and costs awarded against the former were realised from the plaintiff alone, who brought the present suit for contribution against the defendants, who were co-defendants, appellants to the Privy Council:

Held, that the suit was maintainable, and the rule of non contribution among joint tortfeasors was not applicable, where the parties were b) a firm prosecuting their case, and not doing an illegal or unlawful act. 4 Pat. L. J.

CONTRACT ACT, S. 73.

486 and 7 W. R. 384 rel. (*Coutts and Sultan Ahmad, JJ.*) RAMDEO RAM MARWANI v. RAI BAIJNATH GOENKA BAHDUR.

1 P. L. T. 624: 58 I. C. 31.

—S. 69—Contribution—Co-pliffs instituting false case on a mortgage bond—Costs—Liability

A co-plaintiff who conspired with the other plaintiff and brought a false suit on a mortgage bond, which was dismissed, and who was made to pay the entire costs, was not entitled to maintain a suit for contribution against the other plaintiff.

Institution of a false case is doing an illegal or unlawful act, and the rule of non-contribution among joint tortfeasors is not limited to tortious acts only. (*Coutts and Sultan Ahmad, JJ.*) KALANATH CHAUDHURY v. JADUNANDAN KUMAR. 1 P. L. T. 620: 58 I. C. 28.

—S. 69—Payment by person interested—Right to recover.

Although S. 69 of the Contract Act does not require the person making the payment to be compellable to make it, or that it should be made at the opposite party's request the person making the payment nevertheless must establish some material interest in making the payment, that is to say, he must show that by the payment he averted some loss or detriment to himself: (*Drake-Brockman, J. C.*) MOJIRAM v. SAGARMAL. 55 I. C. 60.

—S. 69—Suit for contribution—No question of appropriation arises. See CONTRIBUTION. 56 I. C. 949.

—Ss. 69 and 70—Contribution—Patidar and darpatidar—Suit for rent—Sale—Deposit of decretal money and statutory compensation by co-sharer not a party—Suit for contribution.

The plaintiff who was part owner of a darpatni which had been sold by the patnidar in execution of a decree for rent obtained by him in a suit in which the plaintiff had not been made a party had the sale set aside by depositing the decretal money and the statutory compensation of five per cent of the purchase money due to the auction purchaser and then sued the other co-sharers for contribution:

Held, that though the decree was not binding on the plaintiff, as the entire darpatni had been put up to sale, the plaintiff had the right to sue under S. 70 of the Contract Act, though not under S. 69 and that not merely in respect of the decretal amount but also of the statutory compensation money intended for the auction purchaser 38 Cal. 1; 16 C.L.J. 156; 16 C. W. N. 975 ref. (*Richardson and Huda, JJ.*) KANGAL CHANDRA PAL v. GOPI NATH PAL.

24 C. W. N. 1068.

—S. 73—Damages—Breach of contract—Sale of goods—Measure of damages.

Plff. a trader in flour at R., used to get his goods from the defendant at Allahabad. On

CONTRACT ACT, S. 73.

21-7-1914 Pltf. wrote to deft as follows "With-in 5 or 7 days in July I shall send an order for one wagon of goods. Please write Swoda (Contract) in respect thereof". It was further stated that pltf. would send for 2 wagons for delivery in August, 2 wagons in September, 2 wagons in October and 2 in November and that these wagons would be sent for (one at a time) at an interval of 15 days. Pltf. asked defts to quote rates. On the 24th July the defts. sent a reply quoting the rates from July to November. On the 24th July pltf. sent a telegram ordering delivery of one wagon of goods on a former contract and that was despatched by the defts. On 26-7-1914 pltf. wrote as follows:—"The goods ordered for might have been sent by you. Please write swoda for one wagon for the month of July in respect of flour". Then followed the rate of the goods as quoted in the defendant's letter dated the 24th July. The letter then proceeded as follows: "Please write swoda for 4 wagons in respect thereof. On arrival of the goods ordered I shall send for 1 wagon of July swoda. Further I shall make the swoda for the months of October and November pucca hereafter. Please send a reply to this letter." On the 29th July a letter dated the 28th July was despatched by the defts. to pltf. in which the same rates as were quoted on the 24th July were given. On the 29th July the defts. sent a telegram to pltf. in which they gave different rates from what were quoted in their letter dated 24th July. On the 30th July pltf. objected to the rates mentioned in the telegram.

Held, that the letter dated the 24th July constituted a complete contract.

The rate of damages was the difference between the price prevailing at R on the day of delivery and the contract rate plus the cost of freight and bags. (*Chatterjea and Duval, JJ.*) *MADHUSUDAN KOER v. BADNIDAS.*

31 C. L. J. 93 : 56 I. C. 693.

—S. 74—Penalty—Default of instalment—Interest.

The provision to pay interest from the date of default of payment of instalment up to the date of realisation is a perfectly proper provision as to interest and is not at all penal. (*Coutts and Das, JJ.*) *BAIJ NATH GOENKA v. DALEEP NARAIN SINGH.* (1920) Pat 261 : 1 Pat. L. T. 582 : 58 I. C. 489.

—S. 74—Penalty—Duty of Court to award relief.

Where a mortgagor pleads that the stipulation as to the payment of interest is penal, the question before the Court is not what the mortgagee has actually charged and whether that is penal or not, it must decide for itself whether original stipulation as to interest was penal or not; and if it was penal what reasonable compensation the plaintiff is entitled to receive. (*Draex-Brockman, J. C. and Kotwal, A. J. C.*) *BANSI v. SHEO SHANKAR PURI*

55 I. C. 66.

CONTRACT ACT, S. 74.

—S. 74—Penalty—High rate of interest—Duty of Court—Reasonable rate.

Under a mortgage the principal sum was payable within six months and on default interest at the rate of $37\frac{1}{2}$ per cent should be charged. *Held*, that the rate of interest was penal and the compensation awarded at the rate of 12 $\frac{1}{2}$ per cent was reasonable. But the rate should have been allowed up to the date fixed for payment and interest at 6 per cent. after the date. (*Lyle, A. J. C.*) *KALI PRASAD v. MUHAMMED YASIN KHAN.* 54 I. C. 833.

—S. 74—Penalty—Lease—Provision for penal mesne profits on failure to surrender—Relief against.

Where a lease contains a stipulation that the lessee shall pay mesne profits at an unduly high rate on failure to give up the lands which form the subject matter of the lease on the expiry of the period for which it is granted the Court has power to alter the rate agreed upon. (*Adami and Das, JJ.*) *MORGAN v. BADU RAMJEE RAM.* 5 P. L. J. 302 : (1920) Pat. 168 : 1 Pat. L. T. 310 : 56 I. C. 366.

—S. 74—Penalty—Mortgage—Compound interest on default.

An agreement to pay interest at the rate of Rs. 12—12—0 per cent. per annum is not unconscionable nor can such an agreement become so merely because there is stipulation to pay compound interest at the same rate in the event of there being a default in the payment of the simple interest agreed upon.

124 P. R. 1918 P. C. foll. (*Shadi Lal and Broadway, JJ.*) *RAM DAS v. ABBAS.*

2 Lah. L. J. 393 : 56 I. C. 74.

—S. 74—Penalty—Nature of—Relief against.

A penal provision under S. 74 of the Contract Act is not restricted to money, increased interest or the like. It is wide enough to include any other stipulation by way of penalty, e. g., a stipulation to convey certain property on default of payment of a debt on a fixed date. (*Stuart and Kanhaiya Lal, A. J. C.*) *MAHADEO BAKSH SINGH v. SANT BAKSH SINGH.*

23 O. C. 118 : 7 O. L. J. 356 : 57 I. C. 518.

—S. 74—Penalty—Relief against—Power of court to allow reasonable compensation.

S. 74 of the Contract Act is not restricted to money, increased interest or the like. It is wide enough to include any other stipulation by way of penalty for instance a stipulation to convey certain property on default of payment of a debt on a fixed date.

Where a penalty is designed only to secure money, the court can give by way of compensation all that can be reasonably expected or desired.

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21 O. C. 180 and 34 I C 500 Ref. (*Stuart and Pandit Kanhaiya Lal, JJ*) MADHO BAKHSH SINGH v. SANT BAKHSH SINGH.

23 O C. 119

—**Ss. 74 and 16**—Interest—Hard and unconscionable bargain—No power to relieve against in the absence of circumstances bringing the case under S. 16 or S. 74. See CONTRACT ACT, Ss. 16 AND 74. 54 I C 785.

—**Ss. 74 and 16**—Penalty—High rate of interest—Hardship—No power to relieve in the absence of circumstances bringing the case within S. 16. See CONTRACT ACT, Ss. 16 AND 74. 54 I. C 558.

—**S. 75**—Offer to settle a claim—Not a promise to pay.

An offer to settle a claim at a certain amount could not be treated as a promise to pay the amount (*Banerji, J.*) MUTSADDI LAL v. B. B. AND C. I RAILWAY CO.

42 ALL. 390 : 18 A. I. J. 377 : 58 I. C. 547.

—**Ss. 79, 83 and 118**—C. I. F. Contract—Sale of goods—Right to reject goods—Grounds for

Under a C. I. F. contract property in the goods sold passes at the time of shipment but such passing is subject to the buyer's right to reject the goods if after inspection they are found to be not goods in accordance with the contract; this however refers to the goods at the time of shipment and not to any shortage or deterioration caused on the voyage for which the buyer's remedy is on the policy of insurance. (*Twomey, C. J. and Robinson, J.*) AH CHOY v. TRADING COMPANY.

56 I. C 978

—**S. 86**—c. i. f. Contract—Property when passes.

S. 86 of the Contract Act does not preclude a buyer from agreeing to take the risk of loss or damage before the property in the goods passes to him. In a C. I. F. contract on tender of the effective shipping documents the property in the goods passes to the buyer, but even if this were not so, a contract, the terms of which imply that the goods are at the buyer's risk from the time of the shipment, is not invalid. (*Twomey, C. J. and Robinson, J.*) AH CHOY v. TRADING COMPANY

56 I. C. 978.

—**S. 88**—Sale of goods—Ready goods—Meaning of—Damages.

A seller under a contract for sale of 'ready goods' sued the buyer to recover damages for not taking delivery of the goods. The defence was that the seller had not the goods in his possession at the date of the contract and the buyer was not, therefore bound to take delivery:—

Held, that if at the time of entering into the contract and during the period intervening between that date and the due date the seller

CONTRACT ACT, S. 129.

was in a position at any moment when called upon by his buyer, to deliver the goods, he had sufficiently complied with the terms of the contract. (*Buckland, J.*) MULCHAND CHANDOLIA v. KUNDANMULL. 47 Cal. 458.

—**S 107**—Contract for sale of goods—Sale not complete—No ascertainment of goods—Damages on re-sale—Measure of.

In an action for damages for breach of a contract to buy goods the plaintiff could only recover the difference between the contract price at the market price at the date of the breach and not between the contract price and the price fetched at the re-sale which took place much later.

Where there is no complete sale S. 107 of the Indian Contract Act (IX of 1872) has no application. (*Kanhaiya Lal*) SHAMBU DAYAL v. DURGA PRASAD. 23 O C. 67: 56 I. C. 647.

—**S 108**—Exception I—Mate's receipt—Document showing title to goods.

A mate's receipt is not a document showing title to goods within the meaning of exception 1 to S. 108 of the Contract Act. 7 Bur. L. T. 49 Foll. (*Twomey, C. J. and Maung Kin, J.*) ELLERMAN RICE MILLS LTD. v. PE GYI.

12 Bur. L. T. 184 : 55 I. C. 289.

—**S. 113**—Sale of goods—Warranty.

S. 113 of the Contract Act has no application to the case of a sale of specific goods which were before the parties at the time of the negotiations because such a sale is not one of goods "as being of certain denomination" so as to give rise to the warranty referred to in the section, namely, a warranty that the goods were such as are "commercially known by that denomination" (*Lindsay, J. C.*) FATEH CHAND v. LACHMI NARAIN. 57 I. C 481.

—**Ss. 113 and 118**—Sale of goods by description—Goods not answering to—Rights of buyer.

A buyer is entitled to refuse to take delivery of goods when they do not answer to the description in the contract and is not liable to pay any damages which the vendor may have suffered on account of such refusal. (*Broadway, J.*) FIRM OF PRABHU DIAL KISHAN CHAND v. HARI CHAND. 55 I. C. 209.

—**Ss. 129, 130 and 131**—Guarantor's death—Effect of—Continuing guarantee—Fidelity guarantee.

The guarantee of fidelity in a place of trust, as for instance the post of khazanhee of a bank for a fixed or determinable period and of a permanent character, is not a continuing guarantee which is defined by S. 129 of the Contract Act as a "a guarantee which extends to a series of transactions," and is therefore not revoked by the death of the guarantor.

Where in a case a khazanhee of a bank was by the express terms of the contract of his employment required to report upon the

CONTRACT ACT, S. 131.

"credit, solvency and circumstances" of customers, and he did not report his own fraudulent dealings w th the bank. *Held*, that it was a misfeasance of the duties of a khazanchie within the terms of the agreement. (*Lord Phillimore*) S. N. SEN v. BANK OF BENGAL.

32 C. L. J. 223 : 28 M. L. T. 124 :
13 Bur. L. T. 94 : 58 I. C. 1. (P. C.)

—S. 131—*Continuing guarantee—Death of surety—Liability of guarantor—Contribution.*

A and I stood sureties for one Z who was a candidate for service in the Postal Department.

Under the terms of the bond they bound themselves and their heirs for the conduct of Z, but either of them could terminate his suretyship on giving certain notice to the postal authorities. A died; Z misappropriated money and I had to pay the whole amount. In a suit for contribution against the heirs of A held that the guarantee was a continuing guarantee and that under the terms of the security bond the surety could not be discharged by death and so, his property was liable to contribute (*Gokul Prasad and Ryves, JJ.*) MAHOMED UBED ULLAH v. MAHOMED INSHA ALLAH KHAN **18 A. L. J. 976.**

—S. 133—*Principal and surety—Variation in Contract with principal—Contract providing for continuance of liability of surety.*

The plaintiffs appointed defendant No. 1 as their sub-agent to sell their goods on commission at the rate of $7\frac{1}{2}$ per cent. on the sale proceeds and the latter was to get all the office expenses. Defendant No. 2 stood surety for defendant No. 1 and expressly waived all or any of the rights as surety which may at any time be inconsistent herewith and which he might be otherwise entitled to claim and enforce," and further agreed that the guarantee shall not be revocable by him at any time, but shall continue during the employment of the sub agent." Subsequently the plaintiffs varied, without the knowledge or consent of defendant No. 2, their contract with defendant No. 1 whereby the latter was to receive commission at the rate of 22 per cent. inclusive of all office expenses. A question having arisen whether the variation had the effect of discharging the surety (defendant No. 2) from all subsequent liability:

Held, that under S. 115 of the Contract Act 1872, the variation involved the result that the surety was discharged as to transactions subsequent to the variation.

The general clause in the letter of indemnity under which the surety waived all rights under the statute could not be read as implying any consent to the variation within S. 133 or as entitling the plaintiffs to enforce the liability against the surety even though, according to law, he was discharged from such liability (*Shah and Hayward, JJ.*) K. R. CHITGUPPI & Co., v. VINAYAK KASHINATH KHADILKAR.

22 Bom. L. R. 659 : 58 I. C. 184.

CONTRACT ACT, S. 137.

—Ss 133 and 139—*Discharge of Surety—Rescission of contract.*

The plaintiffs agreed to buy from B 100 bales of Broach Cotton for April 1918 delivery at Rs. 400-12-0 per candy. The defendant as surety guaranteed the performance of the contract. The plaintiffs on hearing reports as to the financial soundness of B agreed to sell B 100 bales of Broaca Cotton for the same delivery at Rs 617-8-0 per candy. The plaintiffs sued the defendant to recover the difference between the rates of the two contracts or the differences between the rate of the first contract and the rate on the due date of delivery. The defendant contended that he was discharged from his suretyship by reason of the second contract between the plaintiff and B.

Held, that each of the contracts was capable of performance on the due date and there was no rescission of the original contract by a new agreement.

(1) that the defendant was therefore not discharged as surety and was liable to pay the plaintiff's damages calculated on the difference between the rate of the contract and the rate on the due date of delivery (*Crump, J.*) UDERAM v. SHIVBHAIJAN **22 Bom. L. R. 711 : 58 I. C. 272.**

—Ss. 134 and 139—*Principal and surety—Promissory note—Suit against maker and sureties—Withdrawal of claim against maker during trial—Effect of Piff's right against sureties—English and Indian Law.*

During the trial of a suit on a promissory note brought against the maker and two sureties the plaintiff withdrew his claim against the maker, the principal debtor. *Held*, (1) that there was a reservation of plaintiff's right to proceed against the sureties and (2) that the release of the principal debtor during the trial of the suit did not destroy plaintiff's right to proceed against the sureties.

The principle of the English law that the discharge of the principal debtor will not affect the right of suit against the sureties there is a reservation to proceed against them is applicable in India L. R. 7 C. P. 9, 38 M. 178 Ref. Ss. 134 & 139 of the Contract Act are applicable to negotiable instruments. (*Seshagiri Iyer and Moore, JJ.*) MURUGAPPA MUDALAI v. MUNUSAMI MUDALAI **38 M. L. J. 131 : 11 I. W. 248 : (1920) M. W. N. 178 : 54 I. C. 758.**

—S. 135—*Principal and surety—Delay—Forbearance to sue.*

A mere forbearance or delay in suing the principal or pressing him for payment does not discharge the surety. (*Shadi Lal and Martineau JJ.*) RAM SINGH v. GULAB RAI. 2 Lah. L. J. 316 : 55 I. C. 610.

—Ss 137 and 139—*Abatement of appeal against debtor—Effect of on liability of surety.*

CONTRACT ACT, S. 145.

The abatement of an appeal as against the principal debtor does not necessarily imply that the debt payable by him is extinguished or discharged, and in such a case liability of the surety continues in spite of the abatement. (*Kanhaiya Lal, J. C.*) RAM SARAN v. BINDESHRI. 54 I. C. 105

S 145—Principal and surety—Decree against both—Surety discharging decree—Payment.

A decree was obtained against plaintiff as surety jointly with the principal debtor. The plaintiff paid off the debt by executing a mortgage in favour of the decree-holder, and sued to recover the amount paid by him as surety from the heirs of the principal debtor. Held, that the suit was maintainable as the mortgage, being a conveyance or a transfer of property and not merely the incurring of a pecuniary obligation, was a good payment under S. 145 of the Contract Act. (*Macnair, A. J. G.*) MATHURA v. CHOTU. 58 I. C. 123

Ss 151 and 152—Railway—Liability of in India—Bailee not an insurer—Special contract reducing liability—Validity of. See RAILWAYS ACT, S. 72.

24 C. W. N. 198.

S. 171—Factor—Agent for sale of goods making advance against goods—Agreement to recoup advance from sale proceeds—Suit by agent for refund of advances before actual sale—Maintainability of.

A factor to whom goods had been consigned for sale and who had made advances as against them, is not entitled to sell without the consent of the owners.

Such a factor is entitled to maintain a suit for refund of advances before an actual sale of the goods, if he had waited a reasonable time for the sale to take place in the ordinary course of business even though the agreement between the parties was that the advances were to be repayable from the sale proceeds (*Wallis, C. J. and Sadasiva Aiyar, J.*) SHEIK MAHAMAD MARACAYAR v. OAKLEY BOWDEN & Co. 11 L. W. 1 : 55 I. C. 671.

S 178—Consignment of goods—Person authorised to take delivery of goods by consignee—Pledging receipt—pledgee if acquires title to the goods—fraud of third party. See (1919) DIG. COL. 358. PROFULLA KUMAR BOSE v. NOBO KISHORE ROY.

54 I. C. 224.

S. 230—Contract by agent personally interested in subject matter—Suit by agent maintainable.

When an agent enters into a contract he may sue thereon in his own name if he has an interest in the contract. 24 M. 130 foll. (*Martineau, J.*) MALLHU v. MEGH RAJ.

55 I. C. 992.

CONTRIBUTION.

S. 230—Contract by agent—Personal liability.

In case where a man is by profession an agent of some particular firm and describes himself as such, he may still be contracting in his personal capacity, but the mere fact that he fails to specify his capacity, as an agent in signing a contract does not raise any such presumption when the terms of the contract itself are clearly to the contrary, (*Chevris, A. J. C. and Wilberforce, J.*) MESSRS. G. S. BHARGAVA & Co., v. B. KOBAYASHI.

2 Lah. L. J. 374.

S. 230—Firm—Decree against—liability of partners.

An award against a firm is not bad. The provisions relating to the execution of a decree against a firm apply to an award which has been filed. Partnership is a relationship between persons recognised by law. The law does not recognise a partnership as being an entity at all; it is a mere guise or cloak or name by which the individual persons, joint owners, are concealed or pointed out. (*Rankin, J.*) LOUIS DREYFUS & Co. v. PURUSHOTTAM DAS NARAIN DAS. 47 Cal. 29 : 56 I. C. 325.

S. 247—Minor partner—Adjudication as insolvent.

A minor partner of a firm cannot individually be adjudged an insolvent; but an application for an adjudication may be directed against the firm and the minor's interest therein. 42 Cal. 225 appr. (*Tudball and Sulaiman, JJ.*) JAGMOHAN v. GRISH BABU.

42 All. 515 : 18 A. L. J. 611 : 58 I. C. 557.

S. 254 (5)—Partnership—Suit for dissolution by partner who has been guilty of misconduct.

Plff. sued deft. for dissolution of partnership on the ground of disputes between the partners and also misconduct and dishonesty on the part of deft. It was found that plff. himself had been guilty of gross misconduct that he had destroyed the old account books, had falsely prepared a balance sheet had made false entries in the books, and had tried to deprive the firm of a valuable account.

Held, that plff. who was himself guilty of misconduct is not entitled to sue for dissolution of partnership and the suit was liable to be dismissed. (*Rattigan, C. J. and Abdul Raoof, J.*) RAM SINGH v. RAM CHAND.

1 Lah. 6 : 9 P. L. R. 1920 : 57 I. C. 185.

CONTRIBUTION—Co-debtors—Discharge liability by one—Right to contribution. LIM. ACT. ARTS. 61, 99 AND 120.

57 I. C. 884.

Co-sharers—Payment of rent—Decree by one—Right to contribution—Appropriation—Contract Act, S. 69.

CONTRIBUTION.

Where a co-sharer is not bound by law to pay a rent decree in favour of the superior landlord, he is not liable to contribution where the decree is paid off by the other co-sharee. Where a statutory duty is imposed on a court it must be presumed that that duty has been performed. There is no question of appropriation in a suit for contribution under S. 69 of the Contract Act. (*Das, J.*) KAMALESWAR PRASAD SINGH v. JAGAR NATH SAHAI

56 I. C. 949.

—Costs—Co-plaintiffs—Contribution as between.

The rules applicable to the question of contribution as between co-defendants do not necessarily apply to the case of co-plaintiffs.

Where persons acting under a *bona fide* claim of right had brought a suit to substantiate that right, but the suit was ultimately dismissed for default and costs were awarded against the plaintiff: *Held*, that a suit brought by one of them from whom the whole of the costs had been realised, for contribution against his co-plaintiffs was maintainable. 7 A. L. J. R. 720; 5 Cal. 720; 11 Ch. D. 236; 25 Mad. 599 dist. (*Sulaiman and Gokul Prasad, JJ J.*) RAM SARUP v. BAIJ NATH.

18 A. L. J. 872 : 58 I. C. 324

—Costs—Joint decree—Costs paid by one—Right to contribution.

If one of several judgment debtors against whom a joint decree for costs has been made pays the entire decree amount he is entitled to maintain a suit against his co-defendants for contribution. (*Lindsay, J.*) RAM SARAN-DAS v. SAGAR MAL.

54 I. C. 370

CO-OPERATIVE SOCIETIES ACT (II of 1912), S. 42.—*Registered Society—Winding up—Liquidator—Order passed by liquidator to wind up assets—Revision.*

The Civil Court has no jurisdiction to interfere with an order passed by a liquidator of a registered Co-operative Society, under S. 42 of the Co-operative Societies Act, 1912 in order to collect the assets of the society from persons whom he thinks are responsible to account to him for the assets. (*Macleod, C. J. and Heaton, J.*) GANPAT v. KRISHNADAS.

44 Bom. 582 : 22 Bom. L. R. 732 : 57 I. C. 423.

CO-OWNERS—Adverse possession—Evidence necessary to constitute—Residence apart from dwelling house—Payment of rent—Sale by co-owner—Ouster.

The entry into and possession of land under the common title of one co-owner will not be presumed to be adverse to the others, but will ordinarily be held to be for the benefit of all. The obvious reason for this rule is that the possession of one co-owner is, in itself, rightful and does not imply hostility, as would the possession of a mere stranger. The law will never constitute a possession tortious, unless from necessity; on the other hand it will consider every possession lawful, the commence-

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ment and continuance of which is not proved to be wrongful; and this is, upon the plain principle that every man shall be presumed to act in obedience to his duty, until the contrary appears. In other words, the only difference between the possession of a co-owner and other cases is, that acts, which, if done by a stranger would *per se* be a *disscisin* are, in the case of tenancies-in-common, susceptible of explanation consistently with the real title. Acts of ownership are not, in tenancies-in-common, acts of *disseisin*; it depends upon the intent with which they are done and their notoriety; the law will not presume that one tenant in-common intends to oust another; the facts must be notorious and the intent must be established in proof. (1912) A. C. 230; (1918) A. C. 895; 28 C. L. J. 437; 16 C. W. N. 849 and 20 C. W. N. 51 ref. (*Mookerjee, A. C. J. and Fletcher, J.*) BALARAM GURU v. SHEYAMACHARAN MANDAL.

24 C. W. N. 1057.

—Building on common land—Obstruction—Mandatory injunction. See *INJUNCTION MANDATORY.*

27 M. L. T. 176.

—Common property—Right to enjoy—Exclusive Possession—Ouster, what constitutes, resistance—Proof of—Tenant-in-common in occupation of portion of joint property—Liability to account, when arises. See (1919) Dig. Col. 363. DEBENDRA NARAYAN SINGH v. NARENDRA NARAYAN SINGH.

47 Cal. 182.

—Ouster—Sole possession and enjoyment for long period.

Sole possession and enjoyment of profits by one co-owner for a long period without any claim by the other co-owners for profits etc., is evidence from which an actual ouster of the other co-owners may be presumed (*Adami, J.*) PARMA PANDE v. RAM SARUP PANDE

58 I. C. 731.

COPYRIGHT—Fine Arts—Pictures—Copyright Eng. and Indian law—Fine Arts—Copyright in—English Act (25 and 26 Vic. C. 68).

The Fine Arts Copyright Acts (25 and 26 Vic. C. 68) does not extend to any part of the British Dominions outside the United Kingdom, (1903) A. C. 496 followed.

In England, before the statute of Anne (8 Anne C. 19) there was no copyright at common law for an author, or a publisher in his published work.

4 H. L. C. 815; 19 Bom. 557, followed, (*Macleod, C. J. and Heaton, J.*) VASUDEO GANESH JOSHI v. ANUPRAM HARIBHAI.

44 Bom. 720 : 22 Bom. L. R. 808 : 57 I. C. 592.

—Sale of—Songs—Right to publish and Sell—Sale when complete—Undertaking to revise songs by the author—Damages.

The author of certain songs composed in Tamil sold the right to publish and sell them

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and received the purchase money therefor, but undertook to make corrections and revise the songs before publication

The author subsequently sold the same songs once again surreptitiously to a third person for consideration. *Held*, the first purchaser acquired a valid title to the composition and was entitled to restrain the author and the subsequent purchaser from infringing his rights therein by publishing and selling any of the songs purchased by him and to damages from the author. (*Abdul Rahim and Moore, JJ.*) RAMIAH ASARI v. CHIDAMBARA MUDALIAR.

39 M L J. 341 :
(1920) M W N 426 : 12 L.W. 151

CORPORATION—Member, expulsion of, from Committee—Rules of natural Justice

The committee empowered to expel a member must make a fair enquiry into the truth of the alleged facts, after giving notice to the member concerned that his conduct is about to be enquired into and giving him an opportunity of stating his case to them.

In order to determine whether a tribunal, which exercises a punitive jurisdiction on an alleged charge of misconduct whereby a man may be deprived of his property in the exercise of quasi judicial powers, has given a decision which cannot be successfully challenged, the court has to investigate whether they have observed the rules of natural justice and also the particular statutory or other rules, if any prescribed for their guidance: (1905) A.C. 708 Ref. The rules of natural justice demand that a man is not to be removed from office or membership or otherwise dealt with to his disadvantage, without having a fair and sufficient notice of what is alleged against him and an opportunity of making his defence; and that the decision, whatever it is, must be arrived at in good faith with a view to the common interest of the society or institution concerned. If these conditions are satisfied, a court of justice will not interfere with the decision. (*Mookerjee and Fletcher, JJ.*) MAHOMED KALIMUDIN v. A. B. STEWART.

47 Cal 623 : 31 C. L J 247 :
56 I. C. 556

CO-SHARERS—Common Land — Abadi Site—Exclusive corporation by one co-owner—Suit for injunction—Right to relief—See ABADI.

1 Lah 249 : 57 I. C. 207.

Common land—Building by some—Suit for demolition—Special damages—Proof of.

It is not competent to some of the proprietors of a village to sue for the demolition of a house built by another co-proprietor on common land without proof of special damages to the plaintiffs

54 P. R. 1992 ; 33 P. R. 1901 ; 71 P. L.R. 1901 ; 44 Ind. Cas. 844 ; 48 Ind. Cas. 418 ; foll.

CO-SHARERS.

Held, that by not raising any objection to the building of the house at the time and instituting a suit after 5 or 6 years, the plaintiffs, had acquiesced in the building and they were, therefore not entitled to the relief they sought. (*Martincau, J.*) SHEO RAM v. MUSSAMMAT. DHAPAN. 2 Lah L.J. 635 : 56 I. C. 454.

Common well—Right to irrigation, over land of neighbouring land owner—Implied right.

Where several persons are joint owners of a common well, it is implied in their covenant of partnership in the well that each co-sharer shall have a right to take water through the more adjacent field. The line of irrigation, once determined, cannot be altered at the caprice of any co-sharer, and it is a fair presumption that the shortest line of lead would be that selected by the co-sharers. (*Le Rossignol, J.*) JANG v. DOGAR.

12 P. L. R. 1920 : 54 I. C. 104.

Cultivation by one—Effect of—Exclusive possession of half the land—Right to.

Cultivation by one co tenant is *prima facie* cultivation on behalf of himself and his co-tenants. A co-sharer by taking possession of half the land without the consent of his co-sharer cannot compel the latter to accept the other half as his share. (*Mitra, A. J. C.*) SADOO v. GANJI.

57 I. C. 495.

Ejectment—Decree—Partition—Possession delivered to landlord other than the plff.—Ejectment if effective against tenant.

If a decree for ejectment had been executed and formal possession delivered to the landlord, the fact that shortly before the order was carried out a partition had taken place and the particular plot from which ejectment had been effected had fallen to the lot of another co-sharer landlord would not make the ejectment less effective as against the tenant. (*Ferard, S. M.*) BABU KHAN v. BHAIRO PRASAD.

54 I. C. 292.

Entry in revenue records—Objection by one of them—Suit to determine share, nature of.

Where several persons hold property jointly an objection made by one of them to the accuracy of an entry in the revenue papers must be regarded as an objection made on behalf of all.

A suit by such co-sharer in a civil court to have his share properly determined is not one for the correction of the entry but one to enable plaintiff to obtain a partition the share which actually belongs to him and of which he is in possession. (*Stuart, J. C.*) BAJU NATH SINGH v. ARJUN SINGH.

55 I. C. 412.

Joint holding—Sale or exchange of his interest in specified plots.

A joint owner of a property may sell a portion of his share in the joint holding.

CO-SHARERS.

148 P. R. 1882; 78 P. R. 1894, 32 P. R. 1900
Foll.

101 P. R. 1884, 94 P. R. 1904; 109 P. R.
1879, 21 P. R. 1878, Ref.

One of the co-sharers of a joint holding is empowered to exchange his interest in certain specified fields and the transferees of such interest can sue for possession but they would be entitled to get a decree only for joint possession. (*Broadway, J.*) **ABDULLA v. MAHAMED KHAN**

2 Lah I. J. 601

—Joint property—Holding of definite plots for convenience of enjoyment—Right of alienation.

The co-sharers in an undivided property may by arrangement among themselves take possession of definite portions of that property and hold them so as to enjoy their proper share of the profits. It's not permissible for any one of such co-sharers to alienate to a third person as his exclusive property the portion which he has been occupying by agreement with his sharers. (*Lindsay, J.*) **JAMNA v. JHALI.**

18 A. L. J. 129: 55 I. C. 94.

—Lambardar—Power of to lease vacant lands—Extent of the power—Consent of other Co-sharers, if necessary.

A provision in a wajib-ul-arz of a village that before leasing vacant lands, the lambardar should consult the wishes of the co-sharers of the village does not mean that the consent of the co-sharers should be obtained. The general rule in the Central Provinces is that the lambardar leases the vacant lands in the ordinary course of management. The mere fact that the co-sharers are not consulted does not entitle them to claim on that ground to avoid a bona-fide lease. (*Mitra, A. J. C.*) **HARI PRASAD v. GOVINDA RAO.**

54 I. C. 634

—Lambardar—Woman—Appointment of Grounds for—Land Revenue Rr 17 and 27.

A person may be a sole owner of an estate in which there is a large number of tenants and Kamins and the police and executive duties involved may be as heavy as though there were many owners. Yet the law recognises sole ownership as one of the reasons which may justify the appointment of a female. This no doubt is because the law also makes provision for the appointment of a substitute. (R. 27) in certain cases including the contingency of physical infirmity to which that arrangement is appropriate. 6 P. R. 1894 Revenue diss.

But that neither sole ownership nor any other feature in the position of the individual concerned, gives to a woman a right to the appointment of headman. There are however exceptions, among which sole ownership is one, which may justify an appointing officer in selecting a woman in spite of her sex, if there are no sufficient countervailing considerations of another order. (*Maynard and Fagon, J. C.*) **MUSSAMMAT JIWANI v. GANGA RAM.**

2 Lah. L. J. 172.

CO-SHARERS.

—Landlords—Purchase of occupancy, holding by one of several co-sharer landlords—Effect of, Purchaser if settled raiyat.

Where a co-share landlord acquires the occupancy right of a raiyat he holds the raiyat's interest without the right of occupancy. Even though he occupies the land for more than 12 years he does not become a settled raiyat so as to be protected from eviction by an auction purchaser under the Bengal Land Revenue Sales Act of the estate comprising the land. (*Fletcher, J.*) **ANWAR ALI KHAN v. AZIZOR RAHAMAN KHAN.** **55 I. C. 510.**

—Landlords—Suit for injunction by one co-sharer against tenant—Maintainability of.

It is competent to one of several co-share landlords if he can make out a case, to obtain an injunction against a tenant especially where the rights of the landlords are in danger of being jeopardized. (*Chaudhuri and Walmsley, J.J.*) **ISWAR CHANDRA SAHA v. SHASHINATH, DAR.**

55 I. C. 951.

—Partition—Effect of—Mortgage by co-sharer—Mortgagee when bound by partition.

Under the guise of a partition a fraudulent exchange of lands was effected between a mortgagor and his co-sharers. As a result the mortgagee got lands of much inferior quality than he would have been entitled to, if the partition had been fair and above-board.

Held, that the partition did not in any way affect the rights of the mortgagee to the undivided share of his mortgagor. (*Ryves and Gokal Prasad, J.J.*) **NANU v. MATHURA PRA-SAD.**

58 I. C. 97.

—Rent—Nazrana — Collection of—Liability to account for. See OUDH RENT ACT S. 36 (2)

22 O. C. 264.

—Shamilat—Gift of land to proprietary body—Land recorded as shamilat—Vendor—Right to share.

In 1870 A sold certain land to M. In 1904-1905 the village shamilat was partitioned and M's descendants were given a share in respect of the khewat land held by them as original owners, and a share in respect of the land purchased by them in 1870. In 1910 A's sons sued M's descendants for possession of share in respect of the latter contending that the sale conveyed no right of any kind to a share in the shamilat that at the time of the sale there was no shamilat attached to the village and subsequent to the sale a large area was made over to the village by the Government and recorded as shamilat deh:

Held, that the gift of the area was made to the whole proprietary body as it was constituted at the time and each proprietor was entitled to a share proportionate to his proprietary holding as it stood recorded at the date of the gift.

Consequently the defendants were entitled to retain the area in suit. (*Shadi Lal and Broadway, J.J.*) **SULTAN ALI v. AMIR KHAN.**

57 I. C. 182.

COSTS.

COSTS—Accounts, suit for—Order as to costs—Practice *See (1919) Dig. Col. 358.*
DEBENDRA v. NARENDA. 54 I.C. 636

—Appeal—No interference unless question of principle involved. *See APPEAL.*

47 Cal. 67

—Appellate Court—Discretion of trial Judge—Interference by Appellate Court on question of principle. *See C.P.CODE, S. 35*
24 C.W.N. 352

—Damages—Suit for—Excessive claim—Costs not to be disallowed to successful plff unless enquiry prolonged. *See C.P.CODE, S. 35.* 24 C.W.N. 352

—*Discretion of Court—Appeal—Competency of.*

Courts have full discretion in the matter of award of costs. But that discretion is not an arbitrary one and must be exercised in accordance with general principles.

In a pre-emption case the plaintiff's right of pre-emption was admitted and the only controversy was as to the price payable. The District Judge dissenting from the Lower Court held that the whole of the price was paid before the Sub-Registrar and that there was no proof of the return of any part of the price. He accepted the vendee's appeal as to the price, but did not set aside the first Court's decree awarding costs against him. The vendee filed a second appeal.

Held, that in the circumstances of the case the Court of Second Appeal was entitled to entertain an appeal on the question of costs.

The vendee having defeated his adversary on the only point in controversy between them was entitled to recover his costs. (*Shadi Lal, C.J.*) **GOBIND SAHAI v. RAM CHAND.** 56 I.C. 971.

—Government—Subject to same rules as ordinary litigant.

In an unsuccessful litigation the Secretary of State is liable to pay costs like any other unsuccessful party. (*Mullick and Sultan Ahmed, J.J.*) **SECRETARY OF STATE FOR INDIA v. LOWAN KARAN MARWARI.** 5 P.L.J. 321 : 1 Pat L.T. 451 : (1920) Pat. 253 : 56 I.C. 507 : 21 Cr. L.J. 475

—Partition suit—Order as to costs—Practice.

Where a partition suit has to be brought for effecting a partition between the members of a family and neither party has been guilty of unfair contention, the costs till the preliminary decree should come out of the estate. 34 Cal. 878 and 42 Cal. 451 not foll. (*Sadasiva Aiyar and Burn, J.J.*) **NEELUTHURI VENKATARAMA-CHARLU v. PATH KUMARA AIYANGAR.** 11 L.W. 5 : 54 I.C. 382

—Principles guiding award of—*Calcutta High Court Rules, Ch. 36, R. 93.*

CO-TENANTS.

When the trial Court holds that costs should be awarded not as an "ordinary cause" but as an "important cause" reasons should be assigned. A suit does not cease to be an ordinary cause because several witnesses have been examined. Costs are now awarded not as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected.

The theory on which costs are now awarded to a plaintiff is that the default of the defendant made it necessary to sue him, and to a defendant is that the plaintiff sued him without cause; costs are thus in the nature of incidental damages allowed to indemnify a party against the expense of successfully vindicating his rights in Court and consequently the party to blame pays costs to the party without fault. These principles apply, not merely in the award of costs but also in the special allowances, not to inflict a penalty on the unsuccessful party but to indemnify the successful litigant for actual expenses necessarily or reasonably incurred in what are designated as important cases or difficult and extraordinary cases.

The character of a case cannot be determined by any particular phase of it but various factors such as the difficult and complicated nature of the questions of law and fact involved, the large amount in controversy, the length of time consumed in the trial and like matters, must be taken into account not separately but in the aggregate. (*Mookerjee, C.J. and Fletcher, J.*) **MAHARAJA MANINDRA CHANDRA NANDY v. ASWINI KUMAR ACHAR-YA.** 32 C.L.J. 168.

—Right to—Appeal from order.

A right to costs is not a vested right and here is a very limited right of appeal.

21 Bom. 779 Ref.

An order for costs is not a decree, it has to be included in a decree or may be a part of a decree; It is only appealable, if the original decree or order is appealable; and in that event an appeal on the question of costs alone will lie, if any question of principle is involved. There can be no second appeal for costs, except on a ground of Law.

The order of 8-5-19 was only on arithmetical calculation and as it did not affect the grounds of appeal, the appellant was not entitled to any extension of time under S. 5 of the Lim. Act.

15 Bom. 155 Ref. (*Mullick, J.*) **SHEIKH GULAB v. JANKI KUER.** 1 P.L.T. 403 : 5 P.L.J. 472 : 57 I.C. 236.

CO-TENANTS—Adverse possession—Alienée from co-tenant—Possession if adverse to other co-tenants—Knowledge. *See ADVERSE POSSESSION.*

11 L.W. 31.

COUNSEL.

COUNSEL—Professional etiquette—Acceptance of professional work—Intervention of solicitor or attorney essential. *See PLEADER.*

31 C L J. 313

COURT FEE—*Appeal—Decree for possession condition of plff. paying off incumbrances.*

A suit for possession was decreed conditionally on payment of incumbrances on the property and the plaintiff appealed against that part of the decree which required him to pay off the incumbrances. *Held*, that court-fees on the memo of appeal were payable *ad valorem* on the value of the incumbrances. 5 I.C. 941 fol. (*Coutts, J.*) KISHUN DUTT PANDEY v. KASI PANDEY. 5 P. L. J. 455:

1 Pat. L. T. 738 : 57 I. C. 481.

Appeal—Joint Decree—Joint Hindu family—Appeal by some members—Court fee payable.

As the members of a Joint Mitakshara family have no specific share, an appeal by some only of such members against a decree to enforce an alienation of the family property must be against the entire decree and Court fees must be paid on the amount of the decree, and not on the appellant's share of that amount. (*Das, J.*) RUPAN RAUT v. PITAMBAR LAL. 55 I. C. 233.

Appeal—Preliminary decree—Suit for dissolution of partnership.

On an appeal against the preliminary decree for winding up a partnership a court fee of Rs. 10 is sufficient, other questions relating to allowing or disallowing certain items being incidental. (*Rattigan, C. J. and A. Raof, J.*) RAM SINGH v. RAM CHAND. 1 Lah 6 : 9 P. L. R. 1920 : 57 I. C. 185.

Mesne profits—Advalorem fee.
On an application for mesne profits the Court fee payable is an *ad valorem* fee (*Miller, C. J. and Imam, J.*) RAM BILAS SINGH v. AMIR SINGH. 55 I. C. 24.

Mortgage—Suit for redemption—Value for purposes of jurisdiction and court-fee.

Plff. sued to redeem a mortgage alleging complete satisfaction and asking for return of the mortgage property and expressing his willingness to pay anything that might be found due from him without stating any amount. *Held*, the value of the suit for the purpose of deciding the jurisdiction and also amount of the Court-fees is the principal sum mentioned in the mortgage-deed (*Halifax A. J. C. J. BANSILALA v. SITKU.* 57 I. C. 673.

Mortgage suit—Two appeals against decree—Consolidation—Court fee for.

The plaintiff sued for sale upon a mortgage. The court of first instance gave him only a simple money decree. Both parties preferred appeals against that decree. The plaintiff's appeal was dismissed while that of the defendants was allowed. The result was that the suit

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was dismissed *in toto*. The plaintiff preferred two appeals against these two decrees, each being valued at the full amount of the claim. *Held*, that he was liable to pay full court fee on each of the appeals: The Court was not empowered under the Court Fees Act to consolidate the two appeals into one (*Tudball, J.J.*) SHIB DAYAL v. MEHARBAN 18 A. L J 894: 58 I. C. 230.

COURT FEES ACT. (VII of 1870) S 5—Court fee—Decision of taxing officer, if open to revision by Court hearing the appeal. Sec (1919) Dig Col 371. MUSSAMMAT CHANDERBATI KUER v. GOREY LAL SINGH. (1920) Pat. 179.

Ss 7 and 12—Suit for redemption or foreclosure—Appeal—Court fee payable on.

In a redemption or foreclosure suit, where the question raised in appeal is the right to redeem or foreclose for an adjudged sum the court-fee payable on the memorandum of appeal is under S. 7. (IX) of the Court Fees Act according to the value of the principal mortgage-money. If however the memorandum of appeal challenges the amount to be paid or received by appellant the fee will be assessed on the difference between the sum awarded (as payable or receivable) by the lower court and that maintained as due in the memorandum of appeal (*Ashworth, J.*) MUSSAMMAT GUMANI v. BANWARI. 22 O. C. 289 : 54 I. C. 738.

S 7 cl (2) of Sch II Art. 17 cl. 3—Right to periodical payment—Suit for declaration of right of arrears—Court fee payable thereon.

The allegation of the plaintiff was that in accordance with the terms of a sale deed executed by her in favour of the defendant she and her descendants after her were entitled to get the sum of Rs. 100 monthly from them. The reliefs prayed for in the plaint were (a) "It may be declared as against the defendants that the plaintiff and her descendants generation after generation are entitled to receive from the defendants and their representatives Rs. 100 per mensem, which is a charge on the property mentioned in Schedule A" (b) "A decree awarding Rs. 1,800 on account of the monthly allowance at the rate of Rs. 100 per mensem for 18 months may be passed." A court fee of Rs. 10 was paid in respect of relief.

(a) *Held*, that the prayer for relief (b) was a prayer for consequential relief, and Art. 17 cl. (3) of schedule II of the Court Fees Act could not apply to the case and that in respect of relief (a) the claim was for declaration of right to a sum payable periodically and came under S 7 cl ii of the Court Fees Act, so that the Court fee was to be paid on ten times the amount claimed to be payable for one year. (Reference under S. 5 of the Court Fees (Act)

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Ref. (*Mears, C. J. and Banerji, J.*) SHAHZADI BEGUM v. MAHBUB ALI SHAH.

42 ALL. 353 : 18 A. L. J. 328 :
55 I C 809

—S 7 (4)—Declaration that adoption never took place—Title to immoveable property indirectly in issue.

A suit for a declaration that an adoption did not take place, is for the purpose of Court fees, one to declare an adoption invalid. Where the adoption affects title to immoveable property, the court fee payable on the suit is an *ad-valorem* fee calculated on the value of the property. (*Kotwal, A. J. C.*) CHINKI v. NARAYAN

58 I C 965

—S 7 (4) (c)—Consequential relief—Prayer for setting aside decree.

A prayer to set aside a decree is a prayer for a consequential relief and the Court fee must be computed under S. 7 (4) (c) of the court fees Act. 5. All 331 ; 20. Bom 736 ; 30 Cal 718. Referred to. (*Drake-Brockman, A. J. C.*) BALDEO PRASAD v. R. S. SETH GHASIRAM.

16 W. L. R. 84 :
56 I. C. 360

—S 7 (4) (c)—Suit for declaration—Decree fraudulent and void—Prayer for injunction essential. See SP. REL. ACT, S 42.

54 I. C. 833.

—S. 7 Cl 4 (c)—Suit for declaration decree with consequential relief—Suit by sons for recovery of possession of properties sold in execution of decree against their father.

When consequential relief is sought in addition to a declaration, the plaintiff is bound to fix a reasonable valuation upon the consequential relief, and if he puts a ridiculous value upon it the court must fix a reasonable value for him, dealing with each case on its own merits.

17 C. 680, 6 C. L. J. 427, followed.

35 C. 202; 42 C. 370. Referred to.

Two *Mitakshara* sons filed two suits to set aside decrees made upon mortgages executed by their father, and sales held under such decrees, and to obtain possession of their individual sharers in the joint family property. Held that in effect the suits were not for recovery of possession but for declarations with consequential relief. The court fee payable in each case was not a sum equal to ten times the Government revenue but an *ad-valorem* calculated on the value of the plaintiff's share in the joint family property. (*Sharifuddin and Roe, JJ.*) SHAMA PERSHAD SAHI v. SHEOPERSAN SINGH.

5 P. L. J. 394

—S 7 (IV) (c)—Suit for declaration that decree is void—Consequential relief—Court fee.

A suit for a declaration that a decree is *null* and *void* and for setting it aside is one for a declaration with consequential relief and is

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governed by S. 7 (IV) (C) of the Court Fees Act. (*Kotval, A. J. C.*) GOVIND v. DHEKLU

56 I. C. 550.

—S 7 (IV) (c)—Valuation of claim—Suit for declaration and injunction—Payment of Court fees—Jurisdiction—Suits Valuation Act, S 8.

The plaintiff has the right to value his claim for the purpose of court fees in a suit for a declaration and for an injunction by way of consequental relief and the value for the purpose of jurisdiction is the same.

In a suit to obtain a declaration and an injunction, the plaintiff valued his claim for the purpose of court fee at Rs. 135, and for the purpose of jurisdiction at Rs. 16,000. The suit was tried by the First Class Subordinate Judge under his special jurisdiction. The plaintiff appealed to the High Court from his adjudication, but later on urged that the appeal lay to the District Court and not to the High Court inasmuch as the value of the Court-fees as mentioned in the plaint was the true value for the purpose of jurisdiction also:—

Held, overruling the contention, that on the special facts of the case the plaintiff must be taken to have filed the suit properly in the court below under its special jurisdiction and to have filed the appeal properly in the High Court. (*Shah and Hayward, JJ.*) BALAKRISHNA NARAYAN SAWANT v. JANKIBAI SITARAM.

44 Bom. 381 : 22 Bom. L. R. 289 :
56 I. C. 340.

—S. 7, IV (c) and (V)—Suit for possession of properties as adopted son—Contest as to validity of adoption.

In a suit for possession of an estate on the ground that he was validly adopted by the widow of the last male owner under authority of the latter the validity of the adoption was contested by the defendants. *Held*, that the suit was in effect a suit for declaration that the plaintiff was the adopted son of the male owner and for consequential relief, namely, possession, and that therefore *ad valorem* court-fees were payable under S. 7 (iv) (c) of the Court-Fees Act 1870. (*Das and Adami, JJ.*) UGRAMOHAN CHAUDHURY v. LACHMI PRASAD CHOUDHURY.

5 P. L. J. 339 : 56 I. C. 422.

—S. 7 (IV) (c) and (V) (b)—Suit for declaration and possession—Suit by Hindu reversioner for declaration of invalidity of alienation.

A Hindu widow had executed a sale deed of part of her husband's estate and the vendees were in possession. In a suit brought by the reversioners praying for a declaration that the sale was void and ineffectual as against them and for recovery of possession, the Court fee was paid on five times the Government revenue of the property, under S. 7, cl. V, (b) of the Court Fees Act. *Held*, that it was unnecessary for the plaintiffs to ask for any declaration in respect of the sale deed, that the suit was not one for a declaration with a consequential

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relief, and that the Court fee paid was correct (*Tudball, J.*) *TIKA RAM v. SALIGRAM.*
18 A. L. J. 903 : 57 I. C. 494.

—**S. 7 (IV) (d)—Conditional decree—Appeal against the Condition—Court fee.**

Where the plaintiff's suit for possession was decreed conditionally on the plaintiff paying off all encumbrances on the property, and an appeal was preferred against the condition embodied in the decree.

Held, that the plaintiff ought to pay *ad valorem* court fees on the value of the encumbrances (*Basudeo Ban v. Sri Kishen Gir* (1910) 5 I. C. 941 *Rel.* (*Coutts, J.*) *KISHUN DUTT MISIR v. KASHI PANDE.*

5 Pat. L. J. 455 : 1 P. L. T. 738 : 57 I. C. 481

—**S. 7 (IV) (d)—Suit for injunction—Valuation—Court-fee—Jurisdiction—Suits Valuation Act, S. 8.**

In a suit for injunction, the plaintiff valued the claim at Rs 10 for purpose of court fees, and at Rs. 500 for purpose of jurisdiction. He paid court fees on the former amount. The Court tied the plaintiff down to the second valuation and called upon him to pay court fees on that account. *Held*, that the plaintiff was entitled under S. 7, cl. (IV) (d), of the Court Fees Act 1870, to value his claim at Rs 10 for Court fee purposes and it was wholly unnecessary for him to fix any other for the purposes of jurisdiction, under S. 8 of the Suits Valuation Act 1887. (*Macleod, C. J. and Fawcett, JJ.*) *GOVINDA KRISHNA SATHE v. HANMAYA.*

22 Bom. L. R. 1450

—**Ss 7 (IV) (f) and 11—Suit for accounts—Valuation—Deficiency—Recovery of**

A suit for administration is on the same footing as a suit for accounts for purposes of court-fees, and is to be valued under S. 7 (IV) (f) of the Court fees Act according to the amount at which the relief is valued in the plaint.

If the amount decreed is in excess of the amount at which the relief was valued the deficiency in court fees must be recovered as laid down in S. 11 of the Act. (*Twomey, C. J. and Maung Kin, J.*) *SAN PAW v. MAYIN.*

12 Bur. L. T. 207 : 55 I. C. 258

—**S 7 (V) and Sch. II, art. 17 (6)—Suit by co-tenant in possession for partition—Suit incapable of valuation—Court-fee.**

A suit by a co-tenant for partition of immoveable property of which he alleges he is in possession on behalf of himself and the other co-tenants is incapable of valuation within the meaning of Sch. II, art. 17 (6) of the Court Fees Act and is not governed by S. 7 clause, (V) of that Act. (*Wallis C. J. and Sadasiva Iyer, J. J. R. P. Gill v. LINGAMALLU VARADA RAGHAVAYYA.*) **43 Mad. 396 : 38 M. L. J. 92 : 11 L. W. 174 : (1920) M. W. N. 124 :**

27 M. L. T. 146 : 55 I. C. 517.

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—**S 7 (V) and Sch. II, Art 17 (VI)—Suit for partition—Deft. in possession—Court fee**

Where in a partition suit defendants are in possession of any part of the property to be partitioned and have denied the plaintiff's title thereto, the suit is one to recover possession of that part of the property at least, and a Court fee *ad valorem* on the share claimed in that part must be levied. (*Roc, J.*) *DIP CHAND RAI v. CHETRU LAL.*

1 P. L. T. 529 : 56 I. C. 570.

—**S 7 (V) and Sch II, Cl 17 (VI)—Suit for possession—Kyaung—Sanghika property—Money value.**

The amount of fee payable for a suit for possession of a kyaung or other sanghika property is to be computed under S. 7 (v) according to the value of the subject-matter.

As such property cannot be transferred by sale, mortgage or gift it has no market value, and the plaintiff should be stamped under schedule II, cl. 17, sub-cl. (vi) which provides a fee of ten rupees (*Rigg, J.*) *KONMA v. U. EINDA.*

13 Bur. L. T. 40 : 57 I. C. 953.

—**S. 7 (V) (a) (1)—Under proprietary tenure—Suit for definite share of estate—Court fee.**

A share in an under proprietary tenure in a permanently settled village is a definite share of the estate as a whole. The Court fee payable on suit for possession of such share is on ten times the revenue payable on the share in suit. (*Wazir Hasan, A. J. C.*) *SWAMINATH v. JANG BAHADUR SINGH.*

58 I. C. 132.

—**S. 7 (v) (e)—Pre-emption—Garden with house, out-houses and trees—Land assessed to revenue—Advalorem fee.**

In a suit for possession by pre-emption of a certain property plff. described it as land assessed to revenue and paid the Court fees on it at ten times the *jama*. The vendee contested the suit and claimed that he had purchased a garden. He further pleaded that the value of the suit had been wrongly assessed. A reference to the deed of sale showed that what was sold was described as a garden together with a house and out houses as well as trees of all kinds

Held, that the property sold was a garden and that under S. 7 (v) (e) of the Court-Fees Act the fee payable should be an *advalorem* one on the market value.

146 P. R. 1018 ; 71 P. R. 1914 foll.

40 M. 824 dist.

The High Court finding that the appellant had no intention whatever of complying with the order of the Lower Court and making good the Court-fees by the fixed date, declined to give him any further opportunity. (*Shadi Lal and Broadway, J.J.*) *BEHARI LAL v. NANDLAL.*

2 Lah. L. J. 362.

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S 7. (ix) and Sch I, Art. 1—Suit for redemption—Appeal regarding mortgage—Money payable—Court-fee.

Plaintiff sued for redemption of a mortgage and stated that more was due to him than he owed and he asked for redemption either without payment or on receipt of what was due to him. The Court gave him a decree on payment of a certain sum.

Held, that the case was governed by Art 1 of Sch. I of the Court-Fees Act and that on the memorandum of appeal court fees were payable *ad valorem* on the amount by which the mortgage money was sought to be reduced in appeal. (*Scott Smith and Wilberforce, JJ.*) *LEKHRAM v RAMJI DAS.* 1 Lah. 234 : 57 I C. 215.

Ss 10 and 12—Court-fee—Deficiency in the lower court—Rejection of appeal under O 41, R 11, C. P. C. power to demand additional court-fee.

When an appeal has been dismissed by the High Court under O. 41, R. 11 of the C. P. Code, the Court has no power to recover from the respondent, (appellant in the Court below), a deficiency in court-fee due on a memorandum of appeal filed by him in that Court If in such a case the second appeal resulted in a decree in the respondent's favour, the High Court would be competent under its inherent powers to refrain from signing the decree until payment of the deficit. 20 All. 362 ref.

Whenever it is intended to recover a deficit from the respondent before the High Court in respect of something due in the Lower Court the proper procedure is to admit the appeal for hearing and to take action under S. 12 read with S. 10 of the Court-Fees Act of 1870 (*Mullick and Jwala Prasad, JJ.*) *RAJDEO NARAIN SINGH v. RAMDIL SINGH*

5 P. L. J. 508 : 58 I C 271.

S 17—Suit on two mortgage bonds hypotheccating same property — Court fee thereon.

Where the plff. brings a suit on the basis of two mortgage-bonds, in which the same properties are hypothecated he has to pay *ad valorem* Court fee on the amount due under each of the two bonds separately and not on the total claim. The word subjects in S. 17 of the Court fees Act, means causes of action and the Plff. has two causes of action on the two bonds although the mortgagee cannot sue on the first mortgage and sell the property except subject to the second and that he cannot sue on the second mortgage for the sale of the property subject to the first. (1910) 14 C. W. N. 1053 ; (1905) 7 Bom. L. R. 811 referred to. (*Coutts, J.*) *NAWABA WAZIRI BEGUM v. SOSHI BHUSAN RAY.*

1 P. L. T. 444 : 57 I. C. 685.

S. 19 (c)—Probate—Payment of full court-fee on—Death of beneficiary—Application for probate again—Court-fee payable.

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S. 19 (c) merely means that when fees have already been paid in respect to the whole or part of the property comprised in the estate of a deceased person no fees shall be payable on the grant of a fresh probate of a will or letters of administration of the estate of the same person *e. g.* when probate is revoked or a portion of an estate remains unadministered.

A person who applies for probate of his wife's will is bound to pay the full court-fees due even though the bulk of the property dealt with in the will was included in the wife's father's will of which probate had been granted on full payment of court-fees. (*Dawson Miller, C. J. and Jwala Prasad, J.*) *BHAGWATI SARAN SINGH v THE SECRETARY OF STATE FOR INDIA IN COUNCIL.* 5 P. L. J. 36 : (1920) Pat. 81 . 1 Pat. L. T 469 : 54 I. C. 703.

S. 19 (d)—Hindu will—Probate—Court-fee—Deduction of property passing by survivorship.

A Hindu by a will left the residue of his property to his son. The executors when applying for probate claimed exemption from the payment of Court-fees on the residue on the ground that the son was entitled to the property by survivorship, *held*, that they were not entitled to the exemption. 23 Cal. 980 not foll. 39 Bom. 245 foll. 33 Mad. 93 ref. (*Coutts, J.*) *IN RE THE ESTATE OF RAM KUMAR PRASAD.*

5 P. L. J. 510 : 1 Pat. L. T. 710 : 58 I C. 1007.

Sch. I, Art 1 and Sch. II, Art. 2—Final decree in mortgage suit—Appeal—Court fee.

An appeal from a final decree passed under O. 34, R 5 C P. C. requires an *ad valorem* Court fee and cannot be stamped as an appeal from an order. 35 All. 476 F. B. followed. (*Macleod, C.J.*) *JANKIBAI RAMDAYAL v CHIMNA SADASHIV.*

22 Bom L. R 811 : 57 I. C. 579.

Sch. II, Art 6—Receiver appointed by Court—Security furnished to Court—Stamp both under Court Fees Act and Stamp Act, necessary. See STAMP ACT. S. 2 (5) Etc.

38 M. L. J. 503.

Sch. II, Art 17 (6)—Suit by co-tenant in possession for partition—Suit incapable of valuation—Court-fee. See COURT FEES ACT, S. 7 (V) ETC.

38 M. L. J. 92.

COURT OFWARDS—Position of—Not an agent for disqualified proprietor—Proprietor how far bound by its acts.

The Court of Wards is not an agent for a disqualified proprietor and his auction is not, therefore, binding on him in the matter of collection of rent. Where a taluqdar in ignorance of the real facts collects rent from a vendee from a hereditary but non-transferable lessee and it is found that before him the Court of Wards in management of his estate did the same with full notice of the sale the

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vendee could claim to be recognised merely as an ordinary tenant but not as a person holding special rights (*Ferard, S.M. and Harrison, J.M.*) **FATEH BAHADUR SINGH v NAGENDRA BAHDUR SINGH** 55 I.C. 518

COVENANT — Running with land — Covenant restricting user of property — Registration, notice — Index in the registration records.

A covenant obtaining in an agreement whereby the owner of a certain property restricts the ordinary user of his property does not run with the land, and is not binding on the purchaser unless he has notice.

The registration of a document does not without more operate by itself as notice. If the property to which it refers is in the index of the register, so that on the purchaser inspecting the index can find it, then only it can be said that the purchaser had constructive notice of it. (*Masham, C.J. and Heaton, J.*) **GORDIANES v. MOHANLAL** 22 Bom. L.R. 1158

—Running with land—Scope—Assignee when bound.

A covenant to run with the land might necessarily affect the nature, quality or value of the thing demised, independently of collateral circumstances, or affect the mode of enjoyment. Held, that the covenant bound the defendant although portion of the covenant did not relate to the thing demised. (*Das and Foster, JJ.*) **THE LONDA COLLIERY CO., LTD. v. BIPIN BEHARI BOSE** 1 P.L.T. 84; 55 I.C. 113.

CRIMINAL PROCEDURE CODE (V of 1893) Ss. 4, 107, 117 and 350 — “Trial” — Inquiry — Meaning of — Proceedings Under Chapter VII — S. 350 (1) proviso (a) — Applicability of.

Held by the Full Bench that S. 350 (1) proviso (a) Criminal Procedure Code applies to a case under S. 107 Criminal Procedure Code.

Per *The Chief Justice* — “Trial” generally means the determination of the issues arising in the particular case. In a case under S. 107 Cr. P. C. issue undoubtedly arises between the Crown and the accused as to whether he should be dealt with under the sections of the code, and the determination of that is a trial.”

Per *Aylng, J.* : — The word “trial” as used in the Criminal Procedure Code presupposes the idea of an offence as defined in S. 4 of the Code. No “offence” is involved in an inquiry under Chapter VIII of the Code. Inquiries under that chapter are not trials; and the proviso to S. 350 (1) of the Code does not apply “*Suo Vigore*” to such proceedings. S. 117 (2) however attracts proviso (a) to S. 350 (1).

Per *Coutts Trotter, J.* — Whether a proceeding under S. 107 Cr. P. C. is a “trial”

S. 117 of the Code requires the whole of the procedure in a summons or warrant case respectively to be adopted by the tribunal which enquires into a security case. The right of

CR P. CODE, S. 35.

the accused to have the witnessses re-called is not a substantive right but a right relating to the procedure to be adopted, and the accused has that right in a security as in a summons or warrant case (*Sir John Wallis, C.J. Aylng, and Coutts Trotter, JJ.*) **YELUC HURI VENKATA-CHENNAIAH IN RE.** 38 M.L.J. 370:

11 L.W. 435: 27 M.L.T. 178: 56 I.C. 50: 21 Cr.L.J. 402

—S. 4 (h)—Complaint—What is—Report by District Judge against certain insolvents under S. 476 Cr. P. C. directing Dt. Magistrate to take action under S. 471 I.P.C. See CR. P. CODE S. 475 18 A.L.J. 50.

—Ss. 4 (h) 190 (c) and 200—Complaint—Personal knowledge of essential—Cognisance of the case.

A complaint which is otherwise a proper complaint is not illegal because the person making it has no personal knowledge of the offence committed. There is nothing in the Cr. P. Code to suggest that a complainant must have personal knowledge of the offence. (*Coutts, J.*) **SURESH CHANDAR DEB v. EMPEROR.** 1 Pat. L.T. 531:

55 I.C. 682: 21 Cr. L.J. 346.

—S. 16—Special Magistrates—Trial commenced by three—Case heard by two—Trial void.

Under the rules guiding the Special Magistrates Bench of Satara, if for any cause it was found necessary to adjourn the hearing of the case after the evidence has been partly taken the trial must be completed before the same Magistrates who commenced it, or must be held afresh before a different set of Magistrates. A bench of three Magistrates constituted under the rules commenced a trial and heard the prosecution evidence but afterwards one member of the Bench was absent. The remaining two Magistrates went on with the trial, heard the defence evidence and convicted the accused.

Held, that the trial having been in contravention of the above rule, was void (*Shah and Hayward, JJ.*) **EMPEROR v. MOHDIN KARIM.** 44 Bom. 400: 22 Bom. L.R. 154: 55 I.C. 849. 21 Cr. L.J. 364.

—S. 20.—Presidency Magistrate—Jurisdiction outside the limits of Calcutta but within port—Calcutta Port Act, Ss. 133 and 138.

A Presidency Magistrate has jurisdiction under S. 20, Cr. P. C. read with S. 139 of the Calcutta Port Act (Bengal Act III of 1890) to try an offence under S. 84, of the latter committed outside the limits of the town but within those of the port of Calcutta. (*Sanderson, C.J. and Newbold, J.*) **Good v. GUNPAT RAI.** 47 Cal. 147.

—Ss. 35 and 397.—Conviction for one offence—Similar conviction in another trial—Concurrent sentence.

A person convicted of an offence and sentenced to undergo a term of imprisonment and

CR. P. CODE, S. 42

found guilty by another Judge of a precisely similar offence in another case is not liable to a sentence to run concurrently with the previous sentence. In such a case if the Judge is of opinion that the previous sentence inadequate, he should pass an additional sentence on the accused. (*Walsh, J.*) **EMPEROR v. BUKKI**

55 I.C. 1006 : 21 Cr. L.J. 393

S. 42.—Police officer—Right to call for assistance—Who shorts of persons sought to be arrested not to tax i.—Refusal to assist, not an offence.

Members of the public are bound to assist a police officer reasonably demanding their aid in the taking of an accused or suspected dacoit whom that officer is authorised by law to arrest. The law however does not intend that the police officers shall have a general power of calling upon the members of the public to join them in arresting a number of unknown persons whose whereabouts are not known. Refusal to assist the police officer in such a quest is not an offence under S. 287, I.P.C. (*Piggott and Walsh, JJ.*) **JOTI PRASAD v. EMPEROR**

42 All 314 : 18 A.L.J. 169.

58 I.C. 673

S. 53.—Railway lands in Gwalior—Arrest of accused—Jurisdiction.

The arrest of a person at the Gwalior Railway station on a charge of an offence committed in British India is legal. The British Govt has no jurisdiction in such area in respect of offences not connected with the railway. (*Hartmann, J.*) **RADHA KISMAN v. EMPEROR.**

1 Loh. 406 :

55 I.C. 351 : 21 Cr. L.J. 303

S. 58.—Summons not duly sealed—Validity—Prosecution for disobedience of such Summons—Clarity in liability. See (1919) *Dig. Col. 379.* **ABDUL RAHIM BEG IN RE**

53 I.C. 528 : 21 Cr. L.J. 800

Ss. 87 and 89—proclamation requirements & order under S. 87, (3)—whether absconder can contest validity of proclamation in his application under S. 89. See (1919) *Dig. Col. 377.* **EMPEROR v. MULTAN SINGH**

2 Loh. L.J. 82 : 54 I.C. 994.

21 Cr. L.J. 210

Ss. 88, and 89—Absconder—Suit for recovery of property.

Ss. 88, and 89 Cr. P.C. debar an absconder from suing for the recovery of his property (*Mulliek and Sultan Ahmad, JJ.*) **SECRETARY OF STATE FOR INDIA v. LOWN KARAN MARWARI.**

1 Pat. L.T. 451 : (1920) *Pat. 253 :*

56 I.C. 507 : 21 Cr. L.J. 475

S. 90—Warrant for witness—Omission to record reasons—Illegality or irregularity.

In a prosecution under S. 498, I.P.C. on the complaint stating that the warrant should be issued for the attendance of the abducted

CR. P. CODE, S. 96.

woman, or else the accused would remove her from his house, the Magistrate, issued a warrant in the first instance for her arrest. He however, did not record any reasons for doing so. Held, that the omission of the Magistrate to record the reasons for the issue of warrant in the first instance in this case amounted to a mere irregularity and not to an illegality, and did not vitiate the legality of the convictions of persons who had forcibly rescued the woman from the custody of the constables who had arrested her under the warrant (*Gokul Prasad, J.*) **MIRAK SINGH v. EMPEROR.**

18 A.L.J. 1149.

S. 94.—Summons to produce documents—Propriety of

The Chief Presidency Magistrate of Calcutta issued a search warrant in execution of which the books of the petitioner's firm were taken possession of by the police. The Magistrate's order was set aside by the High Court in revision and thereupon the Magistrate issued a notice on the petitioner calling upon him to be present in his Court to take delivery of the books personally or by agent. The books were made over to the petitioner's agent and simultaneously a notice was served on the petitioner's agent under S. 14, Cr. P.C. and the books were taken possession of.

Held, on a consideration of the circumstances of the case that the order under Sec 94 Cr P.C. was properly made (*Chaudhuri and Newbould, JJ.*) **T R PRATT v. EMPEROR.**

47 Cal. 647 : 24 C.W.N. 410 :

31 C.L.J. 188 : 57 I.C. 97 :

21 Cr. L.J. 577.

S. 96—General search warrant Issue of when justifiable.

Per Chaudhuri, J.—An order under S. 96 Cr. P.C cannot be made to further a police investigation which may or may not result in an enquiry. The Magistrate has to form his own opinion upon the materials placed before him. He is not relieved from his duty by stating that he believed that the officer of Government holding the investigation for the purposes of which the books were wanted had formed a correct opinion.

The form of the search warrant in the Code refers "to an enquiry now being made or about to be made". There are separate provisions in the Code for investigation and large powers are given to the police in cognizable cases for seizure of documents. The word "investigation" is defined in the Code and is differentiated from an enquiry.

There is no express provision requiring the Magistrate to make a record or keep notes of the examination of the person on whose application the Magistrate issues the search warrant but some record ought to be kept to enable the High Court to form an opinion as regards the materials upon which the Magistrate acted.

CR. P. CODE, S. 96.

(*Chaudhuri and Newbold, JJ*) JAGANNATH AGARWALLA v EMPEROR

24 C. W. N. 405 : 31 C. L. J. 267 : 57 I. C. 93 : 21 Cr. L. J. 573

S. 96—Search warrant—Infringement of copy right—Warrant for production of infringing books etc.—Legality of order—Stay of execution of warrant on security

The Magistrate has power, under S. 96 Cr. P. C. to issue a search warrant for the production of copies of the infringing book, proofs plates printed, and set-up inatters, together with letters and orders with reference to the book, for the purpose of making an order under S. 10 of the Copyright Act.

Where the person against whom such a search warrant was issued prays for the stay thereof and offers an undertaking not to sell, copies of the infringing books but to produce them before the Court whenever required, the Magistrate has jurisdiction to stay execution of the warrant conditionally on the execution of a bond to produce the copies in Court. 7 C. W. N. 522 dist. (*Sanderson, C. J. and Durl, J.*) KISHORI MOHAN BAGCHI v. HARI DAS BYSACK. 47 Cal. 164 : 55 I. C. 999
21 Cr. L. J. 391.

S. 96 (3) General search warrant—Issue of when justifiable—No pending enquiry or trial or proceeding—Effect of

Under orders of the Government the officer appointed for the purpose of holding an investigation into the dealings with the Munitions Board with a view to find out what offence if any was committed and by whom in connection with the said dealings. On the application of this officer to the effect that the books and accounts of the petitioner's firm among others mentioned in the petition were necessary for the purpose of the said investigation the Magistrate issued a general search warrant in respect of the books and documents of the Petitioner's firm specified in the petition.

Held,—that there was no enquiry or trial or other proceedings under the Code and there were no materials before the Magistrate on which he could decide that a search warrant was illegal.

Per *Newbold, J.*—When the law requires the sanction of a Magistrate before the issue of a search warrant that means that the Magistrate should apply his mind to the facts and he ought not to issue a search warrant simply because the police officer asks him to do so (*Chaudhuri and Newbold, JJ*) T. R. PRATT v. EMPEROR. 47 Cal. 597 : 24 Cal. W. N. 403 : 55 I. C. 473 : 31 C. L. J. 345 : 21 Cr. L. J. 313

S. 103—Duty to assist search—Salt Inspector—Refusal to assist him—Offence—S. 187 I. P. C. See PENAL CODE, S. 187.

38 M. L. J. 27.

CR. P. CODE, S. 107.

S. 103—Search—Gambling house—Tea house being a gambling house—Not a competent witness to a search to be a police officer. See BUR GAMBLING ACT, S. 10, 1877
12 Bur. L. T. 289.

S. 103—Order under the conviction for criminal trespass

Upon a conviction for criminal trespass, where the intention of the trespasser is to commit a breach of the peace, an order under S. 103, Criminal Procedure Code may lawfully be passed in the discretion of the Magistrate, 29 W. R. Cr. R. 73 recorded (*Pigot, J.*) DHARAM AJI v. EMPEROR. 47 All 345 : 18 A. L. J. 200 : 33 I. C. 304

Ss. 103, 107, 125 and 406—Security for keeping the peace—Cancellation of bond—Power of District Magistrate

S. 403, Cr. P. C. allows an appeal to the Court of the District Magistrate against an order to find security for good behaviour. Where there is an order for security to keep the peace the District Magistrate's powers are limited to the cancellation of the bonds under S. 125, Cr. P. Code. The section seems to imply that the District Magistrate has no power to revise the original order of a Subordinate Magistrate passed under S. 106 or 107 of the Code. The words of the section contemplate cancellation of bond for a reason arising subsequently to its execution, no, for the reason that the Dist. Magistrate is of opinion that execution ought not to have been ordered (*Halifax, J.*) KAUSAR v. EMPEROR. 57 I. C. 311 : 21 Cr. L. J. 591.

S. 107—Information—Necessity for before initiation of proceedings—Issue of process on magistrate's own knowledge.

Prior to the initiation of proceedings under S. 107, Cr. P. C., information must be given against a person from whom it is sought to make security.

It is illegal for the Magistrate to issue notice to the petitioner merely because he considered from his own statement that he was a quarrelsome person and no information such as is required by S. 107 having been given to the Magistrate the initiation of the proceedings was *ultra vires* (*Scott-Smith, J.*) ABDUL KALIM v. EMPEROR. 36 I. C. 671 : 21 Cr. L. J. 511.

S. 107—Manager of Zemindar—Encouraging illegal collection—Preach of the peace—Security proceedings.

The manager of a zemindar who owned a hat employed peons to realize a toll from the users of the hat for the payment of which the users were not liable. The peons in attempting to realize the toll, resorted to acts of violence and force and threatened to molest the users in order to obtain payment. The Court below found these acts to have been committed with the knowledge and consent of the petitioner and there was a reasonable apprehension that if

CR. P. CODE, S. 107.

persisted in, a breach of the peace would occur.

Held, that the order directing the manager to furnish security under S. 107, Cr. P. C. was justified. S. 107 of the Cr. P. Code has no application to the case of a person exercising a civil right in a lawful manner. (*Mullich and Thornhill, JJ*) BEPIN BEHARI MUKHERJI v. EMPEROR.

57 I.C. 667 :
21 Cr. L.J. 651.

—S. 107—*Proceedings under—Duty of magistrate to record evidence—Plea of guilty.*

In proceedings under S. 107 of the Cr. P. Code where there is an unqualified plea of guilt, the Magistrate is bound to record evidence before passing orders. A statement by a person, in answer to a notice to show cause why security should not be taken from him, that he is not a quarrelsome person but is willing to give the security demanded would not justify an order requiring him to furnish security. (*Mittra, A. J. C.*) PRABUDAS v. EMPEROR.

57 I.C. 672 :
21 Cr. L.J. 656.

—S. 107—*Proceedings under—Hearsay evidence.*

Proceedings under S. 107, of the Cr. P. Code, cannot be based upon hearsay evidence (*Mittra, A. J. C.*) MOHAN v. EMPEROR.

56 I.C. 864 : 21 Cr. L.J. 560

—S. 107—*Security for good behaviour—Arranging defence of property with help of police—Likelihood of breach of the peace.*

There was an old standing dispute about certain property between two parties. The applicant's party obtained a decree from the Civil Court. The other party threatened to oust the applicant's party by means of armed force. The help of the police was asked by the applicant and some constables were sent. The applicant posted some of his men armed with laths to defend the property if necessary. He was called upon to furnish security for good behaviour. *Held*, that the applicant was justified in posting men for the defence of his property in the presence of the police-guard and having done so in self-defence it could not be said that there was any likelihood of breach of peace from his side. (*Walsh, J.*) JANKI PRASAD TEWARI v. EMPEROR.

18 A.L.J. 157 : 55 I.C. 673 :
21 Cr. L.J. 337

—S. 107—*Security to keep peace—Evidence necessary for—Consent of accused if necessary*

To justify an order to furnish security to keep the peace, there must be evidence on the record that the person from whom security is demanded is likely to commit a breach of the peace. The mere consent of the person to be bound down is not sufficient: the fact of a likelihood of a breach of the peace must be established by independent testimony on oath. (*Walsh, J.*) JAGDAT TEWARI v. EMPEROR.

54 I.C. 784 : 21 Cr. L.J. 176.

CR. P. CODE, S. 107.

—S. 107—*Security for keeping the peace—Jurisdiction of Magistrate—“I. regarding act”—Act not forbidden by Penal Code.*

To give jurisdiction under S. 107, Cr. P. Code the Magistrate should have some tangible evidence that some definite wrongful act is contemplated, which act, if committed is likely to cause a breach of the peace.

The words “wrongful act” in S. 107 mean an act forbidden or declared to be penal or wrongful by the criminal law.

The killing of a dedicated bull for the sake of the meat is not an offence. (*Das, J.*) PIR ALI KASAB v. EMPEROR.

56 I.C. 437 : 21 Cr. L.J. 453.

—Ss. 107, 144 and 145—*Scope of—Doubtful claim to land—Procedure.*

Where parties are clearly in the wrong they can be bound down under S. 107 to prevent a breach of the peace or a party threatening to usurp the rights of another can be restrained by a temporary order under S. 144; but where the claim relates to lands and there is an apprehension of breach of the peace as both the contending parties urge their claim to possession the proceedings should be under S. 140 and evidence taken on both sides and proper orders after due inquiry should be passed under S. 145 or 146 Cr. P. Code.

A Magistrate is not entitled to pass successive orders under S. 144 after the lapse of every two months and an order under S. 144 is liable to be vacated if no notice is served upon the parties. (*Jwala Prasad, J.*) GAUNI DATT v. GOBIND SINGH.

1 P. L. T. 44.

—Ss. 107 and 145—*Dispute over possession—Fishery—Proceeding under S. 107—Refusal to change into S. 145—Revision.*

Where a dispute likely to lead to a breach of the peace was over the possession of a fishery and the Magistrate drew up a proceeding under S. 107 of the Cr. P. Code:

Held, that the Magistrate had jurisdiction to proceed under S. 107 of the Cr. P. Code and he having exercised his discretion it was not open to the High Court to direct that the Magistrate must proceed under S. 145 and not under S. 107 of the Cr. P. Code. 39 Cal. 150, 16 C.W.N. 83 ref. (*Walmsley and Greaves, JJ.*) AMULYA CHARAN SIKKAR v. AMRITA LAL MUKEJRI.

24 C.W.N. 1075.

—Ss. 107 and 145—*Scope of—Different persons—Findings against each how far necessary.*

Where R died and the name of the widow was duly registered under the Bengal Land Registration Act, and the agnates of R did not oppose her application a dispute having arisen as to the possession of the property of R:

Held, that the proceeding under S. 107 of the Cr. P. Code against the agnates of R, who set up a title by survivorship, was justifiable, R's widow's name having been registered and there

CR. P. CODE, S. 107.

being overwhelming and conclusive evidence in favour of her possession.

An order under S. 107 of the Cr. P. Code can only be passed when there is a finding that the persons sought to be bound down are guilty of wrongful possession and acts committed or sought to be committed by them, which can only be proved by overt acts against such individual.

Where wrongful overt acts are committed or threatened to be committed jointly by a number of persons and not by some of them, the act is really committed severally and jointly by each of them, who become all liable to the penalty of S. 107. 49 I. C. 642 at 645 and 35 Cal. 929 foll. 1 Pat. L. T. 44 rev. (*Jwala Prasad, J.*) *LACAMI SINGH v. EMPEROR.*

1 P. L. T. 681.

Ss. 107, 145 and 439—Proceedings under S. 145—Order directing dropping of proceedings and initiation of proceedings under S. 107—Revision.

By an order of a Magistrate proceedings under S. 145 Cr. P. Code, were dropped because proceedings under S. 107 would meet the case. Proceedings under the latter section were however actually pending. Held, that the High Court would not interfere in revision with the order dropping proceedings under S. 145 (*Chaudhuri and Newbold, J.J.*) *JAARU KHAN v. SARADA CHARAN SIKDER.* 54 I. C. 614 : 21 Cr. L. J. 134

Ss. 107 and 350—Transfer of magistrate—De novo trial—Right of accused.

S. 350 (1) proviso (a) Cr. P. Code, applies to proceedings under S. 107 and the accused in a security case is entitled to a trial *de novo* on the magistrate being transferred (*Walvis, C. J., Ayling and Coutts Trotter, J.*) *ELACURI VENKATACHIMNAIYYA v. EMPEROR.*

43 M. 510

Ss. 107 and 350 (1)—Prov so (a) to S. 350 (1) applicable to proceedings under S. 107 Cr. P. Code. See Cr. P. Code Ss. 4, 107 Erc.

38 M. L. J. 37.

Ss. 107 and 439—Order requiring security—No enquiry—Procedure illegal

It is illegal to make an order requiring a person to furnish security to keep the peace without any inquiry as to whether he was likely to commit a breach of the peace or was otherwise a proper subject for proceedings under S. 107 Cr. P. C. (*Ryves, J.*) *CHANDER SHEKHAR v. EMPEROR* 54 I. C. 411 : 21 Cr. L. J. 59

Ss. 107 and 439—Order for security to keep the peace—Rival religious sects—Interference by High Court, when proper.

If in the case of rival religious sects composing an assembly one set of persons try to force their views on the other with the result that a disturbance of the public peace is probable, an order binding down the former under S. 107 Cr. P. C. to keep the peace will

CR. P. CODE, S. 110.

not be interfered with. Such an order should merely deter them from creating a breach of the peace and continuing to annoy the others at their worship but should not prevent them from exercising the right of worship. (*Adami, J.*) *GURDEO SINGH v. EMPEROR.*

55 I. C. 97 : 21 Cr. L. J. 225.

Ss 107 and 514—Bond for keeping the peace—Person bound over—Suit to enforce right

It was not the intention of the legislature to prevent persons even though bound over under S. 107 of the Cr. P. Code from seeking to enforce their rights in the Civil Court and an order of forfeiture subsequent to their instituting the suit is illegal. (*Wilberforce, J.*) *SITAL v. EMPEROR.* 1 Lah. 310 :

57 I. C. 942 : 21 Cr. L. J. 702.

S. 109 (b)—Ostensible means of subsistence—Satisfactory accounts—Professional cattle dealers—Encamping on open ground.

A group of persons with their families were camping in an open ground in the City of Meerut. They were there for several weeks. The men were run in under S. 106 (b) of the Cr. P. C. It was found that they had money with them, that they were residents of Bindki district Fatepur; that they had money in deposit with bankers there, and that their occupation was to go about selling cattle for about eight months in the year after which they returned to their homes for the rainy season. It appeared that they had arrived at Meerut on their way back from the cattle fair at Garhmukhteswar. It was found that they had done no trade in cattle while in Meerut. Held, that the men had ostensible means of subsistence and had given a satisfactory account of themselves within the meaning of S. 109 (b) of the Cr. P. Code 17 A. L. J. 432, ref. (*Bauerji, J.*) *NANKI v. EMPEROR.* 18 A. L. J. 321 : 55 I. C. 734 : 21 Cr. L. J. 366.

S. 110—Evidence—Rejection of on improper grounds—Effect of.

The mere fact that some of the witnesses produced by a person against whom proceedings have been instituted under S. 110 Cr. P. Code are his caste fellows is not by itself a sufficient reason for discrediting their testimony. (*Kanhaiya Lal, J. C.*) *ROHAN v. EMPEROR.* 54 I. C. 412 : 21 Cr. L. J. 60.

S. 110—Order under — Definite findings—Necessity for.

In arriving at a decision in a case under S. 110 Cr. P. C. the question is not whether the evidence for the defence outweighs the evidence for the prosecution, but whether the latter is sufficient to sustain the case against the accused and the court ought to come to a definite finding on that point. (*N. R. Chatterjea and Cuming, J.J.*) *SADAT ALI v. EMPEROR.* 58 I. C. 826.

CR. P. CODE, S. 110

S. 110—Scope of — Powers under when to be exercised

The powers under S. 110 of the Criminal Procedure Code are to be exercised very sparingly and only in those cases where the evidence is very clear and precise. It was never intended by the Legislature to provide a means of punishment by enacting S. 110 (*Abdul Raoof, J. v. EMPEROR*)

2 Lah L J 237.

S. 110 — Statements of fellow castmen of accused—Value of

The evidence of persons produced in defence is not to be discounted merely because some of the witnesses produced are fellow castmen of the accused (*Kanthaiya Lal, J. v. RAMCHANDRA TEWARI v. EMPEROR*)

22 O. C 375.

Ss. 110 and 112—Notice to show cause—Nature and contents of—Condition precedent to proceeding under S. 110—Revision—New grounds.

Merely informing an accused person that he was suspected to be a habitual thief is not a sufficient notice under S. 112 of the Code. There must be something in the nature of an indictment or charge containing substantial particulars indicating the grounds upon which the police have given information to the Magistrate.

Where the accused persons were arrested as suspected habitual thieves and the Magistrate fixed a date for the production of evidence with the object of issuing a notice under S. 112 but on the date fixed after hearing prosecution evidence at once called upon the accused to swear upon the defence to a charge under S. 110: held, that the procedure was bad and the proceeding must be set aside.

It's only after the Magistrate has made the order required by S. 112, which is really a notice in writing, that the actual hearing under S. 110 can by law take place at all.

A Magistrate should not detain a person under S. 110 unless he has the information upon which he can make the order required by S. 112 10 A. L. J. R. 351 appr.

Applicants in revision should, as a rule, be confined to the grounds upon which the rule nisi is granted. (*Walsh, JJ. v. RAJBANSI T. EMPEROR*)

44 All 646:

18 A. L J 673

Ss. 110, 112 and 115—Persons outside local jurisdiction—Power to entertain police report against—Order under S. 112 not accompanying warrant — Irregularity — General repute—Evidence regarding

It is not illegal for a Magistrate placed in charge of a sub-division or a district in the absence of anything to the contrary, to take proceedings under S. 110 of the Cr. P. C. upon a police report in respect of persons residing outside his local jurisdiction, irrespective of how the police report came before him.

CR. P. CODE, S. 110.

Where a copy of the order made under S. 112 or the Cr. P. C. does not accompany the warrant as required by S. 115, but the order is sent over to the person affected thereby, and there is nothing to show that there was any prejudice, the omission to attach a copy of the order to the warrant is a mere irregularity not fatal to the trial.

In order to establish general repute for the purposes of S. 110 of the Cr. P. C. the evidence of the investigating Police Officer is inadmissible and irrelevant. (*Mullik and Sultan Ahmad, JJ. v. RAMESHWAR DUSADH v. EMPEROR*)

1 Pat L. T 632:

55 I. C 593 : 21 Cr. L J. 321.

Ss. 110 and 117 (4)—Habitual offender—Security for good behaviour—Proof of Association—Police records—Value of—Duty of Judge

In a proceeding against the accused under S. 110 of the Cr. P. Code the Court delivered the following judgment: "The association of the accused or the commission of crime has been established. They are close neighbours and they are found to be implicated in good many cases together."

Held, that it was doubtful whether that finding was sufficient to comply with S. 117 (4) of the Cr. P. Code.

The existence of history sheets kept by the Police or persons proceeded against under S. 110 of the Cr. P. Code is a matter which cannot be taken into consideration by the Court. A Judge should not delegate his judicial functions to the Police. (*Walmsley and Greaves, JJ. v. JOGENDRA KUMAR NAG v. EMPEROR*)

57 I. C 940 : 21 Cr. L J. 700.

Ss. 110 and 118—Evidence against accused—Dacoity cases—Statements of approvers in—Corroboration—General repute—Police suspicion—Evidence of good character.

The police instituted proceedings against the accused under S. 110 Cr. P. C. though they failed to prove his guilt in regard to three specific charges of dacoity.

Held, that the Magistrate was not wrong in initiating proceedings under S. 110 Cr. P. C. but the evidence against the accused must be very satisfactory.

Statements of approvers in different dacoity cases implicating the accused in a proceeding under S. 110 Cr. P. C. ought to be left out of consideration if there is nothing to corroborate them.

Where in a proceeding under S. 110 Cr. P. C. the prosecution witnesses for general repute say that they believe the accused to be a thief or a dacoit but in cross-examination they admit that their suspicion is the outcome of house searches and arrests by the police the accused is entitled to the benefit of the admission by the prosecution witnesses as to the origin of their suspicion. Where there is positive evidence for the defence that the accused is a good man it

CR. P. CODE S. 110.

is not a sufficient reason for casting it aside to say that proof of malice against the accused on the part of the prosecution is wanting (*Walsley and Huda, JJ.*) SURENDRA NATH MANN v. EMPEROR

54 I.C. 778 : 21 Cr. L.J. 170

—Ss 110 and 120—*Rejection of Surety—grounds for Conviction for hurt*

Where the Magistrate rejected a surety on the ground that he had once been convicted of an offence under S. 323, I.P.C.

Held, that although the question whether a surety should be accepted or not is primarily a question for the discretion of the Magistrate, in this case the Magistrate acted unreasonably in not accepting the surety. I.L.R. 26 All 18. (1903) referred to (*Richardson and Graves, JJ.*) BUDHU AHIR v. EMPEROR

25 C.W.H. 140

—Ss 110 and 123 (6)—*Imprisonment—Default of furnishing security*

S. 110, Cr. P. Code is essentially a preventive rather than a punitive provision. The imprisonment awarded in default of furnishing security should in ordinary cases be simple.

Imprisonment of a rigorous character should not be awarded automatically as a general practice. Under S. 125 (6) the Magistrate has to exercise his discretion and decide whether, on the facts of each case the imprisonment should be simple or rigorous. (*Mears, C.J.*) GANDHARAP SINGH v. EMPEROR. 42 All 563:

18 A. L.J. 640 : 57 I.C. 100
21 Cr. L.J. 580

—Ss. 110, 167, 169—*Arrest on suspicion of dacoity—No proof—Detention in custody with a view to proceedings under S. 110 Illegal without arrest under S. 55—Discrediting defence witnesses*

The accused persons were arrested on suspicion in connection with a particular dacoity. The Police failed to find sufficient evidence to justify the suspicion, but continued to detain them in custody with a view to institute proceedings under S. 110 of the Criminal Procedure Code, and obtained an order from a Magistrate directing such further detention. Ultimately a formal report was made by a clever police officer to the Magistrate having jurisdiction in the matter under S. 110, and a formal order was drawn up by him under S. 112 of the Criminal Procedure Code.

Held, that the first Magistrate had no authority to direct the further detention of the accused persons in custody, on a matter different from the dacoity case unless and until they were re-arrested by the police under S. 55 of the Criminal Procedure Code. This irregularity however, was cured when the formal order under S. 112 was passed.

Held, further, that the fact that witnesses called for defence in S. 110 proceedings were castefellows of the accused and had come forward from distant villages to give evidence voluntarily, without being summoned, was no

CR. P. CODE S. 112.

sufficient ground for discrediting their defence (*Piggott, J.J. Renu v. EMPEROR.*

18 A. L.J. 1114.

—Ss 110 (a) and (f) and 117 (3)—*Charges—Evidence necessary to prove—Evidence of reprie—Hearsay evidence—Police reports, value of*

When a person is charged under S. 110 (i) of the Cr. P. Code evidence of general reputation is not enough to prove that he is a desperate and dangerous character. To prove the charge as well as the evidence of specific acts showing that he is a desperate and dangerous character is necessary.

Per Seshagiri Iyer, J.—To sustain a charge under S. 110 cl. (i) to (e) of the Cr. P. Code the evidence must relate to particular instances which have come to the knowledge of the defendant. Evidence relating to mere beliefs and opinion without reference to acts or instances which are the grounds for such opinion are hardly evidence of reputation within S. 117 (3) of the Criminal Procedure Code. Habitual criminality cannot be regarded as established by the repetition of beliefs and opinions.

In proceedings under S. 110 of the Cr. P. Code police evidence should, if not wholly discarded, be allowed to influence the judgment of the Magistrate as little as possible.

Per Moore, J.—Hearsay evidence amounts to evidence of reputations and is admissible for the purpose of proving a charge under S. 110 (a) of the Cr. P. Code. When it is sought to prove the reputation of a person the evidence required is that of respectable persons who are acquainted with the accused and live in the neighbourhood and are aware of his reputation. The test of the admissibility of the evidence of general opinion is whether it shows the general reputation of the accused and it should at least be the opinion of a considerable number of persons. It must not merely be the repetition of what certain persons have said to the witnesses. (*Seshagiri Aiyar and Moore, JJ.*) KOTHAMIDE RANGA REDDI *In re.*

43 M 450 : 38 M L.J. 97 :
(1920) M.W.N. 393 : 11 L.W. 331 :
55 I.C. 722 : 21 Cr. L.J. 354.

—Ss. 110 (e) and (f) and 537—*Accused bound over under S. 110 (f)—Appeal—Filing altered into S. 110. (e)—Effect of.*

The accused was bound over under S. 110 (f) Cr. P. Code on appeal the District Magistrate found S. 110 (e) was more appropriate and reduced the period and the amount of the security.

Held, that insomuch as cl. (f) of the section described the offence in clause (e) in an aggravated form and the accused was not prejudiced there was no ground for interference in revision. (*Mittra, J.*) AZIZUL JABARKHAN v. EMPEROR.

55 I.C. 688 : 21 Cr. L.J. 352.

—S 112—*Order under—Contents of—Defect in order—Effect of.*

CR. P. CODE, S 118.

Where a preliminary order under S. 112 Cr. P. Code merely reproduces the contents of S. 110 without setting forth the substance of the information against the accused, the proceedings under S. 110 cannot be regarded as legal. Where however the defect in the preliminary order did not prejudice the accused in the trial and he let in all his evidence, the proceedings will not be quashed on the ground of defect in the order. (*Seshagiri Iyer and Moore, JJ.*) *RANGA REDDI* *In re.*

43 M. 450 : 38 M. L. J. 97 :
(1920) M. W. N. 398 : 11 L. W. 331 :
55 I. C. 722 . 21 Cr. L. J. 354

S 118—Security for good behaviour—Order of restriction under Punjab Act (V of 1918) if legal.

If a person is required to furnish security for good behaviour under S. 118 Cr. P. C. it is illegal to make an order at the same time under S. 7 of the Punjab Restriction or Habitual Offenders Act restricting his movements. (*Rattigan, C. J.*) *KABI BAKSI v. EMPEROR.* 1 Lah. 100 . 55 I. C. 993 : 21 Cr. L. J. 385

S. 118—Security for good behaviour—Surety—Rejection of—Grounds for.

When an accused person is called upon to produce a surety such surety must be accepted or, if rejected he must be rejected upon tangible evidence recorded and considered by the Magistrate who ordered him to find security.

Where the Magistrate acting upon a police report that a person tendered as surety had once been challenged in a theft case and without taking any evidence rejected the surety as being an unreliable person, it was held that it did not follow that a person who had once been challenged for theft was not a reliable person and that it was not for the surety to prove that he was of good character, but for the Magistrate if he doubts it, to decide them after upon evidence (*Knox, J.*) *MUNSHI SINGH v. EMPEROR.* 18 A. L. J. 324 : 55 I. C. 733 : 21 Cr. L. J. 365.

S. 122—Security for good behaviour Refusal to accept—Surties—Grounds for

Certain persons who were suspected of harbouring outlaws were ordered to execute a personal recognizance for Rs. 100 each and to furnish sureties for the same amount for good behaviour for a period of one year. The sureties offered though solvent and respectable, were not accepted on the grounds that they lived at some distance from the persons bound over and were not in a position to exercise control over the persons bound over and that the outlaws were still at large;

Held, that the sureties offered having been solvent and respectable, the grounds of refusal stated were not sufficient for their non-acceptance as sureties. (*Shah and Hayward, JJ.*) *JESA BHATHA* *In re.* 44 Bom. 385:

22 Bom. L. R. 190 . 55 I. C. 857 : 21 Cr. L. J. 377.

CR. P. CODE, S. 138.

S 123 (3) Default in furnishing security—Imprisonment—Power of Magistrate to award.

A Magistrate has no authority to pass an order for the imprisonment of a person who upon being required to furnish security fails to do so. He should refer the matter to the Sessions Judge and detain the man in prison pending the orders of the Judge. On 24—1—1920 the District Magistrate passed an order against one S requiring him to furnish security for good behavior, and further directed that in the event of failure to find security he would undergo rigorous imprisonment for three years. S not having furnished security he was at once sent to jail. No reference was made to the Sessions Judge till after an appeal had been filed by S. *Held*, that the order of the District Magistrate directing the imprisonment of S for three years was altogether *ultra vires* and must be set aside and that the Sessions Judge should not have refused to entertain the reference because it was belated but should have proceeded in the manner directed by sub-Section (3) of S. 128 of the Cr. P. Code. (*Shadi Lal, C. J.*) *SUNDAR v. EMPEROR.*

57 I. C. 287 : 21 Cr. L. J. 623.

S. 133—Jurors—Report—Absence of some at the time of investigation—Report if can be acted on.

A report of the jurors under S. 133 Cr. P. Code, is defective when any four out of five jurors where present at the time of the investigation. Such a report is illegal and ought not to be relied on. The Magistrate should allow the proceedings to go on with a fresh jury. (*Sanderson, C. J. and Walmsley, J. J.*) *SRIMATI DASYA v. NIBAN CHANDRA GOSE.*

31 C. L. J. 371 : 24 C. W. N. 928 : 56 I. C. 240 : 21 Cr. L. J. 448.

S. 133—Nuisance—Noise—Remedies of injured person.

A noise which is injurious to the physical comfort of the community is a nuisance within S. 133, Cr. P. C.

The existence of an alternative remedy does not deprive a Magistrate of his jurisdiction under S. 133 of the Code of Criminal Procedure. (*Walmsley and Shamsul Huda, JJ.*) *KRISHNA MOHAN BANERJEE v. A K GUHA.*

32 C. L. J. 42 : 57 I. C. 829 : 21 Cr. L. J. 669.

S 133—Order for removal of obstruction to public river—Legality of.

An order directing the removal of a dam constructed across a public river which amounts to unlawful obstruction of the river and causes damage to the lower riparian owners is justifiable under S. 133 Cr. P. Code. (*Kanhaiya Lal, J. C.*) *JAGANNATH v. CHANDRIKA PRASAD.* 54 I. C. 407 : 21 Cr. L. J. 55.

S. 133—Public nuisance—Order on grounds different from those set out in notice—Order relating to mode of carrying on trade and its probable results of trade—Illegality.

CR. P. CODE, S. 133.

An order under S. 133 Cr. P. C proceeding on grounds not covered by the notice issued is illegal.

Held, that at most the objection was to the mode in which petitioners carried on their occupation of manufacturing bricks notwithstanding the occupation itself and that this was not sufficient to bring the case within S. 133 of the Code, 39 P. R. (Cr) 1888; 47 P. R. (Cr) 1888; 17 P. R. Cr. 1888 Ret.

S. 133 relates to an existing state of affairs and not to the possibility of future results (*Bevan Petman, J.*) **GOKAL CHANDO CROWN**.

**1 Lah 163
56 I.C. 446 · 21 Cr L.J. 462**

—**Ss. 133, 135, 138 and 139—Order of first class Magistrate under S. 133—Application for jury—Verdict—Power of first class Magistrate to remit the case thereafter for disposal to second class Magistrate** See (1919) *Dig. Col.* 397: **ANGAPPA MUDALI v. PERUMAL CHETTY.** **43 Mad 316**

—**Ss. 133 and 137—Bona fide claim of right—Order made without direction to establish right in Civil Court within time prescribed—Order made without evidence if valid.** See (1919) *Dig. Col.* 397: **PEARY LAL MULLICK v. SURENDRA KRISHNA MITTER.**

**24 C.W.N. 247 : 54 I.C. 487
21 Cr. L.J. 87**

—**Ss. 133 and 144—Orders under S. 283 I.P.C. and S. 144, Cr. P. Code—Petition of complaint—Non-examination of complainant before local inquiry by another person—Misjoinder of charges**

It is not proper to make an order issuing notice under S. 144 of the Cr. P. Code with respect to another land in the same order sheet, in which the proceedings for obstruction under S. 283 I.P.C. are instituted.

There can be no prosecution under S. 283 I.P.C. simultaneously with a proceeding under S. 133 of the Cr. P. Code. S. 239 is an exception to the general principle laid down in S. 233 of the Code that for every distinct offence there must be a separate charge and trial. The facts and the circumstances, under which that exceptional S. 239 should apply must be clearly proved by the prosecution. The joint trial of different accused persons with respect to different obstructions, when they were not moved for a common purpose, and where no possible combination or concert between them had been shown is illegal.

Quare—Whether S. 233, I.P.C. is inapplicable unless there be any evidence of any danger, obstruction, or injury, having been caused to any particular person. (*Jwala Prasad, J.*) **JITAN v. EMPEROR.** **I P.L.T. 564**

—**S. 144—Temporary orders—Nuisance—Temporary emergency—Orders under section if justifiable**

The applicant owned a house with a compound where, for a number of years past, at

CR. P. CODE, S. 144.

night time, hours were rung on a bell and the watchman in his rounds used to cough to scare away theives and strike his stick on the ground to scare away snakes. The opponent came into the neighbouring house and started a nursing home in December 1917. Neither he nor any inmate of his house complained about these noises till March 1919. Subsequently differences arose between the parties which became accentuated in June 1919, when the opponent's party threw stones into the applicant's compound by way of protest against the above noises and shot a goose of the applicant in his compound. The applicant's party retaliated by striking the bell continuously for some time and throwing back stones. The opponent applied to the Chief Presidency Magistrate to have the above noises stopped under the provisions of S. 144 of the Criminal Procedure Code.

Held, by Shah, J., that though the order was in form within S. 144 Cr. P. C yet it was in substance outside it, inasmuch as the opponent's application to the Magistrate was for the prevention of nuisance not temporarily but permanently.

Held by Hayward, J., that it was difficult to say that the order was not within S. 144: nor was it possible to hold that a temporary injunction should not be passed merely because the dispute demanded a permanent injunction for final settlement. (*Shah and Hayward, JJ.*) **IN RE C.J.R.** **22 Bom. L.R. 157.**

—**Ss. 144 and 145—Dispute as regards land—Propriety of proceeding under S. 144 Cr. P. C.**

Where the dispute concerns a plot of land the only effective way in which it can be settled, so far as the Criminal Court is concerned, is by instituting a proceeding under S. 145 Cr. P. Code and not by that under S. 144 whereby the danger to the breach of peace reverts after the lapse of two months. The practice of resorting to proceedings under S. 144 Cr. P. Code in cases of disputes concerning lands has been all along condemned. (*Jwala Prasad, J.*) **TARAPADA BHATTACHARJI v. EMPEROR.**

**1 P.L.T. 72 : 55 I.C. 193 :
21 Cr. L.J. 241.**

—**Ss. 144 and 145—Dispute as to possession—Decision on documents not inter partes.**

Unless the possession of a part is undisputed S. 144 Cr. P. Code can have no application and a magistrate has no jurisdiction to pass final orders under S. 144.

Where the dispute related to the possession of lands and the Magistrate upon a perusal of certain documents by which other lessees had relinquished their possession in favour of the opposite party passed orders under S. 144 Cr. P. Code against the petitioners who were lessees of the disputed lands.

Held, that the magistrate ought to have instituted proceedings under S. 145 Cr. P. Code

CR. P. CODE, S. 144.

and after taking evidence as to actual possession in respect of the disputed land, decided the case effectively and conclusively, so far as the Criminal Courts are concerned (*Jwala Prasad, J. BHAIRO GOPE v EMPEROR*.

1 P. L. T. 377.
57 I. C. 662 : 21 Cr. L. J. 646

Ss. 144 and 145—Dispute regarding land—Execution of decree—Delivery of possession to one member of the family—Right of others—Cr. P. Code, S. 1/7.

A landlord got a rent decree against the tenants recorded in the Sherists and obtained delivery of possession through the Civil Court in execution of his decree. The Judgment-debtors with other members of the family who were not parties in the rent-decree interfered with the possession of the landlord-purchaser.

Held, that it was not necessary for the landlord to institute his rent suit against all the members of the family but he can sue only those who are recorded in his Sherista as tenants of the holding and that those, who are not impleaded could litigate their title in a civil suit and there being no dispute concerning the lands the Civil Court's decree and delivery of possession thereunder must be upheld by the Criminal Court. The only way to maintain the possession of the auction purchaser is by proceeding under S. 144 or S. 107 and a proceeding under S. 45 was unwarranted there being no dispute as to the possession having been delivered to the purchaser by the Civil Court. (*Jwala Prasad, J. SUKAN SINGH v PRAYAG SINGH*) 1 P. L. T. 81.

(1920) Pat 124 : 57 I. C. 95 :
21 Cr. L. J. 575.

Ss. 144 and 145—Successive orders under S. 144—Legality of dispute concerning land. See CR. P. CODE, Ss 107, 142 AND 145.

1 P. L. T. 44

Ss. 144, 145 and 146—Dispute likely to cause breach of the peace—Order under S. 144 bendency of, if a bar to proceedings under S. 145—Attachment of properties—Receiver—Moveables if affected.

In a dispute between the trustees of a temple as to possession and management of the temple and its properties, an order under S. 144 was passed. During the subsistence of that order, proceedings under S. 145 were initiated and upon a final order the properties, moveable and immoveable were attached and a receiver was appointed to take possession thereof and to make inventory of the same.

Held, that the subsistence in force of an order under S. 144, Cr. P. Code does not take away the power of the Court to take proceedings under S. 145.

The Magistrate has power to appoint a receiver to remain in custody of property attached under S. 145 though the powers of such a receiver may not be the same as that of one appointed under S. 143.

CR. P. CODE, S. 144.

S. 145 of the Cr. P. Code does not authorize a Magistrate to attach moveable properties.

Burn, J.—The mere fact that both parities claim joint possession will not take away the jurisdiction of a Magistrate to pass final orders under S. 146 where only one party is in actual physical exclusive possession.

An attachment of property by a Magistrate under S. 145 or 146 Cr. P. C. is not the same as an attachment by a Civil Court which operates generally as a restraint on alienation but places the property in the possession of the Magistrate who can ordinarily act only through some agent appointed by him. (*Sadasiva Aiyar and Burn, JJ. GOPALA AIYAR v. KRISHNASWAMI AIYAR*) 27 M. L. T. 234 : 11 L. W. 459 : 54 I. C. 473 : 21 Cr. L. J. 73.

Ss. 144, 145 and 148—Scope of—Difference in—Information, significance of—Omission to specify—Order as to costs

There is a cardinal difference between a proceeding under S. 144, Cr. P. Code and that under S. 145. The former has nothing to do with the question of possession, it relates only to a temporary order in emergent cases of apprehended danger, while the latter, on the other hand, relates to a dispute concerning possession over land or water.

A Magistrate does not act illegally in starting proceedings under S. 145, Cr. P. C. after final order has been passed under S. 144, the former being rather the more appropriate proceeding to finally settle the dispute in the criminal Courts.

The word "information" in S. 145 is not used in any technical sense; it is used to include the knowledge of the Magistrate derived by reading the petitions filed in the case and S. 144.

Where the parties fully knew what the disputed plots were, the mere fact that the magistrate did not specifically mention them does not vitiate the order.

Under S. 148, Cr. P. Code the Magistrate can award costs to the successful party, but it should be based on proper materials, *viz.*, the actual costs incurred as pleader's fees and costs of witnesses. (*Sultan Ahmad, J. JHAMAN MAHTON v. THAKURI MAHTON*.)

1 P. L. T. 369 : 57 I. C. 449 :
21 Cr. L. J. 625.

Ss. 144 and 439—Final order—Sale of property kept in custody—Revision.

Once a Magistrate passes his final order under S. 144 of the Cr. P. Code, he is *functus officio* and cannot make any order with respect to the sale of property kept in custody. Such an order is not an executive order and is *ultra vires* and open to revision by the High Court. (*Sultan Ahmad, J. MUSSAMMAT MAINABATI v. DULLA MANJHI*.)

57 I. C. 817 : 21 Cr. L. J. 657.

CR. P. CODE, S. 145.

S. 145—Breach of the peace—Essentials to give Jurisdiction—Description of subject matter to be precise.

Where in his order directing the issue of a proceeding under S. 145, of Cr. P. C., the Magistrate was of opinion that there was no likelihood of a breach of the peace but as the dispute was one relating to possession, S. 145, Cr. P. C. was applicable.

Held, that the Magistrate acted without jurisdiction inasmuch as the basis of jurisdiction cases of this character is the likelihood of a breach of the peace.

Absence of a clear specification of the subject matter of dispute in the proceedings drawn up is a serious defect. (*Chaudhuri and Newbould, JJ.*) **SRI NARAYAN MUKERJEE v. SATISH CHANDRA GHOSHAL**

24 C. W. N. 621 : 31 C. L. J. 369 : 57 I. C. 161 : 21 Cr. L. J. 593.

S. 145—Dispute as to possession—Civil Court's decree and delivery of possession under O. 21, R. 35 C.P.C.—Proceedings under S. 145 not proper.

Where a decree-holder has obtained delivery of possession under O. 21, R. 35 C. P. C. in execution of his decree the judgment-debtor is precluded from raising the question and a magistrate acts illegally and without jurisdiction in starting a case under S. 145 Cr. P. Code and not upholding the Civil Court's decree and delivery of possession which under O. 21, R. 35 is not symbolic but actual 26 Cal 605; 29 Cal 208; 20 C. W. N. 796; 53 I. C. 882; foll.

An intermediate holder between the decree holder and the judgment-debtor may properly contest the question of delivery of possession which will have to be adjudged by the Magistrate as also when possession is delivered under O. 21, R. 36, if the other ingredients necessary for a case under S. 145, Cr. P. Code be established; but the legislature never intended multiplicity of fruitless action among parties the dispute between whom has been finally adjudged by the Civil Court. (*Sultani Ahmad, J.*) **BEHARI GIR v. RANI BHUBNESHWARI KUEN**

5 P. L. J. 104 : 1 P. L. T. 9 : (1920) Pat. 79 : 54 I. C. 984 : 21 Cr. L. J. 200

S. 145—Dispute concerning several items—Right claimants—Scope of inquiry

Where an inquiry under S. 145, Cr. P. Code embraces several items of property, the actual possession of which is contested by various claimants, the Magistrate has no jurisdiction to decide the question of actual possession, without giving all the claimants an opportunity of being heard.

In an enquiry under S. 145 of the Cr. P. Code the Magistrate's failure to record his reasons holding that there is a likelihood of a breach of the peace, though a culpable irregularity does not affect his jurisdiction. (*Aylng and Coutts Trotter, JJ.*) **VELU MALAVARAYAN v. KUPPUSWAMI PILLAI.**

12 L. W. 315.

CR P CODE, S. 145.

S 145—Ex parte order—Return of service by peon—A ticket—Allegation of non-service—Duty of magistrate—High Court.

Where in a proceeding under S. 145, Cr. P. C. the first party having been absent though there was a written return or service on them by the peon, the Magistrate issued an order in favour of the second party upon taking evidence of that party and subsequently on the first party having filed an application to the Magistrate for rehearing of the case on allegation of non-service of the notice of the order under Cl. (1) of S. 145, the Magistrate refused the said application on the ground that the case could not be revived, and thereupon the first party moved the High Court.

Held, that the Magistrate should not have rejected the application for re-opening of the case without satisfying himself about the truth or otherwise of the allegation of the first party as to the notice not having been served and in these circumstances the High Court directed that the matter be reheard by the Magistrate. (*Walmsley and Greaves, JJ.*) **KALI CH. KAPALI v. ABDUL LASKAR**

24 C. W. N. 902 : 32 C. L. J. 14 : 58 I. C. 928.

S. 145—Immoveable property—Offerings at a Karbala—Right to, dispute regarding—Counsel—Right of, to be heard.

A dispute with respect to the collections and offerings at a Karbala cannot be the subject-matter of a proceeding under S. 145 Cr. P. C. 38 Cal. 387; 37 Cal. 378 followed.

The words "hear the parties" in S. 145 (4) mean "hear the evidence of the parties and arguments of Counsel or Pleaders appearing on their behalf or argument addressed by themselves" and if the magistrate refuses to hear arguments he is not complying with the provisions of the law, wh'ch are imperative.

11. Cal 762, foll (Sultan Ahmed, J.) GHULAM SIBRAIN v. MUSSAMAT KONIZ KHATTON. 5 P. L. J. 246. 1 P. L. T. 608 : 57 I. C. 92 : 21 Cr. L. J. 572.

S. 145—Joint and exclusive possession.

In proceedings under S. 145 of the Cr. P. Code the dispute must be between parties each of whom claims exclusive possession of the property in dispute. Where the dispute is between parties, one of whom claims joint possession of the disputed property, proceedings under S. 145 cannot be drawn up. **4 C. W. N. 426 ; (1919) Pat. 470 foll (Adami, J.) SHAM LAL MANTON v. RAJENDRA LAL.**

1 P. L. T. 594 : 58 I. C. 513 : 21 Cr. L. J. 790.

S 145—Cr. P. Code—Joint possession, right to—Effect of.

S. 145 Cr. P. C. has no application where the contesting parties are entitled to joint possession. (*Sadasiva Iyer and Buria, JJ.*) **GOPALA IYER v. KRISHNASWAMI IYER.**

54 I. C. 473.

CR. P. CODE, S 145.

S. 145—Likelihood of breach of the peace—Order under S 144, effect of—Revision—Interference by High Court, when justified

It is competent for a Divisional Magistrate to initiate proceedings under S. 1'5 Criminal Procedure Code during the substance of an order passed by a Sub-Magistrate under S 144 of the Code.

The High Court will not ordinarily interfere with a preliminary order under S 145 Cr. P. Code except where such order is manifestly illegal (*Sadasiva Iyer and Burn, JJ*) *Gopal Iyer v. Krishnaswami Iyer*.

27 M L T. 234:
11 L. W. 459 : 54 I C. 473 :
21 Cr. L. J. 73.

S. 145—Order directing parties to be in joint possession of disputed properties—Legality. See (1919) Dig. Col. 394. JOGESWAR DAS v EMPEROR.

54. I. C 1008: 21 Cr. L. J. 224

S. 145—Order of Magistrate—Powers of High Court in revision—Superintendence—Government of India Act, S. 107.

The doctrine of inherent power of Court is applicable in criminal cases.

The High Court is competent, in the exercise of the power of superintendence vested in it under S 107 of the Government of India Act, 1915, to set aside proceedings instituted without jurisdiction by a subordinate Court under S. 145 of the Cr. P. Code; such power of superintendence can be exercised notwithstanding S. 435 (3) of the Cr. P. Code. The High Court may make consequential or incidental orders in the exercise of its powers of superintendence over subordinate Courts.

The High Court has inherent power to give directions as to the disposal of property which was attached and has been dealt with by a subordinate court in the course of proceedings instituted without jurisdiction under S. 145 of the Code of Criminal Procedure.

Proceedings under S. 145 of the Cr. P. Code were instituted on the ground that a dispute likely to cause a breach of the peace existed between landlord and tenants relating to the right to grow and collect lac on plum trees standing on lands occupied in the holdings of the tenants. The District Magistrate attached disputed trees with lac thereon, pending decision. At a later stage, by order of the District Magistrate, the lac was collected and stored in the godowns of the landlord and a portion thereof was sold by auction. The Magistrate was held to have no jurisdiction to take action under S. 145 or to make the orders he had passed.

Held also that the lac and the sale proceeds of the portion already sold, after deduction of incidental charges, should be kept in the custody of the Court pending decision by a Civil Court on the question of title to the lac. (*Mookerjee*,

CR. P. CODE, S. 145.

O C J. Fletcher, N R. Chatterjee, Richardson and Ghose, JJ) *ALI MUHAMMAD MANDAL v. PIGGOT* 32 C L J 270.

S. 145—Police report—Evidence taken by police—if admissible in evidence—Benami title decision on—Bengal Land Registration Act

The Police report and the evidence contained therein about the factum of possession is inadmissible in evidence in a proceeding under S 145 Cr. P. Code except for the purpose of initiating the proceeding.

A summary decision under the Land Registration Act is entitled to the same respect as a Civil Court decree in a S 145 proceeding on the question of possession. 6 Cal 835 foll.

But where there was no dispute in the Land Registration case and the question of *benami* is raised the principle becomes inapplicable and the Court must decide the question of possession on the entire evidence adduced in the case. The question of *benami* can, however, be left for decision by a competent Civil Court. (*Jwala Prasad, J*) *KULBANS NARAIN v. RAMSIDH SINGH* 1 P L T 501:

58 I C. 159 : 21 Cr. L. J. 735.

S. 145—Possession—Evidence of—Land Registration Act, Ss. 52 and 78—Effect of registration—Possession of strangers.

A summary adjudication upon the question of possession by the Land Registration Officer under Act VII, B. C. of 1876 is entitled to the same respect on the question of possession in a proceeding under S. 145 of the Cr. P. Code as the decree of a Civil Court. 6 Cal 835 foll.

But where, however, there was no adjudication of possession by the Revenue courts in the land registration proceedings, and they refused to register the name of a particular party on the ground that he was neither a proprietor, manager, nor mortgagee, the Magistrate in a proceeding under S. 145 of the Cr. P. Code was bound to determine as to which of the parties was in actual and physical possession of the property in dispute. (*Jwala Prasad, J*) *BABULAL MISSIR v. MANAGER, BETIA ESTATE.* 1 P. L. T. 588: 58 I C. 513. 21 Cr. L. J. 785.

S. 145—Possession—Right to carry on boring operations—Complicated question of title—Constructive possession—License—Profits à prendre.

Per Chaudhuri, J. (Newbould, J. dissentiente): In proceedings under S. 145 Cr. P. C. the Court has to find actual possession.

*Per Newbould, J.—*S 145 of the Code is applicable where the report shows that there is a likelihood of a breach of the peace and the dispute concerns land. If the Magistrate is unable to find possession he will act under S. 146, if necessary.

*Per Chaudhuri, J.—*When a party claims under a document or agreement the right of doing certain things over a large extent of

CR. P. CODE, S. 145.

territory, the performance of acts under such alleged right in one portion of the ground over which the right extends although it may be good and sufficient for the purpose of keeping alive that right so as to be an answer to the plea of limitation raised in a Civil suit is not of itself a sufficient possession on which the Magistrate's order under S. 145 may be based for the purpose of forbidding in a distant locality acts not necessarily in conflict with such possession though at variance with the right. The Magistrate is not the proper forum for determining such question. 23 W. R. Cr. 45 followed.

In such a case the Magistrate is to proceed under S. 107 of the Code of Criminal Procedure.

Proceedings under S. 146 of the Code with regard to a large mouza will cause great injustice to the persons in actual occupation. It is not the function of a criminal court to go into complicated questions of title and possession including that of adverse possession and of constructive possession of wide areas inferred from actual possession of limited areas. (*Chaudhuri and Newbould, JJ.*) THE INDIAN IRON AND STEEL COMPANY v. BANSO GOPAL TEWARI.

32 C L J. 54.

S. 145—Previous proceedings under—No civil suit—Subsequent proceedings if barred.

When a party has been declared to be in possession as a result of under S. 145 proceedings fresh proceedings under the same section cannot be started aganst him unless it can be shown that the order has been duly vacated or possession has been amicably surrendered. But if no order under S. 145, Cr. P. Code is made in respect of a larger area which includes the smaller area covered under the previous proceedings which were not challenged by civil suit the order will be set aside regarding the common area but will stand good regarding the lands not covered by the previous adjudication.

1 P. L. W. 642, toll. (*Adami, J.*) BAJIT LAL PATHAK v. HARAKH SINGH.

1 P. L. T. 557.

S. 145—Proceedings under—Evidence—Right to begin—Question of possession—Duty of Court to determine.

Although there is nothing in S. 145 Cr. P. Code, to suggest which party should begin the case, it is usual for the second party to begin his evidence.

In proceedings under S. 145 the Court is in no way concerned with the question of title, it has merely to consider and investigate the question of possession. (*Das, J.*) RAM PRASAD SAHU v. EMPEROR.

54 I C 616 :
21 Cr. L. J. 136.

S. 145—Proceedings under—Police report not disclosing breach of the peace—Question of title.

Where the police report, which was the basis of the proceedings under S. 145 Cr. P.

CR. P. CODE, S. 145.

Code did not disclose that there was any apprehension of the breach of the peace, the magistrate's order was without jurisdiction.

A magistrate in a proceeding under S. 145 is entitled to look into the question of title only to arrive at a satisfactory conclusion on the question of possession. He has got no power to decide the question of title or to look into it apart from the question of possession. (*Sultan Ahmad, J.*) RAM SAROOP CHOWDHRY v. MUSAMAT DARSANO KOER. 1 P. L. T. 387 : 58 I. C. 252 : 21 Cr. L. J. 748.

S. 145—Proceedings under—Omission to add necessary party—Failure of Justice—Difference of opinion between members of division Bench—Letters patent (Cal.) Cl. 36—Cr. P. Code Ss. 435 und 439 not applicable—opinion of senior Judge if prevails. See (1919) Dig. Col. 397. MOHAMMAD BEWA v. MRIJAN SARDAR. 54 I. C. 169 : 21 Cr. L. J. 25.

S. 145 and 107—Scope of See SUPRA S. 107. 1 P. L. T. 681.

Ss. 145 and 144—Dispute as to land—Propriety of proceedings under S. 145 rather than under S. 144 Cr. P. C. See Cr. P. CODE Ss. 144 and 145. 1 P. L. T. 72.

Ss. 145 and 146—Property under attachment—Inherent power to release.

Petitioner presented an application to the Magistrate praying for the release of a house which had been attached in a proceeding under S. 145 Cr. P. C. on the ground that the other claimant, had died and that he, petitioner was his heir. The Magistrate refused this application as no judgment of a competent court was produced as required by S. 146 Cr. P. C.

Held, that S. 146 Criminal Procedure Code, is not exclusive, and that an attaching Magistrate has inherent power to release from attachment. When all likelihood of a breach of the peace has disappeared all necessity ceases for maintaining any orders on account of the dispute. 24 W. R. 14 (Cr.) 25 W. R. 68 (Cr.) referred to. (*Wilberforce, J.*) KHUSHI RAM v. THE CROWN. I Lah 451.

Ss. 145 and 147—Dispute regarding right to moor boats and dry fish nets—Section if applicable.

The subject matter of a dispute likely to cause a breach of the peace was a right of easement claimed by one party to moor their boats against, and to spread and dry their fishing nets, on the land of another party. There was no claim by the former to possession of the land. *Held*, that proceedings cannot be taken under S. 145 of the Cr. P. Code, S. 147 of the Code is the appropriate section under which proceedings should be taken. (*Walmsley and Greaves, J.J.*) KALI KUMAR DAS v. BEJOY GOBINDA MITRA.

57 I. C. 937 : 21 Cr. L. J. 697.

Ss. 145 and 147—Immoveable property—Trees—Lac—Produce of land.

CR. P. CODE, S. 145.

Trees may come within the definition of land in S. 145, Cr. P. Code as being "produce of land" but lac which is not a part of the tree itself but is a parasitic growth on the tree, is not "crop" or a "produce of land".

Proceedings held under S. 145, Cr. P. Code in respect of lac are therefore without jurisdiction.

The definition of "land" as including "crops" or the "produce" is for the purpose of S. 145 only and there is no such definition in connection with S. 147 (*Chatterjee and Cuming, JJ v. ALI MOHAMED MONDAL v. FAKIRUDD MUNSHI.*)

24 C.W.N. 1039
32 C.L.J. 255:

Ss. 145 and 435 (3)—Omission to state that there was a likelihood of a breach of the peace—Revision—Powers of High Court.

Where proceedings are in intention, in form and in fact proceedings under Chapter XII of the Criminal Procedure Code by a Magistrate duly empowered to act under the chapter, the High Court has no power to send for those proceedings or to revise them.

The mere omission by a Magistrate in his order initiating such proceedings upon a police report called for by him to state that he was satisfied from the police report that there was a likelihood of a breach of the peace cannot vitiate the proceedings and debar them, in law, from being proceedings under Chapter XXI of the Criminal Procedure Code. (*Gokul Prasad, J. v. MUSSAMMAT HAR PIANI v. NATHE LAL*)

18 A.L.J. 1140.

Ss. 145, 435 and 439—Possession of part of immoveable property directed to be given—Revision—Interference.

There was a dispute between parties concerning certain immoveable and moveable property. The police acting under S. 149, locked up the moveables in two rooms in the house. A first class Magistrate took proceedings under S. 145, Cr. P. Code and came to the conclusion that possession was with the applicant and ordered that the property be made over to her but the two rooms were to remain locked up unless the rights of the parties about the moveables were determined by Civil Court.

Held, that the Magistrate was not competent to pass the order in question.

In a proper case the High Court can call for the records of the proceeding of Magistrates under S. 145, Cr. P. and interfere in revision with his order. (*Piggot and Walsh, JJ. v. MAHADEV v. BENI PRASAD.*)

42 All. 214 : 18 A.L.J. 171 :
55 I.C. 194 : 21 Cr. L.J. 242.

Ss. 145 and 439—Failure to consider oral and documentary evidence.

A magistrate fails to exercise his jurisdiction in a proceeding under S. 145, if he does not consider both the oral and documentary evidence in the case. A decision based simply upon the consideration of only oral or the

CR. P. CODE, S. 145.

documentary evidence is liable to be set aside and the order under S. 146, based upon it is bad. (*Sultan Ahmad, J. v. KAILASHBHARI LAL v. JAI NARAIN RAI*)

1 P.L.T. 291 :
(1920) Pat. 288 : 57 I.C. 169 :
21 Cr. L.J. 601.

Ss. 145 and 439—High Court—Difference of opinion—Opinion of senior judge prevails.

In cases of difference of opinion in matters coming under S. 145, Cr. P. C. the senior judge's opinion prevails, as the jurisdiction exercised by the High Court is under S. 107, of the Govt. of India Act and not under Ss. 435, and 439, Cr. P. Code. (*Chaudhuri and Newbould, JJ. v. THE INDIAN IRON AND STEEL COMPANY v. BANSO GOPAL TEWARI.*)

32 C.L.J. 54.

S. 145, and 439—Proceedings under—Omission to add party Revision—Powers of High Court—Govt. of India Act S. 107 Difference of opinion between members of division bench—Procedure—Letters Patent Cl. 36.

S. 439 Cr. P. Code does not apply to a proceeding under S. 145 which is outside S. 435. On a difference of opinion on revision of such a proceeding, the opinion of the senior Judge prevails under cl. 36 of the Letters Patent.

27 Cal. 892 ; 40 Cal. 477, 500 relied on.
15 C. L. J. 337 ; I L.R. 39 Mad. 750 approved 15 Bom. 452 diss.

Sembte : If it be held that cl. 36 applies only to original or appellate jurisdiction the Court should act in the absence of any provision to the contrary upon the principle underlying the clause.

The power of the High Court to interfere under S. 107 of the Government of India Act in cases under S. 145 Cr. P. C. is not confined to questions of jurisdiction alone. It may also interfere when the Magistrate has acted with illegality or material irregularity and a party has been prejudiced thereby. 33 Cal. 68 foll.

Per Newbould J. The omission to add a party in a proceeding under S. 145 of the Code is not an error of jurisdiction. 30 Cal. 155 foll.

There was no irregularity in the present case resulting in such material prejudice as would justify the Court's interference.

Per Shams-ul-Huda J. Where the refusal of the Magistrate to add a party on his application to the proceeding has resulted in a serious failure of justice the Court will set aside the order under S. 145. *Held*, that there was such failure of justice in the case. (*Newbould and Shamsul-Huda, JJ. v. MARIAM BEWA v. MERJAN SARDAR.*)

47 Cal. 438 :
31 C. L. J. 183.

Ss. 145 and 439—Proceedings under—Rival lessees from competing claimants—Proceedings under S. 145 proper—Interference by High court—Govt. of India Act, S. 107.

CR. P CODE, S. 145.

The High Court can interfere with orders under S. 145 of the Cr. P. Code only under the powers vested in it by S. 107 of the Government of India Act.

A Magistrate can take action under S. 145 Cr. P. Code when rival lessees claiming under separate trustees to be in actual possession are likely to cause a breach of the peace (*Sadasiva Aiyar and Burn, JJ.*) **GOPAL AIYAR v. KRISHNASWAMY IYER.** 27 M. L. T. 234 : 11 L. W. 459 : 54 I. C. 473 : 21 Cr. L. J. 78.

Ss. 145 (4) and 439—Dispute as to possession—Refusal of magistrate to take oral evidence—Legality of—Revision—Interference by High Court—Evidentiary value of documents.

In possession proceedings relating to a tract of forest land, the Magistrate inspected the locality, and, being of opinion that the inspection completely satisfied him as to the point in issue *viz.*, the fact of actual possession of the disputed property, declined to the oral evidence and passed an order after discussing the documentary evidence (showing title to the property) filed in the case. Held, that the Magistrate acted without jurisdiction in refusing to take evidence and that the High Court had Jurisdiction to set aside his order, 36 M. 275 Ref. 31 M. 82 Rel. on.

Documents showing title to the property in question should only be utilised for the purpose of elucidation of the oral evidence that may be admitted in the case and should not by themselves, be used for concluding the question as to possession. (*Seshagiri Aiyar and Moore, JJ.*) **SRIMANAVEDAN RAJA v. PARAPRAVAN MOIDU.** 38 M. L. J. 73 : 27 M. L. T. 85 : (1920) M. W. N. 133 : 11 L. W. 285 : 54 I. C. 254 : 21 Cr. L. J. 46.

S. 145 (4)—Moveables—Attachment of, illegal.

S. 145 Cr. P. C. does not empower the court to attach moveables (*Sadasiva Iyer and Burn, JJ.*) **GOPALA IYER v. KRISHNASAMI IYER.** 27 M. L. T. 234 : 11 L. W. 459 : 54 I. C. 473 : 21 Cr. L. J. 73.

S. 145 (4)—Order under—Duty of court to find out actual possession with party—Inquiry—Irregularity.

Before making an order under S. 145, Cr. P. Code the Magistrate must comply with the provisions of Chapter XII of the Code and must himself make an enquiry.

Where therefore the Magistrate sent a petition made to him under S. 145, Cr. P. Code to a Zaildar for a local enquiry and report and on receiving the report read it out to the petitioner and told him not to build upon the land in dispute.

Held, that the order was wholly bad in law. (*Abdul Raoof, J.*) **YAR ALI SHAH v. RAMIM SHAH.** 57 I. C. 83 : 21 Cr. L. J. 563.

CR. P. CODE, S. 164.

S 146—Attachment under—Effect of—Appointment of receiver.

An attachment under S. 147 Cr. P. C. implies the taking and keeping possession of the attached property by the magistrate. A receiver appointed under S. 145 has only power to take possession of the properties and submit an inventory thereof. (*Sadasiva Iyer and Burn, JJ.*) **GOPALA IYER v. KRISHNASAMI IYER.** 27 M. L. T. 234 : 11 L. W. 459 : 54 I. C. 473 : 21 Cr. L. J. 78.

S 148 (3)—Costs—Order for, Subsequent to passing of Judgment.

In a case under S. 145 an order for costs may be made subsequent to the passing of the judgment. All that the law requires is that the order should be by the same Magistrate. An application for costs if not made at the time judgment is delivered should be filed within a reasonable time. (*Sancton, C. J. and Walmsley, J.*) **NAFAR CHANDRA PAL CHOUDHURY v. SIDHARTHA KRISHNA MIZUMBAR.** 24 C. W. N. 672 : 31 C. L. J. 34 : 58 I. C. 255 : 21 Cr. L. J. 751.

Ss. 162 and 439—Criminal Trial—Police diaries—Statement in—Omission in copy—Discovery—Right to cross examine witness.

During the pendency of an appeal against a conviction it was discovered that an accused person was furnished with materially inaccurate copies of the statements of prosecution witness recorded in the police diary. The accused on the discovery of the mistake applied to have that witness recalled for the purpose of re-cross examination in order generally to impeach his credit.

Held, that the accused was entitled to have the witness recalled for re-cross-examination and that the court below committed a grave error of law in refusing the application, which justified interference by the High Court in revision. (*Atkinson and Adami, JJ.*) **SADANAND MISRA v. EMPEROR.** 55 I. C. 337 : 21 Cr. L. J. 289.

S. 162—Provisions of—Police cannot evade by recording as the first information a statement obtained after the investigation has commenced.' See EVIDENCE ACT, SS 32 (3) AND 33. 16 N. L. R. 30.

Ss. 164, 364 and 533—Oral Confession made before a Magistrate — Such Confession inadmissible in evidence—Evidence Act S. 91. See (1919) Dig. Col. 403. EMPEROR v. MARUTU SANTU MORE. 54 I. C. 465 : 21 Cr. L. J. 65.

S. 164—Statement recorded in the presence of the police—Value of.

A statement cannot be said to be properly recorded under S. 164 Cr. P. C. if a police officer is present at the time and is allowed to put questions to the witness.

CR. P. CODE, S 179

Statements of witnesses who do not say anything about the commission of an offence which they have witnessed to anybody till the time of their examination by the Police and who on being questioned previously stated that they knew nothing cannot be relied on (*Martineau, J.*) **INDER SAIN v. EMPEROR.**

56 I C 210 : 21 Cr L J 418

—**Ss. 179 and 81 (2)—Criminal breach of trust—Essentials of offence committed in a certain place—Trial at another jurisdiction.**

The gist of the offence of criminal breach of trust is the dishonest misappropriation, conversion or disposal of the property. The loss to the complainant is a consequence of the breach of trust and not necessarily an integral part of it.

The complainant authorised the accused to withdraw certain money of his at Rangoon and to transmit it to him at Maymyo. The accused withdrew the money but failed to remit as directed. He was prosecuted for criminal breach of trust at Maymyo.

Held, that inasmuch as the money had been received retained and misappropriated at Rangoon, the Rangoon Courts alone had jurisdiction to try the case. (*Pratt, J. C.*) **ABDUL SALAM v. RAMNEWAL SINGH**

54 I. C 677 : 21 Cr L J 149

—**Ss. 179 and 181 (2)—Forum—Offence under S. 403 I. P. C.—Place of misappropriation or detention or of intended payment**

Where the accused took the money from the complainant at Raniganj and deposited it with a certain firm at Barh and after withdrawing it at Barh misappropriated and did not return it back to the complainant's master at Mansuranganj Patna city and the complaint was lodged before the sub-divisional officer, Patna City.

Held, that the offence under S. 403 I. P. C. is complete the moment the accused receives or retains the money with a dishonest motive of appropriating it or converting it into his own use, and the failure to return it to the complainant's master at Patna City was not an essential ingredient for the offence of misappropriation.

S. 181 (2) controls S. 179 of Cr. P. C., and there being no allegation that any part of the money was received or retained within the jurisdiction of the Patna City the offence could only be enquired into and tried by the Criminal Court exercising jurisdiction at Barh, and the sub-divisional Magistrate, Patna City had no jurisdiction to entertain the complaint.

21. C. W. N. 573, foll.; 35 All 29, and 34 All 487 ref. (*Jwala Prasad, J.*) **GOKKARAN LAL v. SARJU SAW.**

1 P. L. T. 200 : 56 I. C 775 : 21 Cr L J 519.

—**S. 180—Jurisdiction—Non-British Subject—Receipt of Stolen property—Offence—House-breaking in British India—Jurisdiction of British Courts,**

CR. P. CODE, S 190.

The accused was a subject of the Kapurthala State and the stolen property was found in his possession in that state. He was prosecuted under S. 47 I. P. C. for an offence of house-breaking which took place in Jullunder District. The learned Sessions Judge considered that no offence of house-breaking was made out but that the accused was guilty of an offence under S. 411.

Held, that a non-British subject retaining stolen property in a Native State is not amenable to British Courts and that the Jullundur Courts had no jurisdiction. **9 A 522; 16 P. R. 1830 Cr. 21 P. R. 1833 Cr. 101, (Wilberforce, J.J.) MUHAMMAD HUSSAIN v. EMPEROR.**

2 Lah. L J. 348

—**S 188—Offence—Commission of in Native State—Trial in British India when permissible—Certificate of political agent if necessary. See (1919) Dig. Col 404. EMPEROR v. NANDU.**

42 All 89.

—**S. 190—Cattle Trespass Act, S. 20—Offence—Cognizance of, by magistrate—Authorisation of Magistrate. See (1919) Dig. Col. 405. EMPEROR v. VISHVANATH VISHNU JOSHI.**

44 Bom 42. 54 I C 495 : 21 Cr. L. J. 95.

—**Ss. 190, 200 and 537—Scope of—Cognizance of offence on complaint—Omission to examine complainant on oath. See (1919) Dig. Col 405. MANGU KOERI v. EMPEROR.**

1 P. L. T. 346.

—**Ss 190 (B), 191—Police report—Meaning of—Application by police inspector, sub-inspector to Magistrate stating facts disclosing offence under S 155 I. P. C.—Complaint—Non examination of complainant—Police Act S. 24—Duties of police officers.**

A magistrate cannot take cognizance of an offence under S. 190 (c) Cr. P. Code without complying with the provisions laid down in S. 191.

The term 'police report' in clause (b) of S. 190 is not confined only to a report submitted in respect of a cognizable offence under S. 173, Cr. P. Code or to reports submitted under Chapter XIV of the Code.

20 Bom. 169 ; 1 P. L. T. 73 ; 32 Mad. 3 diss.

11 A L J. 331 ; 27 1. C. 145 ; 1 Cr. I J. 1047 ;

23 C. W. N. 481 ; 46 Cal 807 foll.

Under S. 4 (h) a 'complainant' does not include a 'police report' and therefore under S. 190 (b) the Magistrate can take cognizance of an offence upon a police report, without examining the police officer on oath under S. 200, Cr. P. Code.

Under Chap. XIV S. 154 the police is bound to investigate into the information relating to cognizable offences but not in respect of a non-cognizable one, unless he is required to do so by the magistrate when he has to submit the report under S. 173 which is not confined to reports on cognizable cases only.

CR. P. CODE, S. 190.

But the police officer has a general power under S. 24 of the Police Act, to lay any information before a Magistrate irrespective of the special provisions laid down in Chap. XIV of the Cr. P. Code, and the 'term police' report in S. 4 (b) and S. 190 (b) of the Cr. P. Code, refers to all kinds of reports submitted by the police whether under Chap. XIV of the Cr. P. Code, which deals with reports upon information lodged to the police or under S. 24 of the Police Act, when he investigates into offences of his own initiative or without any information lodged by any person provided the report states facts which *prima facie* constitute an offence. The non-examination is a mere irregularity. 1 Pat. L. T. 349 referred to.

When the accused persons were charged under S. 155, I. P. C. and some of them were also charged for rioting, which was the found-action of the former.

Held, that the case under S. 455, I. P. C. should be postponed till the disposal of the rioting case. (*Jwala Prasad, J.*) SHEIKH ABDUL ALI v. EMPEROR.

1 P. L. T. 446

—**Ss. 190 (b) and 473—Police report—Meaning of—Report treated as complaint—Omission to examine complainant—Effect of.**

The police report referred to in S. 190 (b) of the Cr. P. Code means a police report as contemplated under S. 173 of the Code i.e., a report in the course of an investigation of a cognizable offence 26 Bom. foll. If the report be called a complaint under S. 190 (a) the non-examination of the complainant on oath was fatal to the prosecution case. 2 Pat. L. J. 667 Ref. (*Das, J.*) RAM LAL v. EMPEROR.

1 P. L. T. 73 : 55 I. C. 285 : 21 Cr. L. J. 269.

—**S. 190 (1) (c)—District Magistrate—Cognizance of offence of information received by him in another capacity—Legality of.**

S. 120 (1) (c) of the Code of Criminal Procedure empowers a District Magistrate to take cognizance of an offence upon information received by him in another capacity *viz* as President of the District Board. 10 C. W. N. 775 not foll. 37 C. 221, referred to (*Abdur Rahim and Spencer, J.J.*) SUNDARESAN *In re.*

43 Mad. 709 : 38 M. L. J. 219 : 27 M. L. T. 123 : (1920) M. W. N. 230 : 11 L. W. 355 : 55 I. C. 684.

—**Ss. 191 and 556—Cantonment magistrate—Direction to prosecute—Trial and conviction by, improper. See CANTONMENT CODE Ss. 92 AND 197.** 55 I. C. 1002.

—**Ss. 192, 202, 203 and 437—Dismissal of complaint—Order for further enquiry—Inquiry made over to Subordinate Magistrate—Competency of the latter to try and dispose of the case. See Cr. P. CODE Ss. 202, 233, etc.**

5 P. L. J. 47.

CR. P. CODE, S. 195.

—**Ss. 192 and 529—Transfer of criminal case by sub-divisional magistrate to whom it had already been transferred—Irregularity.**

The transfer by a Sub-Divisional Magistrate of a case under S. 192 Cr. P. Code when the case has already been transferred to him by the District Magistrate is a mere irregularity covered by S. 529 of the Code, (*Coutts and Adami, J.J.*) YUSUF ALI KHAN v. EMPEROR.

54 I. C. 496 : 21 Cr. L. J. 98.

—**Ss. 195 and 476—Criminal proceedings during pendency of Civil case—Indissolvability of.**

Per Jenkins, C. J.—Though no universal rule can be laid down it is ordinarily undesirable to institute criminal proceedings until determination of civil proceedings in which the same issues are involved. It is too well known to need elaboration that criminal proceedings lend themselves to the unscrupulous application of improper pressure with view to influencing the course of the civil proceedings and beyond that there is the mischief of criminal proceedings being instituted with an imperfect appreciation of the facts where they have not been ascertained in the more searching investigation of a Civil Court. (*Jenkins, C. J. and Woodroffe, J.J.*) J. M. LUCAS v. OFFICIAL ASSIGNEE OF BENGAL.

24 C. W. N. 418:

56 I. C. 577 : 21 Cr. L. J. 481.

—**S. 195—Order under—Contents of—Ground for upholding sanction.**

An order under S. 195, Criminal Procedure Code, granting sanction to prosecute should contain materials to justify the sanction; an order giving no reasons whatsoever for granting sanction, cannot be upheld.

The mere fact that sanction is granted to the Public Prosecutor because the Magistrate disbelieved the prosecution story, is not a sufficient ground to justify an order upholding sanction. (*Sultan Ahmad, J.J.*) RAMANI MOHAN GHOSH v. THE PUBLIC PROSECUTOR OF BHAGALPURE.

1 P. L. T. 521:

55 I. C. 207 : 21 Cr. L. J. 255.

—**S. 195—Perjury—Sanction—Appealate Court.**

Where a trial Court which has the advantage of seeing a witness in the box, and is cognisant of the full facts in connection with the case, refuses to sanction the prosecution of the witness, the Sessions Judge should not unless a clear case is made out against the witness, too readily adopt a different view and grant sanction. (*Jwala Prasad, J.J.*) NIRGHIN MAHTON v. EMPEROR. 56 I. C. 680 : 21 Cr. L. J. 500.

—**S. 195—Sanction—Alteration of an age certificate filed with an application for appointment as patwari before Collector in administrative capacity—Prosecution—Sanction—whether necessary. See (1919) Dig. Col. 408. EMPEROR v. SANTI LAL.**

42 All. 130.

CR. P. CODE, S. 195.

S. 195—Sanction—Application for Undue delay in passing order.

Upon an application by the decree-holder for sanction to prosecute the judgment-debtors and certain other persons for wrongful resistance to execution, the trying court after adjourning the case from time to time for the examination of witnesses, ultimately disposed of the matter after examining the peon only. Sanction to prosecute was given but nearly six months from the date of the application. In the circumstances of the case, the High Court strongly condemned the delay which had taken place in disposing of the application. (Sanderson, C. J., and Welbourn, J. J.) MIRAN LIL SAHA v. SAROJENDRA NATH SAHA & COUDAUJI 47 Cal 741 : 24 C.W.I. 743 : 58 I.C. 821

S. 195—Sanction—Court which can grant—Duty of Court.

Sanction to prosecute for perjury can only be granted by the court which tried the case in which he alleged a perjury was committed. Sanction, therefore, by a sub-court and Magistrate in respect of a statement made in the Court of Session is bad in law. In granting sanction to prosecute, it is incumbent on the court to inquire whether the statement made was material to the result of the case, and whether there is a *prima facie* case and reasonable prospect of conviction. The Court should also consider whether a prosecution is desirable in the public interests (Raymond, A. J. C.) KUMJALI PARIMAL v. EMPEROR.

58 I.C. 515 : 21 Cr. L.J. 787.

S. 195—Sanction order—Grounds for—Contents of order—Interference.

An order under S. 195, Cr. P. Code granting sanction to prosecute should contain materials to justify the sanction; an order giving no reasons whatever for granting sanction cannot be upheld.

The mere fact that sanction is granted to the public prosecutor because the Magistrate disbelieved the prosecution story, is not a sufficient ground to justify an order upholding sanction. (Sultan Ahmed, J.) RAMANI MOHAN GHOSE v. PUBLIC PROSECUTOR OF BAGALAPUR 1 Pat. L.T. 521 : 55 I.C. 207 : 21 Cr. L.J. 255.

Ss. 195 and 476—Sanction—Principle regulating grant of—Private spite

Sanction to prosecute should not be granted where it appears that the object of the applicant is not to vindicate public justice but to satisfy private spite. If the Court thinks that proceedings ought to be instituted in the interests of justice, it should proceed under S. 477 Cr. P. C. (Rytes, J.) SHEIKH SANAOO v. EMPEROR. 54 I.C. 416 : 21 Cr. L.J. 64.

Ss. 195 and 537—Sanction proceedings of—Nature of—Notice—Appeal.

An order under S. 195, or the Criminal Procedure Code sanctioning or refusing sanc-

CR. P. CODE, S. 195.

tion to prosecute is appealable. Proceedings under S. 195, of the Criminal Procedure Code are of a judicial character, and no order should be passed in such proceedings without giving notice to the party in those proceedings to whose prejudice the court decides to pass an order. An omission to give such notice is a defect of procedure resulting in a failure of justice, and consequently the defect is not curable by S. 537, of the Code (Wazir Hasan J.) MUHAMMAD YUSUF ALI v. MUHAMMAD YAKUB ALI. 23 O.C. 222 : 21 Cr. L.J. 642 : 57 I.C. 658.

S. 195—Sanction to prosecute—Application after expiry of period for second appeal—Delay—Notice to opposite party if necessary—Sanction granted by judge who did not hear the case if good.

The fact that an application under S. 125, Cr. P. C. to prosecute albeit is not made immediately after the decree of the first court but after the decision of an appeal against that decree and on expiry of the period for filing a second appeal, is not fatal to the grant of the application it being undesirable to take criminal proceedings in relation to a matter which is still the subject of civil litigation. It is inexpedient to try a case when the result is likely to interfere with the due course of justice.

The issue of a notice is not essential to the validity of a sanction given under S. 195, though if such notice is issued the opposite party may be able to show that he and the applicant are on bad terms.

Where there is a *prima facie* strong case for granting sanction on the fact that such sanction is granted by a Judge who did not hear the case is no ground for revoking the sanction or for holding that the sanction is bad. (Drake-Brockman, J. C.) NATHURAM v. BAREY. 55 I.C. 107 : 21 Cr. L.J. 235.

Ss. 195 and 476—Sanction under S. 195—Subsequent direction of prosecution—Last order if sustainable—Undue delay in passing order under S. 476 if fatal.

Where in the course of an execution proceeding the Subordinate Judge sanctioned under S. 195 Cr. P. C. prosecution of the petitioners under S. 186 I.P.C. on the application of the decree-holder and on appeal the District Judge refused to revoke the sanction but at the same time observed that the prosecution ought to be conducted by the Crown and not by any private party and that before criminal proceedings were actually instituted the Subordinate Judge should be moved to take action under S. 476 Cr. P.C. and thereupon on the application of the decree-holder the Subordinate Judge directed the prosecution of the Petitioners under S. 186 I.P.C. under S. 476 Cr. P.C. and it was contended that the order was without jurisdiction as there was no judicial proceedings pending at the time.

CR. P. CODE, S. 195.

Held, that it is not necessary that there should be in existence a judicial proceeding in the course of which an order under S. 476 should be passed; all that is required by law is that the order should be passed with respect to an offence which may have been committed before it, or brought to its notice in the course of a judicial proceeding. The offence under S. 185 I. P. C. was brought to the notice of the Subordinate Judge in course of the S. 195 proceeding which was a judicial proceeding.

The necessity of a judicial proceeding pending in the course of which an order under S. 476 is passed arises in exceptional cases where for instance an officer who heard the judicial proceeding in the course of which the offence was brought to his notice is succeeded by another officer. The subordinate Judge has power to pass the order under S. 476 Cr. P. C. after the lapse of sanction under S. 195 Cr. P. C. (*Sultan Ahmed, J.*) *BIRAN RAI v. EMPEROR.*

(1920) **P. 205 : 1 P. L. T. 331 :**
56 I. C. 553

S. 195 (1)—Offence under S. 209—Sanction when to be granted.

In the absence of any direct evidence the existence of circumstantial evidence is sufficient to justify an order granting sanction to prosecute (*Imam, J.*) *GAURISHANKA v. PRASAD SAHU v. BALDEO KOERI*

54 I. C. 884 : 21 Cr. L. J. 180.

S. 195 (1) (B)—Execution proceedings—Not pending—Sanction not necessary.
See *PENAL CODE*, Ss 192 AND 193
22 Bom. L. E. 1239.

S. 195 (1) (b)—Perjury—Sanction to prosecute for, when to give.

No person should be convicted under S. 195 I. P. C. unless it be proved that it is impossible that the statements of the party accused made on oath can be true.

Sanction to prosecute for perjury should not be lightly given in cases where the court would have to determine the question by merely weighing the evidence on both sides. (*Das, J.*) *PADARATH SINGH v. RATAN SINGH.*

5 P. L. J. 23 : (1920) Pat 140 : 1 Pat L. T. 458 : 54 I. C. 673 : 21 Cr. L. J. 145

Ss. 195 (1) (c) and 145—Sanction—Dispute as to possession of land—Document produced by one party—filed in court by police—Sanction in respect of document unnecessary.

The principle upon which S. 195 Cr. P. C. is based is that the sanction of the court is necessary for a prosecution when there has been a voluntary obstruction or attempted obstruction of the course of justice in a prosecution before it.

In a dispute as to the possession of land between an auction-purchaser and another claimant the latter produced a certain docu-

CR. P. CODE, S. 195.

ment before the police officer who was inquiring into the dispute. The officer filed it with his report and subsequently referred to it in his deposition. The party who had produced the documents withdrew from the proceedings and the Magistrate without referring to the document recorded a finding that possession was with the auction-purchaser. The latter moved the Magistrate to impound the document and to sanction the prosecution of his opponent. The latter resisted the application on the ground that sanction was not necessary. The auction-purchaser filed a complaint against him under Ss. 463, 471 and 476 I. P. C.

Held, that it could not be said that the document which came into court merely because it was attached to the police report prior to the proceedings was "produced" in the proceeding.

Assuming however that it was "produced," the prosecution of the accused who had no hand in its production was not barred by reason of the absence of sanction.

The accused had not in any way abused the authority of the Court and therefore the sanction of the Court was not necessary.

The words "has been committed by a party" in S. 195 (1) (c) can only mean "is alleged to have been committed by a party" (*Foster and Sultan Ahmad, J.J.*) *JANARDHAN THAKUR v. BALDEO PRASAD SINGH.* **5 P. L. J. 135 : 1920 Pat 137 : 1 Pat L. T. 129 : 55 I. C. 288.**

S. 195 (1) (4), (5), (6) and (7)—Sanction—Refusal by magistrate of second class—Grant of sanction by magistrate specially authorised to hear appeals—Omission to specify particulars.

A magistrate specially authorised to hear appeal under S. 407 (2), Cr. P. Code, is not a Court to which an appeal ordinarily lies under S. 195 (7) from a magistrate exercising second class powers.

30 C. 59 : 3 N. L. R. 50 Foll.

A sanct. on under S. 195, Criminal Procedure Code, refused by a Magistrate of a second class cannot be granted under sub-section (6) by a Magistrate specially empowered to hear appeals under S. 407 (2) of the Code.

30 C. 59 : 3 N. L. R. 50 Foll.

The sanction was liable to be cancelled for the further reason that the Magistrate failed to specify what the false statements were on account of which he granted sanction and the court before which and the occasion on which the offence complained of was committed. (*Wilberforce, J.*) *MUSAMMAT JIWANI v. EMPEROR.* **2 Lah. L. J. 660.**

S. 195 (5)—Appellate Court—Power to take additional evidence.

The Appellate Court which under S. 195 Cl. 5 has power to revoke or grant sanction has power to take fresh evidence if it thinks necessary. 33 Mad. 90 ; 30 Mad. 311. explained

CR. P. CODE, S. 195.

(*Sadasiva Aiyar and Napier, JJ.*) *In re SUBCASARI.* 12 L. W. 605

—S. 195 (6) and (7)—Application to Superior Court—Nature of—Appeal—Order Revision—Transfer of magistrate—Jurisdiction to grant sanction.

An application to the superior court, under S. 195, cl. (6) Cr. P. C. is not an appeal. 11 A. L. J. 11 not foll.

No application in revision lies to the High Court under S. 195 Cl. (6) Cr. P. C. from an order of the Sessions Judge passed thereunder on an application to revoke a sanction given by a Magistrate.

A Sessions Judge writing a judgment in such cases should not merely write the word "Rejected". Such practice strongly disapproved. A Magistrate to whom the application for sanction was originally made can grant it although on the date on which he passed the order he has been placed in charge of another sub-division within the same District (*Knox, J.*) *MUSAMMAT CHHOTI v. KHACHERU*

42 All. 649 : 18 A. L. J. 758 : 58 I. C. 250 : 21 Cr. L. J. 746.

—S. 195 (6)—Order by Munsif refusing sanction to prosecute—Confirmation by Dt. Judge—Appeal—Power of High Court—Revision.

It is only when a sanction to prosecute given by the first court is revoked by the appellate authority referred to in clause (6) of S. 195 of the Code of Criminal Procedure or when a sanction refused by the first court is granted by such appellate authority that the order of the appellate authority can be said to be an order refusing or giving sanction as the case may be. And therefore it is only when the appellate authority gives or refuses a sanction which has been refused or given by the first court that the appellate order is appealable under clause (6). The High Court following the practice of the Calcutta High Court might interfere in revision with an order of the Dt. Judge confirming a sanction given by the Munsif. 11 C. W. N. 192; 2 C. L. J. 222; C. 477 foll.; 30 M. 382; 10 C. W. N. 1026 : 34 C. 551 : 37 C. 13 Ret. Das, J.) *PADARATH SINGH v. RATAN SINGH*.

1 Pat. L. T. 458 : 5 P. L. J. 23 : (1920) Pat 140 : 54 I. C. 673 : 21 Cr. L. J. 145.

—Ss. 195 (6) and 476—Sanction to prosecute—Expiry of period—Order directing prosecution under S. 476 if legal.

Sanction to prosecute was granted by a Munsif. On appeal to the District Judge it was found that more than six months had elapsed since the date of the sanction; the District Judge accordingly revoked the sanction. But directed the prosecution of the accused under S. 476 Cr. P. C.

Held, that the order of the District Judge was illegal and must be set aside.

CR. P. CODE, S. 197.

S. 476 Cr. P. Code must be read consistently with S. 195 of the Code. (*Das, J.*) *LALJI TEWARI v. EMPEROR.* 5 P. L. J. 58 :

1 P. L. T. 147 : (1920) Pat 125 : 54 I. C. 894 : 21 Cr. L. J. 190

—S. 195 (6)—Sanction to prosecute—Order passed by first class magistrate—Appeal—Jurisdiction of Additional Sessions Judge.

An Additional Sessions Judge can, under S. 195 (6) Cr. P. C. grant or revoke a sanction which has been refused or granted by a Magistrate of the first class. (*Macleod, C. J. and Heaton, J.*) *IN RE SIKANDARKHAN MAHOMEDKHAN*. 44 Bom. 877 :

22 Bom. L. R. 200 : 55 I. C. 862 : 21 Cr. L. J. 382.

—Ss. 195 (6) and 7—Sanction—First class munsif—Appeal—Jurisdiction.

As appeals from the order or decree of a Munsif ordinarily lie to the District Court and only in special cases to the Senior Subordinate Judge, the Munsif is subordinate to the District Court within S. 195, Cr. P. C. and it is only the District Judge who could hear appeal from an order giving or refusing to give sanction under that section 11 C. 458, foll. 39 C. 774 ; 13 Cr. L. J. 296 Ret. (*Scott-Smith, J.*) *SUNDAR SINGH v. PHUMAN SINGH*. 2 Lah. L. J. 415 :

56 I. C. 591 : 21 Cr. L. J. 495.

—S. 195 (6)—Superior Court—Powers of—Remand.

A superior court before which an application comes under S. 195 (6) Cr. P. Code has no power to remand the case for further inquiry but it has, nevertheless, inherent power to make an inquiry itself and to proceed in accordance with law (*Roc and Sir Ali Imam, JJ.*) *BALDEO KOERI v. LAKSHMI NARAYAN KUER*. 1 Pat. L. T. 627 : 56 I. C. 511 : 21 Cr. L. J. 479.

—S. 195 (7)—Appeal—Order by judge in chambers—Directing prosecution.

No appeal lies from an order of a Judge in Chambers of the Punjab Chief Court sanctioning the prosecution of a person in respect of allegations made by him in an affidavit presented to the Judge. (*Shadi Lal and Le Rossignol, JJ.*) *RAMJI DAS v. EMPEROR*. 1 Lah. 259 : 57 I. C. 176 : 21 Cr. L. J. 608.

—S. 197—Order for prosecution—Direction to police to prosecute, if sufficient.

No form is necessary for an order for sanction to prosecute under S. 187, Cr. P. C. Where a Magistrate after fully considering the charge against an accused person and consideration of all the materials of case, makes the papers over to the Police with a view to prosecute the accused under S. 409 I. P. C. the order is in substance a sanction under S. 197 of the Code. (*Mullick and Sultan Ahmed, JJ.*) *SARWAN v. EMPEROR.* 57 I. C. 104 : 21 Cr. L. J. 584.

CR. P. CODE, S. 197.

S. 197—Village magistrate—Complaint of offence under Ss. 167, 211 468 and 471 I. P. C. in case pending before him—Sanction if necessary—Proceedings without sanction void ab initio.

A Village Magistrate preparing a record alleged to be false, relating to a case which was actually pending before him, is a Judge and acts as such. Sanction under S. 197 Cr. P. Code is necessary before any court can take cognizance of the offence of which he is accused in connection with it. Proceedings taken without such sanction are void *ab initio* and must be set aside. 32 Mad. 255 dist (*Spencer and Krishnan, JJ.*) SUBBIAH PILLAI v. EMPEROR.

(1920) M. W. N. 7 : 55 I. C. 105 : 21 Cr. L. J. 233.

S. 197 (1) Subordinate official—Meaning—if Sanction required.

An official is subordinate to the authority which appoints him and which has the power to dismiss him. No set form of sanction is required by S. 197 (1) of the Criminal Procedure Code. (*Chavis, J.*) C. A. HEYMERDINGER v. EMPEROR.

58 I. C. 344 : 21 Cr. L. J. 760.

Ss. 200, 213 and 436—Case triable by Sessions Court—Discharge of accused by magistrate—Commitment to sessions ordered by Dt. magistrate—Duty of magistrate.

If a magistrate holding an inquiry into a case triable by a Court of Session had certain evidence put forward by witnesses which would make out a *prima facie* case, it is his duty to make an order of commitment. It is not open to him, in commenting upon the truth or otherwise of the depositions made to him to discuss the probabilities of the evidence being true.

Where in such a case he accused is discharged by the District Magistrate. The Magistrate has power to examine the evidence and if he finds a *prima facie* case established against the accused to make an order of commitment to the Court of Session. (*Adami, J.*) BALAMAKUND DAS v. EMPEROR.

54 I. C. 986 : 21 Cr. L. J. 202.

Ss. 200 and 537—Complainant—Non examination of—Conviction—Propriety of.

The mere omission of the Court to examine the complainant under S. 200 Cr. P. Code does not vitiate a trial when it is not shown that the accused have been, in any way, prejudiced thereby or there has been a failure of justice and when the accused did not take any objection at an earlier stage before conviction particularly when the complainant was examined and cross-examined at length during the course of the trial.

The procedure laid down in S. 200 ought to be strictly complied with, as it embodies a very valuable safeguard, which the legislature has

CR. P. CODE, S. 202.

provided and it must be scrupulously observed and insisted upon.

51 I. C. 465 ; dis. 1 P. L. J. 592; 49 I. C. 616 ; 11 Mad. 44 rel.

(1911) 2 W. N. 326 ; 10 I. C. 156 at 158 ; 25 I. C. 977 ; 48 I. C. 582 ; 9 All. 666; 37 All. 628 ; 15 C. W. N. 481 ; and 23 C. W. N. 484 foll.

3. C. W. N. 87 ; 30 Cal 923; 18 All. 221 ; 2 P. L. J. 653 expl. and dist. (*Jwala Prasad, J.*) EMPEROR v. HEMEN GOPE.

1 P. L. T. 349 : 58 I. C. 459 : 21 Cr. L. J. 779.

Ss. 200 and 203—Complaint—Offence under S. 283, I. P. C.—Rejection of complaint.

Where a petition, stating that an obstruction to a public path had been caused, had been filed before a Magistrate, not signed by anybody and the Magistrate without examining the complainant on oath under S. 200 of the Cr. P. Code sent it on for enquiry by a third person, upon receipt of whose report, the Magistrate examined the complainant on oath and issued process against the accused.

Held, that the petition which was unsigned could not be treated as a complaint and there was no provision in the Cr. P. Code authorizing the Magistrate to send it on for enquiry by a third person before examining the complainant on oath and the complainant having not stated on oath about the obstruction on the road, the accused could not be convicted under S. 283, I. P. C. (*Jwala Prasad, J.*) JITAN v. EMPEROR.

1 P. L. T. 564.

Ss. 202 and 204—Cognisance of case—Complaint—Power of magistrate to issue summons—Enquiry if necessary.

A Magistrate has full power upon receipt of complaint to issue a summons to the person accused if he believes in the truth of the complaint. If he finds there are good grounds for proceeding, it is not necessary for him to call for an enquiry beforehand. (*Adami, J.*) SHEIKH ASLUL KHALIQUE v. SURJA SINGH.

54 I. C. 1004 : 21 Cr. L. J. 220.

Ss. 202 and 203—Complaint against police officer—Dismissal on police report without evidence—Improper exercise of discretion.

Where there is a complaint against a police Officer a Magistrate does not exercise a proper discretion in dismissing it under S. 203 Cr. P. C. On the mere report of a local investigation by a superior officer of police, the magistrate should himself hear the witnesses on whom the complainant relies to establish the truth of his allegation, and give his best consideration to their statements along with the report of the local investigation. (*Piggot, J.*) HARIHAR PRASAD v. EMPEROR.

55 I. C. 679 : 21 Cr. L. J. 343.

Ss. 202 and 203—Complaint against police officer—Full investigation by magistrate himself necessary.

CR. P. CODE, S. 202.

A complaint making grave criminal charges against a police officer was made by a young woman to a District Magistrate. The Magistrate took her statement but not in detail with reference to her allegations, and sent the complaint for enquiry to the superintendent of police. Held that complaints making serious allegations against a police officer should not be dealt with under Ss. 202 and 203 Cr. P. Code and that the Magistrate should have fully examined the complainant and proceeded to investigate the matter himself promptly and very fully and that he should not have sent the case for enquiry to the police. (*Knox, JJ*) MUSSAMMAT SHAMA v. EJAZ AHMAD

18 A. L. J. 731:
57 I. C. 665 : 21 Cr. L. J. 649.

—Ss. 202, 203 and 476—*Complaint against police officer—Investigation by another police officer—Dismissal of complaint—Prosecution of complainant under S. 211, I. P. C.*

Where a complaint is made against an officer of police, it is improper to direct another Police Officer to conduct the investigation. The investigation should be conducted by the Magistrate receiving the complaint or by some other Magistrate.

When a complaint is dismissed upon the report of the Investigating Officer without taking the complainant's evidence, it is improper to direct the prosecution of the complainant under S. 211, I. P. C. (*Tudball, J.*) MEWA LAL v. EMPEROR.

18 A. L. J. 620 :
56 I. C. 64 : 21 Cr. L. J. 416.

—Ss. 202, 203, 234 and 437—*Dismissal of complaint—Order for further inquiry made over to Subordinate Magistrate—Competence to try and dispose of the entire case.*

A complaint was dismissed by the sub-Divisional Magistrate to whom it was made and on the motion of the complainant the Sessions Judge ordered "further enquiry to be made into the complaint." The record of the case and this order were forwarded to the District Magistrate "for information and compliance." The latter ordered that the judicial enquiry directed by the Session Judge should be held by another Magistrate with first class powers.

Held, that the latter had jurisdiction to hold an inquiry as to whether a *prima facie* case had been made out against the accused and having found that a *prima facie* case had been made out he had jurisdiction to try and dispose of the case himself. (*Jwala Prasad, J.*) RAM BARAI SINGH v. RAM PRATAB R.M.

5 P. L. J. 47:
57 I. C. 162 : 21 Cr. L. J. 594

S. 202—*Police enquiry—Value of Evidence of complainant to be received.*

The police enquiry contemplated by S. 202 C. P. C. cannot take the place of such evidence as the complainant may desire to produce before an adjudication is made on his or her

CR. P. CODE, S. 210.

complaint. Such an enquiry can be ordered before evidence is recorded to enable the Magistrate to determine how far the complaint was *prima facie* well founded.

When the Magistrate decides to record the evidence himself he should complete the enquiry and determine upon the evidence adduced how far the complaint is borne out. (*Pandit Kanhaiya Lal, J.*) MAHADEVI v. RAM SAHAI.

22 O. C. 321.

—S. 203—*Dismissal of complaint—Revival of proceedings on second complaint—Propriety*

A Magistrate who has dismissed a complaint under S. 203 Cr. P. C. can revive the proceedings upon a second complaint, if he considers that there are good grounds for so doing. (*Knox, J.*) JAIKISHAN v. KALLA.

55 I. C. 859 : 21 Cr. L. J. 379.

—S. 203—*Dismissal of complaint—Subsequent complaint on same facts before successor of magistrate.*

The fact that a complaint has been dismissed by a Magistrate is no bar to the entertainment of a second complaint upon the same facts by his successor, (*Piggott, J.*) MOHAN SINGH v. EMPEROR.

58 I. C. 687

—S. 203 and 403—*Dismissal of complaint, whether fresh Complaint can be entertained by another magistrate applicability of S. 403.*

S. 403 Cr. P. Code does not apply to dismissal of complaint under S. 203 Cr. P. Code and a fresh complaint on the same facts can be entertained. 28 Cal. 652 ; 29 Cal. 726 ; 29 M. 126 ; 2 Pat. L. J. 34 foll.

When a complaint has been dismissed under S. 203 a fresh complaint on the same facts can be entertained by another magistrate. (*Jwala Prasad, J.*) SHEO GOBIND SINGH v. EMPEROR.

1 P. L. T. 293:

57 I. C. 820 : 21 Cr. L. J. 660.

—S. 209—*Cause triable by sessions—Discharge by magistrate.*

The complainant filed a petition alleging that she was beaten by the accused and some of her property was taken away by them. The District Magistrate on a preliminary enquiry found that it was probable that the woman was ill treated by some of the accused while others knew all about the affair but discharged them. Held, that the case was one eminently triable by a Court of Session and the District Magistrate ought to have committed it to that court. (*Knox, J.*) MAKHNI v. FARZAND ALI.

18 A. L. J. 232 : 55 I. C. 478 :
21 Cr. L. J. 318.

—Ss. 210 and 436—*Enquiry under chapter 18—Discharge of accused—Dt. Magistrate ordering committal to session—Power of High Court in revision.*

Where a Magistrate, who held an enquiry under Chapter XVIII of the Code of Criminal Procedure, which related to enquiries into

CR. P. CODE, S. 215.

cases triable by a Court of Session found that the case for the prosecution had not been proved and discharged the accused, and the District Magistrate ordered him to be committed to the Court of Session, on the ground that he had been improperly discharged, and it was contended that the Magistrate was not justified in law in so discharging the accused and that his only duty was to record evidence and find out if *prima facie* case had been made against him and then to commit him to the Court of Sessions.

Held.—Under S. 210 of the Code of Criminal Procedure, the Magistrate had power to weigh the evidence and discharge the accused if the evidence was found to be unworthy of credit. 35 Bom. 163, 37 All. 355; V. 12 C.W.N. 117, followed.

The High Court could go into evidence in order to find out whether the order passed by the District Magistrate under S. 436 directing the commitment of the accused was proper or not. (*Jwala Prasad, J.*) SHEIKA TINCOURI v. EMPEROR. 1 P.L.T. 153 : 55 I.C. 600 : 21 Cr. L.J. 328.

—**Ss. 215 and 478**—High Court—Judge trying original Civil Suit—Order of commitment by—Appealability of Order—Grounds for—Letters Patent cl. 15. See (1919) Dig. Col. 421. VENKATAGINI AIYAR v. N. W. FIRM. 43 Mad. 361 : 54 I.C. 172 : 21 Cr. L.J. 28

—**Ss. 216 and 217**—Committing magistrate—Right of to summon witnesses before sessions court—Delay in appearance—Prosecution under S 174, I.P.C.

It is the duty of the committing magistrate to see that all the evidence is produced before the Sessions Court, the words ‘when called upon’ in S. 217 Cr. P. Code implying the power to summon witnesses. Under S. 174 I. P. C., the offence is complete, if the accused does not appear in response to a summons legally served upon him and issued by a competent authority.

The fact that the form of the summons was one under S. 252 Cr. P. Code which is in practice used for sessions case as well, did not affect the legality of the summons, if it specified clearly the time and place for appearance. (*Jwala Prasad, J.*) AJODHYA PRASAD SAHA v. EMPEROR. 1 P.L.T. 342 : 58 I.C. 62 : 21 Cr. L.J. 718.

—**Ss. 227, 229 and 222**—Sessions trial—Material alteration of charge at the close of trial—Prejudice.

At the trial of a person in a court of session if it is found at the conclusion of the trial that the charges as framed disclose no offence against the accused, it is illegal and prejudicial to the accused to alter or amend the charges and to convict him thereon without affording him an opportunity of meeting the altered or amended charges. The fact that the accused cross examined the prosecution witnesses to prove the unsustainability of the charges

CR. P CODE, S. 233.

as originally framed is no ground for holding that by substantially altering the charges the accused was not prejudiced.

A Court of Session is not a court of original jurisdiction and though vested with large powers of amending and adding to charges can only do so with reference to the immediate subject of the prosecution and committal and not with regard to a matter not covered by the indictment (*Seshagiri Aiyar and Moore, JJ.*) MUTHU GOUNDAN v. EMPEROR.

27 M.L.T. 272 : (1920) M.W.N. 149 : 11 L.W. 317 : 54 I.C. 409 : 21 Cr. L.J. 357.

—**Ss. 233 and 235**—Joint trial of five accused—Defamatory statements by several witnesses in the course of an enquiry—Joint trial illegal. See EVIDENCE ACT, S. 132.

18 A.L.J. 940.

—**Ss. 233 and 239**—Counter Cases—Simultaneous trial if valid and proper.

A simultaneous trial of two counter cases is not prohibited under the Cr. P. Code. S. 233 and 239 are inapplicable as a simultaneous trial is not a joint trial; But in certain cases and under certain circumstances simultaneous trials might be irregular and improper but that would not entitle the accused to have the whole trial set aside unless it was clearly shown that the procedure adopted had prejudiced him in his defence. (*Jwala Prasad, J.*) DHAKO SINGH v. EMPEROR.

1 P.L.T. 498 : 58 I.C. 243 : 21 Cr. L.J. 739.

—**Ss. 233 and 439**—Joint trial—Receipt of stolen property at different times—Separate charge in respect of each article.

Several persons were charged with receiving stolen property being the proceeds of a single burglary at different times.

Held, there should be a separate charge in respect of each of the stolen articles and each of the accused should be tried separately. In such a case a joint trial of the accused is illegal and objection to the trial may be taken for the first time in revision in the High Court. (*Jwala Prasad and Adami, J.J.*) PADMANABA PATNAIK v. EMPEROR. 57 I.C. 283 : 21 Cr. L.J. 619.

—**Ss. 233, 235 and 239**—Joint trial of several accused—“Same transaction”—Meaning of—Common design and purpose.

The general law as to the trial of accused persons is embodied in S. 233 Cr. P. C. which provides for separate trial of each accused person for every distinct offence, and the exceptions are laid down in Ss. 235 and 239, which must strictly be construed so as not to defeat the right of independent trial conferred by the general law.

If persons have been wrongly tried together in respect of offences, which cannot be jointly tried together legally in point of law, the conviction so obtained against them is illegal.

CR. P. CODE, S. 233.

and void. It is not a mere irregularity, it is a question of substance and not of form.

The phrase 'in the same transaction' in S. 233 suggests not necessarily proximity in time so much as continuity of action and purpose, and the foundation for the procedure laid down for joint trial of several persons is their association concurring from start to finish to attain the same end. Community of purpose or design and continuity of action are essential elements of the connection necessary to link together different acts into one and the same transaction.

29 Bom. 449. 30 Bom. 49. 33 Mad. 502 followed.

When A, B and C were tried jointly and committed. A having been charged under S. 354 I. P. C. for having committed indecent assault upon the complainant's wife, and B and C under S. 323, I. P. C. for having caused hurt to the complainant and there was no evidence to show that there was any continuity of action or purpose between the act or acts committed by A, B, and C or any association between them for a common purpose in execution of a common design.

Held, that the conviction of A, B, and C in a joint trial was illegal and unsatisfactory (*Atkinson and Adami, JJ.*) *TEPANIDHI GOBIND CHANDRA BHARATI v. KING EMPEROR.* 5 P. L. J. 11 : 1 P. L. T. 180. : 54 I. C. 769 : 21 Cr. L. J. 161.

—**Ss. 233 and 435—Theft of two articles—Single trial.**

Two of the accused were charged with having stolen two articles, one a box and another a bicycle. The theft was committed as part of the transaction of rioting. The main charge against the accused was one under S. 147, I. P. C. The second charge against two of them was in respect of the theft of the box and the bicycle.

Held, that the second charge on the face of it charged the theft, of the two articles as one offence and did not include two distinct offences so as to contravene S. 233 of the Cr. P. Code (*Sanderson, C. J. and Walmsley, J.J.*) *BEJOY KRISHNA MUKERJI v. SATISH CHANDRA MITTRA.* 57 I. C. 922 : 21 Cr. L. J. 682

—**S. 234—Distinct offences—Joint trial—Several accused**

S. 234 Cr. P. C. only applies to the trial of a single person for separate offences of the same kind, and not to cases in which more persons than one are tried jointly. (*Pratt, A. J. C.*) *NGA SAN PA v. EMPEROR.*

58 I. C. 522 : 21 Cr. L. J. 794

—**S. 234—Offence under S. 401 I.P.C.—Acts of theft and association during a period exceeding one year.**

S. 234 Cr. P. C. does not apply to a single charge under S. 401 of the Penal Code of belonging to a gang of persons associated for the purpose of habitually committing theft

CR. P. CODE, S. 236.

between January 1911 and September 1917. The charge relates to one offence only, though based on evidence of several offences of theft and various acts of association during such period. The gist of the offence under S. 401 is association for the purpose of habitually committing theft or robbery, and habit is to be proved by the aggregate of acts (*Huda and Dival, JJ.*) *KASEM ALI v. EMPEROR.*

47 Cal. 154 : 31 C. L. J. 192 : 55 I. C. 994 : 21 Cr. L. J. 386.

—**S. 235—Joinder of charges—Offences under Ss. 411, 414 and 429, I. P. C.—No prejudice.**

There is no illegality in joining a charge of receiving stolen property with one for cheating, if the acts were part of the same transaction. The true test of a series of acts forming the same transaction is that there should be a continuous operation of acts leading to the same end and a common purpose should run through all the acts (*Seshagiri Iyer and Phillips, JJ.*) *LOCKLEY, In re.* 43 Mad. 411 : 38 M. L. J. 209 : 11 L. W. 130 : (1920) M. W. N. 137 : 55 I. C. 345 : 21 Cr. L. J. 297.

—**Ss. 235 and 537—Joinder of charges—Same transaction—Misjoinder—Effect of—Prejudice**

Where two offences cannot be tried together their joinder vitiates the whole trial. The mere fact that the accused has not been prejudiced is not a valid ground for condoning the defect.

Disregard of an express provision of law as to the mode of trial is not a mere irregularity such as can be remedied by S. 537 of the Cr. P. Code. A trial conducted in a manner prohibited by law is illegal.

No hard and fast rule can be laid down for determining the question whether the charges in a particular case should be treated as constituting one transaction.

The word "transaction" suggests not necessarily proximity in time so much as continuity of action and purpose. It is not necessary that the acts constituting the crimes should have been committed all on the same occasion but it is sufficient that though separated by a distinct interval of time, they are closely connected by continuity of purpose and progressive action towards a single object. (*Shadi Lal C. J. and Dundas, J.J.*) *PAHLAD v. EMPEROR.*

1 Lah. 562 : 57 I. C. 450 : 21 Cr. L. J. 626.

—**Ss. 235 and 239—Joint trial—Same transaction** Meaning of. See S. 233 *supra*.

* 5 P. L. J. 11.

—**Ss. 236 and 237—Applicability of—Person charged with kidnapping, if can be convicted of abetment of the offence.**

S. 235, Cr. P. C. which must control S. 237 of the Code, only applies when from the evidence led by the prosecution it is doubtful which of the offences has been committed by

CR. P. CODE, S. 238.

the accused. But if the evidence which has been led by the prosecution leads to one result and result only, it cannot possibly be said that it is doubtful which of the offences has been committed by the accused.

A person charged with an offence under S. 363 I. P. C. cannot be convicted of an offence under that section read with S. 109 where he was not charged with that offence. (*Das, J.*) *MUSSAMM VT SHEORATNI v. EMPEROR.*

54 I. C. 252 : 21 Cr L J 44

—**S. 238—Trial with assessors—Accused found guilty of minor offence triable by jury—Conviction if void.**

On the trial of an accused by a Sessions Judge with the aid of assessors for an offence so triable, it is competent to the Judge to convict the accused of a minor offence though the minor offence is triable only by a jury. (*Shah and Crump, JJ.*) *EMPEROR v. CHANGOURA PINGOURA.*

22 Bom. L R. 1241.

—**Ss. 239, 237 and 238—Charge under S. 235 read with S. 149 I. P. C. Conviction under S. 445 Legality of.**

When an accused person is charged with an offence under S. 325 I. P. C. read with S. 149 I. P. C. he cannot be convicted of the substantive offence under S. 325 I. P. C. such a course not being warranted by Ss. 236, 237 and 232 Cr. P. C. 11 C. W. N. 666; 34 C. 698; 5 Cr. L. J. 427 foll. (*Mullick and Sultan Ahmed, JJ.*) *PERTAP RAI v. EMPEROR.*

56 I.C. 231 : 21 Cr. L. J. 439.

—**S. 239—“Same transaction” meaning of—Joint trial several accused for different offences when legal. See S. 233 *supra***

5 P. L. J. 11.

—**Ss. 241, 243 and 245—Summons case—Record of evidence—Pencil record on scraps of paper—Subsequent fair copy—Procedure illegal**

Where a Magistrate actually recorded the statements of the witnesses in pencil on scraps of paper and at his convenience copied those statements and placed them on record justifying the procedure as the trial was under Chap. XXII of the Cr. P. Code.

Held, that the procedure adopted was unprecedented and illegal. The production of the original record of statements made by witnesses, on which the accused are convicted, is necessary and there being no legal evidence on the record justifying the conviction, it was illegal and liable to be set aside. The law does not provide for the destruction of original records and substitution of their copies at the convenience of the Magistrate (*Sultan Ahmed, J.*) *JAGDISH PRASAD LAL v. EMPEROR.*

1 P. L. T. 63 : (1920) Pat. 96 : 55 I. C. 101 : 21 Cr. L J 229

—**Ss. 244 and 247—Summons case—Examination of complainant if essential—Examination of witnesses in the absence of complainant effect of.**

CR. P. CODE, S. 249.

S. 244, Cr. P. Code does not make the examination of the complainant himself in a summons case absolutely necessary.

S. 247, Cr. P. C. gives the Magistrate a discretion to adjourn the hearing on any day when the complainant is absent and the examination of witnesses on any such day in the absence of anything to show that the accused was in any way prejudiced does not vitiate the trial. (*Chaudhuri and Newbold, JJ.*) *SARAFDI HAZI v. EMPEROR.*

24 C. W. N. 199.

—**S. 247—Complaint—Dismissal of—Complainant present in another Court—Effect of.**

Where a complainant was present in the Court of a Magistrate who had previously dealt with the case under the belief that it would be heard by him, but it was taken up and dismissed under S. 247, Cr. P. C. by the Chief Presidency Magistrate without the knowledge of the complainant :

Held, that the order of acquittal under S. 247, ought in the circumstances of the case to be set aside. (*Sanderson, C. J. and Newbold, J.*) *W. J. GOOD v. GUNPAT RAI KHEMKA,*

47 Cal. 147.

—**S. 248—Complaint—withdrawal of against some of the accused—Compounding of offence with regard to some of the accused—Effect on others. See (1919) Dig. Col. 425. SHYAM BEHARI SINGH v. SAGAR SINGH.**

1 P. L. T. 32.

—**S. 239—Joint trial—Rival parties to a riot—Possession of land—Common object.**

Both the parties to a riot were tried together. The Sessions Judge referred the matter to the High Court with a recommendation that a fresh trial be ordered. *Held*, the object of both the parties being to take forcible possession of the same piece of land there was a common object and they could be tried together in one and the same trial. (*Knox, J.*) *EMPEROR v. MANGAT.*

18 A. I. J. 744 : 57 I. C. 82 : 21 Cr. L. J. 562.

—**S. 249—Power of magistrate to cancel Summons — Filing of complaint—Complainant not examined—High Court setting aside proceedings—Fresh complaint if maintainable.**

J. informed the Police of certain offences committed by P. but the Police reported the charge to be false. The S. H. O. started a case under S. 182, I. P. C. against J. M. prayed for action under S. 107, Cr. P. Code against P. and the magistrate received a report that J.'s charges against P. were true and the magistrate cancelled the summons against J. and entertained the complaint filed b. II against P. for an offence under S. 362, I. P. C. but the proceedings were quashed by the High Court as M. had not been examined and M. lodged a fresh complaint against P. for offences under Ss. 147, 448 and 354 I. P. C.

CR. P. CODE, S. 250.

Held, the Magistrate had full power under S. 249 Cr. P. Code to cancel the summons against J. 12 C. W. N. 68 dist

There was nothing illegal in entertaining the fresh complaint filed by M. after his first complaint proved infructuous owing to his non-examination.

The case under S. 182 I. P. C. against J. could not be said to be pending so as to bar the fresh complaint filed by M. particularly as M. had nothing to do with the case of J. (Adani, J.) *NATHU THAKUR v. EMPEROR*

1 P. L. T. 28 : 54 I. C. 838 :
21 Cr. L. J. 184

—S. 250—Compensation—Complaint found to be false and frivolous—"Frivolous" meaning of—Order for compensation if legal.

An order for the payment of compensation under S. 350 Cr. P. Code can be made in a case which is false and frivolous or vexatious

"Frivolous" means "silly" or "without due foundation" (*Findlay, A. J. C.*) *MUSSAMMAT JAINA v. SANTUDAS*

54 I. C. 249 : 21 Cr. L. J. 41.

—Ss. 250 and 252—Compensation—Notice to complainant—Necessary—Imprisonment on default of payment

Under the proviso to S. 250, Cr. P. Code the complainant should be given an opportunity to object to the order awarding compensation.

The award of imprisonment in default of payment of compensation is also illegal as it being in the nature of fine the provision of S. 3 Cr. P. Code must be applied. 21 Cal. 979; 26 Mad. 127; 28 Cal. 164 foll. (*Jwala Prasad, J. v. AKLOO MISTRI v. NAWAB LAL*)

1 P. L. T. 558 :
58 I. C. 225 : 21 Cr. L. J. 751.

—S. 250—Compensation—Order for imprisonment on default if permissible—"Frivolous or vexatious" charge—Meaning of.

It is illegal to award imprisonment in default by an order under S. 250 of the Criminal Procedure Code, requiring compensation to be paid. It is only when recovery is found to be impracticable that the defaulter may be sentenced to imprisonment. The term "frivolous or vexatious" in S. 250 Cr. P. C. covers a deliberately false report. A vexatious charge may be partly true, and the idea conveyed by the word is that the object of the person making the accusation should primarily be to harass the persons accused (*Drake Brockman, J. C. BAKAJI v. MUKUD SINGH*)

55 I. C. 98 : 21 Cr. L. J. 226

—Ss. 250 and 4 (0)—Frivolous or vexatious complaint—Compensation to accused—Complaint to recover legal fare—Public conveyances Act S. 28.

A proceeding to recover the legal fare under S. 28 of the Bombay Public Conveyances Act, 1837 is not a complaint of an offence within S. 250 Cr. P. C. Hence if such a complaint is frivo-

CR. P. CODE, S. 250.

lous or vexatious no compensation can be awarded. (*Shah and Crump, JJ. In Re VALLI MITRA.*)

44 Bom. 463 :

22 Bom. L. R. 195 :

55 I. C. 860 : 21 Cr. L. J. 380.

—S. 250—Frivolous or vexatious complaint—Order of discharge—Compensation order passed some days after, but as part of order of discharge if valid

In discharging an accused person on 13-1-1919 the trying Magistrate called on the complainant to show cause why he should not be ordered to pay compensation under S. 250 Cr. P. C. The complainant showed cause on the 27th and the Magistrate passed the order on the 28th directing complainant to pay compensation to the accused

Held, that the procedure was quite regular since the Magistrate in directing the compensation to be paid had stated in writing practically in his order of discharge his reasons for awarding the compensation. (*Shah and Hayward, JJ. In re NAGINDAS CHANUSA.*)

22 Bom. L. R. 184 :

55 I. C. 851 : 21 Cr. L. J. 371.

—S. 250—Order for compensation—Duty to examine witnesses before making order

Where a Magistrate made an order for compensation in spite of the complainant's request for the examination of his remaining witnesses.

Held, that the moment the Magistrate informs the complainant that he is considering the passing of an order of compensation against him, the complainant's position changed and he is on his defence, though not actually accused, (2) that opportunity should be given to him to adduce evidence and (3) that the order having been made without the examination of the complainant's remaining witnesses must be set aside. (1898) A. W. N. 9 dist. (*Sadasiva Aiyan and Napier, JJ. In RE JONNALAGADDA APPALINARASAYYA BHUKHTA.*)

39 M. L. J. 484 : 12 L. W. 388 :
(1920) M. W. N. 785.

—S. 250—Proceedings under—European British subject not setting up his right in original proceedings—Whether amounts to relinquishment of right—Whether he cannot set up right in subsequent proceedings—Jurisdiction of High Court to interfere in revision. See (1919) Dig. Col. 427. *ASHBEY CLARKE HARRIS v. MRS. PEAL.*

58 I. C. 351 : 21 Cr. L. J. 797.

—S. 250—Summary trial—Theft—Complicated question of title—Bonafide claim—Plea of—Criminal trial improper—Admission of unregistered document—Registration Act, S. 17.

Summary trial in a case involving complicated questions of right and title is improper as it causes prejudice to the accused. The superior court is entitled to interfere with the discretion exercised by the Magistrate.

CR. P. CODE, S. 254.

Held, that the Magistrate acted illegally in admitting in evidence the hukumnama which was in the nature of a perpetual lease and therefore compulsorily registrable under S. 17 (d) of the Registration Act, and as the title of the appellant was based on it, the conviction was illegal. (*Jwala Prasad, J. v. BHIKU BHAIJARAO SINGH v. EMPEROR.*) 1 P. L. T 121 : 55 I. C 854 : 21 Cr. L. J. 374.

Ss 254, 256, 262 and 263—Summary trial—Warrant case—Right of accused to cross-examine after examination-in-chief prosecution witnesses.

In the trial of a warrant case under the summary procedure the accused are entitled to cross-examine the prosecution witnesses after the whole evidence of the prosecution has been closed.

In a summary trial of a warrant case the Magistrate must adopt the procedure laid down in Chap. XXI except that he has not to frame charge as laid down in S. 254 and is not bound to record the evidence of the witnesses. Therefore the provision of S. 256 which gives an absolute right to the accused to cross-examine the prosecution witnesses after they had been examined-in-chief must apply to a summary trial of warrant cases. (*Sultan Ahmad J. v. TITTU SAHU v. EMPEROR.*)

1 Pat. L. T. 652 : (1920) Pat. 283 : 57 I. C. 454 : 21 Cr. L. J. 630.

Ss 256 and 257 proviso—Framing of charge—Accused if liable to pay process fees for summoning prosecution witnesses for cross examination.

The accused have got the right to cross-examine prosecution witnesses once before the charge is framed and secondly after the charge is framed under S. 256 Cr. P. C and no court can legally refuse their application for cross-examination of the prosecution witnesses for the first time after charge Under S. 257 the accused are given the third opportunity of cross-examining the prosecution witnesses. They are entitled to this right except when the Magistrate finds and records in writing that the application for further cross-examination is meant "for the purpose of vexation or delay or for defeating the ends of justice."

Under the proviso to S. 257 if the accused have cross-examined or had the opportunity to cross-examine the witness after the charge was framed the Magistrate cannot be compelled to summon the witnesses unless the Magistrate is satisfied that it is necessary for the purposes of justice (*Sultan Ahmad, J. v. RAMYAD SINGH v. EMPEROR.*) 5 P. L. J. 94 : (1920) Pat. 59 : 1 P. L. T. 112 : 58 I. C 686.

Ss. 256 and 257—Right of accused to re-cross examine prosecution witnesses—Witness not available for re-cross examination—Admissibility of evidence given by witness—Evidence Act, S. 33.

CR. P. CODE, S. 256.

The accused, clerk in a Company, arranged for the purchase of certain articles for the company from one C. The appellant received Rs. 3,000 from the manager of the Company on the representation that the money was required for the articles purchased but he paid only Rs. 2,000 to C and misappropriated the balance of Rs. 1,000, A complaint under Ss. 411 and 414 I. P. C was laid against the accused. During the examination and cross-examination of the prosecution witnesses the possibility of the probable charge under S. 420 I. P. C was present to the minds of the Magistrate and the counsel who appeared on either side. Before the framing of the charge and at the close of the cross-examination of W. a witness for the prosecution, the Magistrate asked the counsel for the accused if the presence of W would be necessary for any further cross-examination. The counsel stated that even if a charge was framed, W. was not required for further cross-examination. W. thereupon left India. After the framing of the charge and on the day to which the case was adjourned for the examination of the witnesses for the defence, the accused asked for summons to W. for further cross-examination but the Magistrate refused to issue process or adjourn the case for the return of W. The accused having been convicted on appeal.

Held, that the right of the accused to further cross-examine the prosecution witness given by S. 256 was an absolute one but applies to the witnesses who have not been discharged and are in Court.

Where the witnesses are not in Court the accused can only apply under S. 257, for processes to issue to the witnesses and the Magistrate in such a case has a discretion to refuse process to any particular witness named if in his opinion it is vexatious. Though the waiver of the counsel for the accused may not deprive the accused of his right to further cross-examine the prosecution witnesses, on the facts of this case the Magistrate was not acting illegally in either refusing to issue a process or declining to adjourn the case for the return of W. W. having been cross-examined by the accused and his presence not being possible without an amount of unnecessary delay and expense his evidence given was admissible under the Evidence Act for the trial. The fact that the accused had not the further opportunity to cross-examine the witness would not make his evidence inadmissible. (*Sushagiri Aiyer and Phillips, JJ v. Lockley In re 43 Mad 411: 38 M. L. J. 209: 27 M. L. T 289: 11 L. W. 130: (1920) M. W. N 137: 55 I. C. 345: 21 Cr. L. J. 297.*

S 256—Summary trial of warrant case—Procedure.

The provisions of S. 256 of the Cr. P. Code are applicable to summary trials of warrant

CR. P. CODE, S 263.

cases (*Sultan Ahmad, J.*) TITTU SAHU v. EMPEROR. 1 Pat. L. T. 652 : (1920) Pat. 283 : 57 I. C. 454 : 21 Cr. L. J. 630.

—S. 263 (h)—Summary condition—Reasons for finding—Absence of.

Where in a summary trial a brief statement of the reasons for the finding is not entered as required by S. 263 (h) of the Cr. P. Code, the conviction is illegal and is liable to be set aside (*Coutts and Adam, JJ.*) MACSOON ALAM v. EMPEROR. 1 Pat. L. T. 716 : 57 I. C. 672 : 21 Cr. L. J. 656.

—S 267—Warrant case—Right of accused to compel attendance of defence witness.

In a warrant case, the accused is entitled, under S. 267, Cr. P. Code to obtain the process of the Court for the attendance of a defence witness. (*Piggot, J.*) JHABBOO v. EMPEROR. 55 I. C. 676 : 21 Cr. L. J. 340.

—Ss 271 and 226—Sessions trial—Charge—Necessity for precision and care in drawing up—Additions and Alterations.

It should be quite clear, from the record of a sessions trial, what was the charge that was read over to the accused under S. 271 Cr. P. C. In a trial by a Court of Session the actual charge sheet to which the accused is called upon to plead is a very important document. It should be drawn up and considered with extreme care and caution so that the accused may have no doubt whatever as to the offences to which he is called upon to answer, and the Judge or the Appellate Court may have no doubt also upon the matter.

Every addition or alteration made to the charge has to be read over and explained to the accused. (*Knox, J.*) JAGDEO PRASAD v. EMPEROR. 18 A. L. J. 442 : 56 I. C. 58 : 21 Cr. L. J. 410.

—S. 288—Applicability of—Witness not produced and examined in court of Sessions. See EVIDENCE ACT, Ss. 32 (3) AND 33. 16 N. L. R. 30**—S. 291—Witness—Application to enforce attendance—When to be made—Refusal of Judge—Procedure.**

Where after the examination of the defence witnesses present had concluded, and the case was ready for arguments, an application was made to the court to enforce the attendance of certain witnesses, whose names had been entered in the list given by the accused to the committing Magistrate and who had been summoned but failed to attend, and it further appeared from the petition of appeal to the High Court that their evidence was material:—

Hold, that the refusal of the Judge to enforce the attendance of the witnesses based not on the ground of their evidence being immaterial but of delay in the application, was not justifiable,

CR P CODE, S 303.

and that the conviction ought, therefore to be set aside and a retrial ordered.

Steps should be taken by the Sessions Judge to ensure an early application by the parties with regard to the attendance of their witnesses. (*Sanderson C. J. and Walmsley, J.*) FAIJUDDI v. EMPEROR. 47 Cal. 758.

—S 297—Charge to jury—Omission to draw attention to important facts.

The Sessions Judge in his charge to the jury did not give a correct representation of facts appearing from the evidence and omitted to draw the attention of the jury to important facts in favour of the defence in the deposition of the prosecution witnesses. *Hold,* that the Sessions Judge's charge to the jury was unsatisfactory and defective in such a manner as would justify an appeal the setting aside of the conviction and the verdict of the jury. (*Sanderson, C. J. and Walmsley, J.*) ABDUL GAFUR v. EMPEROR. 57 I. C. 830 : 21 Cr. L. J. 670.

—S 297—Sessions trial—Charge to jury—Duty of Judge.

It is not sufficient for the Judge who tries a Sessions case, to state in his record of the heads of charge that he referred to certain sections of the Penal Code and explained to the Jury the law with regard to the offence. He should set out the directions which in fact he gave to them in respect of the law in order that the High Court may not be hampered by having to speculate as to what he said but might be in a position to judge whether the elements constituting the particular offence in question have been properly and fairly explained to the jury. (*Sanderson, C. J. and Walmsley, J.*) KASIMUDDIN NASVA v. EMPEROR. 57 I. C. 934 : 21 Cr. L. J. 694.

—Ss 277 and 298—Trial by jury—Misdirection—Failure to direct attention to the cleas of the accused severally—Omission to explain weight due to retracted confession Sec. (1919) Dig. Col. 428. HEMANT KUMAR PATHAK v. EMPEROR. 47 Cal. 46 : 58 I. C. 455 : 21 Cr. L. J. 775.**—Ss. 297 and 303—Unanimous verdict—Jury—Questioning of, after verdict.**

Where a Judge's charge to a Jury is calculated to confuse them, the verdict of the jury cannot be allowed to stand and the accused must be retried. S. 303 Cr. P. C. has no application where a Jury returns a clear verdict. The section applies only to cases where questions are necessary to ascertain what the verdict of the Jury is. (*Sanderson, C. J. and Walmsley, J.*) EDON KARIKAR v. EMPEROR. 58 I. C. 829.

—Ss. 303 and 307—Sessions Judge—Reasons for verdict of jury—Enquiry as to.

S. 303 Cr. P. C. does not authorise the Sessions Judge to put questions to the Jury as to the reasons for their opinion.

CR. P CODE, S. 307.

Sadasiva Aiyar, J.—A reference under S. 307 is not rendered invalid by reason of the Session's Judge having asked such questions. 36 Mad. 585. *toll (Sadasiva Aiyar and Spencer, JJ.) SUBBIAH THEVAN In re.*

43 Mad. 744 : 39 M. L. J. 65 :
11 L. W. 561 : 56 I C 498 :
21 Cr. L. J. 463.

—**S. 307—Jury trial—Division of opinion—Reason for—Ascertainment of Reference to High Court—Powers of Court—Conviction based on circumstantial evidence**

In a trial by Jury, if the case against the accused depends entirely on circumstantial evidence and the Jurors are divided in opinion the Judge ought, before making reference to the High Court to ascertain from the Jurors the reasons for their opinion.

On a reference under S. 337 Cr. P. C. it is open to that Court to consider the entire evidence in the case and to give due weight to the opinions of the Session's Judge and the Jury and to acquit or convict the accused of any offence of which the jury could have convicted upon the charge framed and placed before it.

In order to pronounce a conviction in a case of circumstantial evidence the facts found should on a reasonable hypothesis be inconsistent with the innocence of the accused. *Jwala Prasad and Adami, JJ.) EMPEROR v. MUSAMAT ZOHRA.* 1 P. L. T. 657 : 55 I C. 294

—**S. 337—Accomplice—Statement on oath by accused who has accepted pardon but not discharged—Statement if admissible against other accused.**

M one of the accused persons was offered a pardon on 6th June 1918. On the 11th June the case was *chained* by the Police and M was entered as one of the accused persons in the opening sheet of the Magistrate's proceedings. M's evidence was recorded by the Magistrate on the 4th July. The case was not one exclusively triable by the Court of Session or High Court.

Held, that S. 337 of the Cr. P. Code was inapplicable.

As there had been no verbal or written order of discharge by the Magistrate, M was still an accused person on the 4th July when he was examined and his evidence was consequently not admissible against the other accused. 33 Cal. 1353. Ref. 21 P. R. Cr. 1904. dist. (*Martineau, J.J. MAHANDU v. EMPEROR.*)

1 Lah. 102 : 1 Lah. L. J. 182 :
57 I C. 167 : 21 Cr. L. J. 599.

—**S. 337 (4)—Whether a Dt. Magistrate who authorised the tender of pardon to an approver can try the case. See (1919) Dig. Col. 430. AKBAR v. EMPEROR. 55 I C 466.**

—**S. 339—Approver Pardon—Tender of, by District Magistrate—Power of Session's Judge to order commitment of approver.**

CR. P. CODE, S. 342.

A case where the Dt. Magistrate had tendered pardon to an approver was heard by the Sessions Judge who at the conclusion of the trial directed the commitment of both the approvers to the Sessions for trial on the criminal charge.

Held, that the Sessions Judge had jurisdiction to pass the order. At the trial the accused could plead their pardon and it would be for the trial Court to decide whether or not the pardon had been forfeited. (*Broadway, J.*) *CHANAN SINGH v. EMPEROR.* 1 Lah. 218 : 56 I C 774 : 21 Cr. L. J. 518.

—**S. 341—Procedure—Case reported to High Court.**

In serious cases reported under S. 341 of the Cr. P. Code it is usually the practice to refer the matter to the Local Government. In the case however, of a minor offence, the High Court itself may pass an appropriate sentence or discharge the accused. (*Scott Smith, J.*) *EMPEROR v. RAHMAN.*

1 Lah. 260 : 57 I C. 285 ;
21 Cr. L. J. 621.

—**Ss. 342, 343, 337 and 204—“Accused person”—Who is—Competency to give evidence—Magistrate has the option to proceed or not against some of the accused—Tender of pardon—Illegality of procedure.**

A person who is not on his trial in the particular proceedings in which he is offered as a witness is not an “accused” within S. 342 Cr. P. Code, even though he might have been made an accused and was illegally discharged by the police. 58 P. R. Cr. 125 : 33 Cal. 1353 ; 19 Bom 661 toll.

Hence a person separately tried is a competent witness against his accomplices. 45 Cal. 720 toll.

The word “accused” as used in S. 343 Cr. P. C. means “a person over whom the Magistrate or other Court is exercising jurisdiction”. It does not include “any person supposed to have been directly or indirectly concerned in or privy to the offence under inquiry” unless there is a trial or inquiry in respect of that person, including a Magisterial inquiry under the code in relation to an offence before its cognizance has been taken. The issue of process is not essential to constitute a person an accused within S. 343. 33 Cal. 423 ; 4 N. L. R. 81 Rel on.

Whilst a person is accused under S. 337, no influence other than that authorized by law can be used to induce a disclosure, even before he has been challenged, 3 P. R. Cr. 1897 toll.

Under S. 204 the Magistrate taking cognizance of the case is bound to proceed against all the accused if there is a *prima facie* case. Under S. 239 he has an option to proceed jointly or separately, but it is not left to his discretion not to proceed at all. He, like the police, has no option, and is bound to proceed against them all.

CR. P. CODE, S 342.

A pardon may be offered to one or more of the accused, but only in the manner prescribed by law.

If, therefore, such pardon has not been given and an accused who has not been proceeded against is thereby made a competent witness in the trial of the others, and such illegality has operated to their prejudice, the trial is bad and the conviction must be set aside. (*Mittra, A., J.C.J GOVINDA v. EMPEROR.*

16 N.L.R. 9 : 58 I.C. 449.

—**Ss. 342 and 537—Applicability of Sessions Trial—Omission to examine accused—Ilegality or irregularity**

S. 342 Cr. P. Code is a general provision applicable to trials in all cases including Sessions cases and its provisions are not discretionary but obligatory. The first part of the section is discretionary but the second part is obligatory as is clear from the use of the word 'shall'. It requires the court to examine the accused after the witnesses for the prosecution have been examined and before the accused is called on for his defence.

History of the provisions in earlier Acts discussed.

S. 289 clause (1) does not control S. 342; its object is simply to lay down the stage at which the accused shall be asked whether he means to adduce evidence.

The omission to examine the accused under S. 342 vitiates the trial and the conviction is liable to be set aside. The defect is not curable under S. 537 Cr. P. C. 41 C. 733; 10 Bom. L. R. 201 Ref. (*Jwala Prasad and Sultan Ahmad, JJ. v. RAGHU BHUMI v. EMPEROR.*

1 P.L.T. 241 : 5 P.L.J. 430 : 58 I.C. 49 : 21 Cr. L.J. 705

—**S. 342—Non-examination of accused—Effect on trial.**

S. 342 Cr. P. Code is mandatory and the non-examination of the accused under the section is not merely an irregularity but an illegality which vitiates the trial (*Coutts and Adam, JJ. v. SURAJ PANDEY v. EMPEROR* (1920) Pat. 281 : 1 P.L.T. 641 : 58 I.C. 521 : 21 Cr. L.J. 793.

—**S. 342—Summons case—Power to examine accused—Practice.**

A magistrate before convicting an accused, person of an offence triable as a summons case is bound to examine him as required by S. 342 of the Cr. P. Code. (*Shah and Crump, JJ. v. FERNANDEZ.*

22 Bom. L.R. 1040.

—**S. 344—Applicability of on appeal—Application for adjournment—Costs. See. (1919) Dig. Col. 431 SURAJ BHAN v. EMPEROR.**

2 Lah. L.J. 79 : 54 I.C. 985 : 21 Cr. L.J. 201.

—**Ss. 345 and 439—Composition of offence during pendency of revision.**

A court exercising revisional jurisdiction has no power to give leave to the parties to file a

CR. P. CODE, S 347.

compromise. S. 439 (d) Cr. P. C. does not override S. 345 (7) and does not enable the High Court to allow a composition to be filed 7 A.L.J. 103 not foll (*Tudball, J. v. RAMBARAN SINGH v. EMPEROR.*

18 A.L.J. 574 : 56 I.C. 239.

—**S. 345—Compounding of offences—Composition with one of the accused—Trial of remaining accused.**

Where more persons than one are charged with a compoundable offence, it is open to the complainant to compound with one more of the accused and to proceed with the case against the rest. 7 C.W.N. 176, diss. 41 Mad. 323 foll. (*Shah and Crump, JJ. v. ALIBHAI ABDUL VORA.*

22 Bom. L.R. 1221.

—**S. 345—Compounding of offence with some of the accused—Conviction of other accused—Legality of.**

The compounding of the offence of hurt against two of the accused does not in law have the effect of an acquittal of the remaining accused and their conviction is not therefore illegal. 41 Mad. 323 foll. 14 Cr. L.J. 292, dist. (*Bevan Petman, J. v. RAM KISHEN v. EMPEROR.*

1 Lah. 169 : 56 I.C. 229 : 21 Cr. L.J. 437.

—**S. 345 (5)—Conviction—Composition of offence not permissible without leave of court pending appeal.**

Under S. 345, Cl (5) Cr. P. C. there can be no valid composition of an offence after conviction without the leave of the Court before which the appeal against the conviction is pending. 45 Cal. 186 ref. (*Seshagiri Aiyar, J. v. PEDAKANTI CHINNA NAGUDU, In re.*

11 L.W. 33.

—**S. 347—Commitment to sessions—Discretion of Magistrate—Summons case tried with warrant case—Procedure.**

A Magistrate committed a case for trial by the Court of Session upon charges against some of the accused persons under S. 302 and 160 of the Penal Code and against others under S. 160 of the Code only. On behalf of these latter it was objected that as the case against them was a summons case which was triable by the Magistrate and the accused could be adequately punished by him, their commitment for trial by the Court of Session was illegal.

Held, that under S. 347 Cr. P. Code it being in the discretion of a Magistrate, duly empowered, to commit cases to Court of Session where a certain case calls for such committal and this discretion not being limited to cases where the Magistrate cannot inflict an adequate sentence there may be other good reasons which may, in the exercise of sound and wise discretion, justify committal, and that as the procedure to be followed where, as in this case, the complaint forms the subject of two distinct charges arising out of the transaction, one of which is a summons case and the other

CR. P. CODE, S. 349.

a warrant case, the commitment was not illegal (*Raymond, A. J. C.*) **GHANI YACUB v EMPEROR.** 58 I.C. 519:

21 Cr. L.J. 791.

—**Ss 349 and 367—Procedure under Duty of Magistrate receiving records.**

Under S. 349 a Sub-divisional Magistrate when he receives the records has to make up his mind whether the accused are guilty or not and exercise his own independent judgment in the matter and to write a judgment conformable to the requirements of S. 367. (*Seshagiri Iyer and Moore, JJ.*) **KARUPPIAH PILLAI v. EMPEROR.** 1920 M.W.N. 120:

11 L.W. 308 : 54 I.C. 404:

21 Cr. L.J. 52

—**S. 350—Evidence recorded partly by one magistrate and partly by another conviction.**

Where a case under S. 379, I. P. C. was pending before a Magistrate A, who recorded some evidence, and upon the petition of transfer filed under S. 528 of the Cr. P. Code by the complainant, the case was made over to the Magistrate S, who completed the remaining evidence in the case, and convicted the accused, who, however, has not pressed for a *de novo* trial.

Held, that although the Magistrate A was still in the District and had not ceased to exercise jurisdiction so far as that particular case was concerned, he had lost his jurisdiction after it had been withdrawn from his file and S. 350 of the Cr. P. Code was applicable, and the accused having failed to demand that the witnesses be resummoned, the conviction was not illegal. (*Jwala Prasad, J.*) **RUPA SINGH v. EMPEROR.**

1 P. L. T. 679.

—**S. 356—Vernacular record of evidence prepared—Irregularity.** See (1919) *Dig. Col.* 433. **UDIT NARAIN v. EMPEROR.**

54 I.C. 172 : 21. Cr. L.J. 28

—**Ss. 367 and 439—Judgment—Contents of—Wholesale acceptance of prosecution evidence in summons case—Ill legality of.**

Where the judgment of a Magistrate makes no attempt to scrutinise the oral evidence of the complainant but summarily accepts that evidence the judgment cannot be upheld in revision (*Drake Brockman, J. C.*) **PIRBAX v MUSAMMAT BAJI.**

54 I.C. 620 : 21 Cr. L.J. 140.

—**S. 367 and 423—Omission of trial Court to write a proper judgment—Procedure on appeal.**

Where an Appellate Court finds that the Magistrate has not written a judgment in conformity with the provisions of S. 367 Cr. P. Code, the correct procedure is to accept the appeal and to remand the case for hearing *de novo*. The Appellate Court cannot retain the appeal on its file and ask for a judgment

CR. P. CODE, S. 403.

which the Magistrate has failed to record (*Seshagiri Aiyar and Moore, JJ.*) **KARUPPIAH PILLAI v. EMPEROR**

(1920) M.W.N. 120 : 11 L.W. 308 : 54 I.C. 404 : 21 Cr. L.J. 52

—**S. 393 (b)—Whipping, sentencing legality of in addition to seven years rigorous imprisonment.** See (1919) *Dig. Col.* 434. **AKBAR v. EMPEROR.** 55 I.C. 466

—**S. 403—Acquittal in a trial under S. 147, I.P.C.—Subsequent trial under S. 186 I.P.C.—If a bar**

Where in execution of a decree against a minor a writ of attachment was issued and the decree-holder who accompanied the peon to execute the writ was assaulted and severely injured by the uncle of the judgment-debtor the petitioner and on the trial of the petitioner upon the complaint of the decree-holder under S. 147, I.P.C. he was acquitted but subsequently the decree-holder obtained a sanction for the prosecution of the petitioner under Ss. 183 and 186, I.P.C., and he was convicted under S. 186, I.P.C., and it was contended that the trial of the petitioner under S. 186, I.P.C., was invalid and incompetent as his acquittal in the S. 147 case was a bar to his prosecution under S. 186 I.P.C.

Held, that S. 403 did not apply to the case and that acquittal of the accused in the S. 147, I.P.C. case was no bar to his trial under S. 186 I.P.C. (*Sultan Ahmed, J.*) **TANUKLAL MANDAR v. EMPEROR.**

1 P. L. T. 654 : (1920) Pat. 285.

—**Ss. 403 and 195—Autrefois acquit—Dismissal of application for sanction to prosecute for false statement on oath if bar to prosecution.**

The dismissal of an application by a party to a judicial proceeding for sanction to prosecute the opposite party under S. 181 and 193 for statements made by the latter on oath is no bar to the prosecution having been started prior to the application for sanction, and its dismissal further not attracting the operation of S. 403, Cr. P. C. (*Mookerjee, C. J. Fletcher, Richardson, Walmsley and Buckland, JJ.*) **SATIS CHANDRA CHAKRAVARTI v. RAM DAYAL DE.**

24 C.W.N. 982 : 32 C.L.J. 94.

—**S. 403—Autrefois acquit—Same offence.**

The petitioners were tried on charges of kidnapping a minor girl and rioting with the common object of kidnapping the girl. The trying Magistrate acquitted them of the said charges but convicted them of being members of an unlawful assembly with the common object of causing assault and wrongful restraint. In appeal the Sessions Judge set aside the conviction and ordered a retrial on charges of abducting the girl in order to confine her secretly and of rioting with that common

CR. P. CODE, S. 403.

object. Held, that the retrial was barred by S. 403 Cr. P. C. (*Walmley and Graves, JJ.*) KALA NATH BRAHMAN v. EMPEROR.

24 C. W. N. 856.
57 I. C. 929 : 21 Cr. L. J. 689

S. 403—Autrefois acquit—Second trial on the complaint of a different person—Bar.

There was a riot between certain Brahmins and certain Kurmis. A Brahman filed a complaint whereupon four Kurmis were convicted under S. 323 I. P. C. Sometime after another Brahman filed a similar complaint against the same accused on same facts. Held, that the second trial was barred by S. 403 Cr. P. C. (*Ryves, J. v. RAM CHANDER v. EMPEROR*)

18 A. L. J. 85 : 54 I. C. 772.
21 Cr. L. J. 164

Ss. 403, 435 and 436—Petition for commitment to sessions or to District Magistrate during pendency of trial before sub-Magistrate—Rejection of petition—Subsequent petition to sessions Court under S. 436 after termination of proceeding—Competency of Sessions Court to order committal—Sessions Judge if can order commitment for offence for which the accused had been acquitted I. P. C. Ss. 147 and 304. See (1919) Dig. Col. 436 GANDI APPARAZU *In re.* 43 Mad. 330 : 38 M. L. J. 194 : 21 Cr. L. J. 91 : 54 I. C. 491.

S. 403 (2)—Autrefois acquit—Trial for offence for which separate charge might have been framed at the former trial—Penal Code Ss. 52, 79 and 147.

The petitioners who were police constables were convicted of rioting in the course of which they took several persons in custody. Two of the petitioners were previously tried on a charge under S. 403 (2) I. P. C. in respect of the arrests made by them and were acquitted:

Held, that the present trial of these two petitioners for rioting was not viated by contravention of the rule embodied in S. 403 sub-sec. (1) Cr. P. C. The case was covered by sub-sec. (2) which provides that a person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made aginst him on the former trial under sec. 235 (1) Cr. P. C.

Held on a consideration of the circumstances of the case that the petitioners were not entitled to the benefit of S. 79 I. P. C. (*Mookerjee, O. C. J. and Fletcher, JJ.*) RAM SAHAY RAM v. EMPEROR.

24 C. W. N. 763 : 31 C. L. J. 476.
57 I. C. 278 : 21 Cr. L. J. 614.

S. 412—Plea of guilty—When can be acted upon—Mistake of law—Omission to record plea—Effect of Retrial.

Per *Chaudhuri and Shamsul Huda, JJ.*—When a plea of guilt is based on a mistake of law it shall not be accepted. It is incumbent

CR. P. CODE, S. 421.

on the Magistrate to try the accused on the merits

Per *Newbould, J.*—The principle of S. 412 Cr. P. Code should ordinarily be applied in cases in which the Appellate Court is asked to exercise its revisional powers

When a person has pleaded guilty and had been convicted on such plea he waives his right to question the legality of the conviction: 5 B 85 foll.

If a plea of guilty should not be recorded a retrial should be ordered by an Appellate Court. (*Ashutosh Chaudhuri, Newbould and Shamsul Huda, JJ.*) EMPEROR v. AKUB ALI MAZUMDAR.

31 C. L. J. 122 :

56 I. C. 851 : 21 Cr. L. J. 547.

S. 417—Appeal against acquittal by Government—Jurisdiction to convict—High Court—Appeal against conviction and acquittal—Difference See (1919) Dig. Col. 439 EMPEROR v. SAKHARAM MANAJI.

54 I. C. 161.

21 Cr. L. J. 17.

S. 417—Appeal against acquittal—Interference when justified.

Sound principles of criminal jurisprudence require that the indication of error in a judgment of acquittal ought to be clear and more palpable and the evidence more cogent and convincing in order to justify its being set aside than would be necessary in the case of a conviction. (*Scott Smith and Wilberforce, JJ.*) EMPEROR v. TUREZI.

55 I. C. 685. :

21 Cr. L. J. 349.

S. 418—Trial by jury—Minor discrepancies—Misdescription.

Where a Sessions Judge in his charge to the jury observed :

"If you are satisfied that there was no object in proving a false case, not from the point of view of seeking for small discrepancies, but upon a broad view of the evidence given before you"

Held, that there was no misdirection to the jury and the Sessions Judge was right in conveying the caution against the minor discrepancies in immaterial and collateral events in the case. 1 W. R. Cr. 17 Rel. (*Jwala Prasad, J.*) BAIJNATH MAHTON v. EMPEROR.

1 P. L. T. 708.

S. 421—Appeal—Summary dismissal of—Contents of appellate judgment.

It is the duty of an Appellate Court in dealing with an appeal under S. 421 Cr. P. Code to record reasons for dismissing it summarily and its judgment should show that the evidence and arguments advanced have been considered. (*Das, J.*) GANESH RAM v. GYAN CHAND.

54 I. C. 619. :

21 Cr. L. J. 139.

S. 421—Criminal appeal—Summary dismissal when proper.

An Appellate Court is entitled to dismiss an appeal summarily under S. 421, Cr. P. C. and that the order is not improper, where the

CR. P. CODE, S. 423.

appellant's case has been carefully considered and intelligently disposed of by arriving at independent finding of its own upon a perusal of the evidence on the record (*Jwala Prasad, J.*) **PANCHI MANDAR v EMPEROR.**

1 P. L. T. 318
57 I. C. 273 : 21 Cr. L. J. 609

S. 423.—Appeal—Judgment—Contents of.

It is the duty of an Appellate Court, in dealing with an appeal preferred to it, to consider the evidence, both oral and documentary, and to apply its mind to the case before recording a judgment thereon. Where an appellate Court fails to do this, its judgment cannot be said to be in accordance with law. (*Coutts and Adami, JJ.*) **NARIN PRASAD BOSE v EMPEROR.**

1 Pat. L. T. 716 :
57 I. C. 664 : 21 Cr. L. J. 648.

Ss. 423 and 437—Appellate Court—Power of—Jurisdiction to order retrial, when holding cognizance of complaint ultra vires.

Under S. 423, an Appellate Court, can set aside the previous order of dismissal and order a further enquiry under S. 437.

The Appellate Court having held the complaint which resulted in a conviction to be *ultra vires* had no jurisdiction to order a retrial, there having been no trial upon the complaint, filed. (*Jwala Prasad, J.*) **SHEO GOBIND SINGH v. KING EMPEROR.**

1 P. L. T. 293 :
57 I. C. 820 : 21 Cr. L. J. 660.

Ss. 423 and 367—Appellate Court—Trial not satisfactory—Procedure.

There is no power under S. 423, Cr. P. Code for an Appellate Court to retain the case on its own file when asking for a judgment which the Subordinate Court has failed to record under S. 367, Cr. P. C. The proper procedure is to reverse the order appealed against and remand the case for a hearing *de novo*. (*Seshugiri Iyer and Moore, JJ.*) **KARUPPLAH PILLAI v. EMPEROR.**

(1920) **M. W. N. 120 : 11 L. W. 308 : 54 I. C. 404 : 21 Cr. L. J. 52.**

S. 423, (2)—Appeal—Jury trial—Unanimous verdict of conviction—Power of High Court to interfere in the absence of misdirection, when there is circumstantial evidence. See. (1919) eDig. Col. 442. MOHINI MOHAN GHOSH v. EMPEROR.

54 I. C. 56 : 21 Cr. L. J. 8.

Ss. 424, and 372—Appellate judgment—Contents of.

The provisions of S. 367 Cr. P. C. have been made applicable to appellate judgments by S. 424, of the Code and it is the duty of an Appellate Court to decide the points raised in appeal and to write a judgment in accordance with law. (*Broadway, J.*) **BINDRABAN v. EMPEROR.**

54 I. C. 1007 : 21 Cr. L. J. 223.

CR. P. CODE, S. 435.**Ss. 428, and 540—Appellate Court—Additional evidence—Power to examine witnesses—Sessions Judge—Powers of.**

At the hearing of the appeal a request was made by the Crown to examine or cause to be examined two witnesses. These two witnesses had been named in the initial report and had been examined by the Police at an early stage of the investigation but that for some unknown reason they had not been examined by the Committing Magistrate nor by the learned Sessions Judge, in fact their names had not been included in the *chalan*. The Sessions Judge regarded these witnesses of importance and found their testimony necessary.

Held, that the interests of justice required their examination and it would save time and would tend to expedite matters if these witnesses were examined before the appeals were proceeded with further.

The learned Sessions Judge having regard to his view of the importance of these witnesses should have had recourse to the provisions of S. 540 Cr. P. Code (*Broadway and Bevan Petman, JJ.*) **EMPEROR v UJAGAR SINGH.**

2 Lah. L. J. 349.

S. 429—Sind Frontier Regulation Ss. 20 and 27—Security for good behaviour—Revision by High Court—No power. See SIND FRONTIER REGULATION Ss. 20 AND 27.

13 S. L. R. 21.

Ss. 435 and 439—Acquittal—Revision against—Grounds for interference—Defamation.

Where it is plain that the lower court for reasons outside the merits of the dispute has really declined to decide the controversy and has dealt with matters which really do not decide the complaint before him, the High Court will interfere in revision from an order of acquittal; for example where in a case of defamation by stating a person to be of the "Chamar caste" the Judge has decided that the case ought to be dismissed because he regards it as trivial and contemptible but has not decided the issues requiring determination for a finding as to whether or not an offence of defamation has been committed. (*Walsh, J.*) **BHAGWAN SINGH v. ARJUN DATT.**

18 A. L. J. 846 : 57 I. C. 84 : 21 Cr. L. J. 564.

Ss. 435 and 438—Order for further enquiry—Additional Session's Judge—Power of.

An additional Session's Judge has jurisdiction in a case transferred to him by the Sessions Judge in which the accused has been discharged, to set aside the order of discharge and direct further inquiry. (*Knox, J.*) **Nazar HUSSAIN v. EMPEROR.**

55 I. C. 341 : 21 Cr. L. J. 293.

Ss. 435, 439 and 145—Order under S. 145—Revision—Interference when justified.

CR. P. CODE, S. 435.

The High Court will not ordinarily interfere with a preliminary order under S. 145 Cr. P. C. unless it is manifestly illegal. (*Sadasiva Iyer and Bura, JJ.*) **GOPALA IYER v. KRISHNA SWAMI IYER** 27 M. L. T 234 11 L. W. 459 : 54 I. C. 473 21 Cr. L. J. 73.

S. 435—Revision.—Complainant's Vakil—Right to be heard

On a complaint of an offence under S. 147 I. P. C. the accused were convicted. The Sessions Judge on appeal set aside the conviction and the sentence. The complainant then applied in revision.

Held, that the High Court acting under S. 435 of the Cr. P. Code and in the exercise of its discretion, had the power to hear a Vakil on behalf of the complainant. (*Sanderson and Walmsley, J.*) **BEJOY KRISHNA MUKERJI v. SATISH CHANDRA MITTRA**.

57 I. C. 922 : 21 Cr. L. J. 682

Ss. 435 and 439—Revision—Powers of High Court to examine evidence. See (1919) Dig. Col. 444. Mir Moze Ali v. EMPEROR. 54 I. C. 58

Ss. 435 and 439—Scope of Sections to be read together.

S. 439 Cr. P. C. is to be read along with and subject to the provisions of S. 435. 15 Cal 608 (617) fol.

If a case is outside S. 435, S. 439 cannot apply to it. (*Newbold and Huda, JJ.*) **MARIAM BEWA v. MIRJAN SARDAR**

47 Cal 438 : 31 C. L. J. 183

Ss. 436 and 210—Enquiry into Sessions case—Discharge by Magistrate—Order for committal by Dt. Magistrate—Revision—Power of H'g Court to go into the evidence. See CR. P. CODE, Ss. 210 AND 436

1 P. L. T. 153.

Ss. 437—Discharge of accused person—No charge framed—Revision—Order for further enquiry. Sec (1919) Dig. Col. 445. SHEO NARAIN SINGH v. RADHA MOHAN

42 All 128

Ss. 437, 202 and 203—Dismissal of complaint—Order for further enquiry—Enquiry made over to Subordinate Magistrate—Competency of the latter to try and dispose of the entire case. See CR. P. CODE, Ss 202 AND 203 etc. 5 P. L. J. 47.

S. 437—Discharge—Further inquiry—Order for Notice to Accused—Order of discharge when to be set aside.

An order for further inquiry after discharge should not be passed without notice to the accused the order being one which is prejudicial to him.

2 P. R. (Cr.) 1901 Ref.

Further inquiry should not be ordered unless the order of discharge was manifestly perverse or foolish or was based upon a record of evidence which was obviously in-

CR. P. CODE, S. 437.

complete. 10 P. R. Cr 1911 Ref. (*Abdul Raof, J.*) **NABI BAKSH v. EMPEROR**

1 Lah. 218:

56 I. C. 777 : 21 Cr. L. J. 521.

S 437—Further inquiry—Discharge—Order when set aside.

Further inquiry after discharge is generally improper unless the order of discharge is manifestly perverse or foolish or is based upon a record of evidence which is obviously incomplete. 10 P. R. 1911, Cr. foll. Where the trial Magistrate after recording all the evidence for the prosecution discharged the accused but it was set aside by the District Magistrate who ordered further inquiry into the case.

Held, that the order of discharge was not manifestly perverse or foolish and the order directing further inquiry was not justifiable. (*Shati Lal, C. J.*) **KISHAN CHAND v. EMPEROR.** 57 I. C. 91 : 21 Cr. L. J. 571.

S. 437—Further enquiry—Grounds, of—Taking a different view of the evidence.

Where an accused person has been discharged, if the circumstances and the evidence are such that two different courts might take the different views of the evidence, and the order of discharge is one which cannot be said to be either perverse or *prima facie* incorrect and there is no suggestion that any further evidence is forthcoming, no further enquiry should be directed under S. 437 Cr. P. C. (*Cokul Prasad, J.*) **BINDESRI DUBE v. EMPEROR.**

18 A. L. J. 1135.

Ss 437 and 203—Further inquiry—Notice to accused.

No notice to the accused is necessary before an order setting aside an order of dismissal under S. 203 of the Cr. P. Code and directing further enquiry into the case may be passed under S. 437 of the Code.

S. 437 of the Cr. P. Code applies both to the case of an order of discharge and to an order of dismissal (*Sanderson, C. J. and Walmsley, J. J.*) **FAZARBI BIBI v. MOONSAB MOLLA.**

32 C. L. J. 44 : 57 I. C. 823 : 21 Cr. L. J. 663.

Ss 437 and 439—Order of discharge—Revision—Practice.

It is only as a Court of last resort, after application has been made to the District Magistrate or Sessions Judge, that the Judicial Commissioner will interfere, under S. 439 Cr. P. C. with an order of discharge. (*Predeaux, A. J. C.*) **GUNWANTRAO v. SHAMRAO.**

58 I. C. 943.

S. 437—Order for further inquiry—Notice to accused if necessary.

Where an accused person has once been brought before a court of justice under process, and is discharged by order of the Court, such order of discharge ought not to be interfered with except after notice to show cause issued to the accused. If it is set aside without such

CR. P. CODE, S. 438.

notice the order could not be upheld. (*Pigget, J.*) **HIRA LAL v. EMPEROR.**

58 I C 927.

S 438—Reference—Question of fact—Interference by High Court.

Where under S. 438, Cr. P. C. the Sessions Judge made a reference to the High Court recommending that a conviction under S. 323 I. P. C., should be set aside on the merits, the High Court accepted the reference and set aside the conviction. (*Sanderson, C. J. and Walmsley, J.*) **EMPEROR v. NASIRAM MISTRI**

24 C. W. N. 549.

S 439—Acquittal—Revision against Interference by High Court when offence merely technical or involves question of public importance. See CAL. MUN. ACT, Ss 578 AND 681,

31 C. L. J. 127

Ss. 439 and 476—Direction to prosecute by Revenue Court—No power to High Court to revise order. See C. P. CODE S. 115.

58 I C 913

S. 439—Findings of fact—Revision High Court—Powers of.

In dealing with an application under S. 439, Cr. P. C., the high Court must see whether there is anything in the way in which the Trial Court has looked at the law or in the method by which it has dealt with the evidence which makes it so doubtful whether the conviction is right that it would amount to a miscarriage of justice to allow it to stand. (*Walsh, J.*) **MAHBOOB v. EMPEROR.**

56 I C. 856 : 21 Cr. L. J. 552.

S. 439—Interlocutory proceedings—Interference in revision.

As a general rule the High Court will not interfere in interlocutory proceedings (*Knox, J.*) **JAI KISHAN v. KALLA.**

55 I C. 859 : 21 Cr. L. J. 379.

S. 439 and 476—Order under S. 476—Revision—C. P. C. S. 115,

An order passed by a Civil Court under S. 476 Cr. P. C. can be revised only under S. 115 C. P. C and not under S. 439 Cr. P. C. (*Mitra and Kotwal, A. J. C.*) **BABULAL v. EMPEROR.**

16 N. L. R. 23 : 55 I. C. 286.

Ss. 439 and 145—Proceedings under S. 145—Revision by High Court—Power of interference—Govt. of India Act S. 107. See CR. P. COCE Ss. 145 and 439.

47 Cal 438

S. 439—Acquittal of accused—Joint trial of two—Appeal by one—Power of court to deal with non appealing accused.

Under S. 439 Cr. P. Code the High Court has power, in a proper case, while trying the appeal preferred by another accused, to deal with the case of an accused person not appealing against his conviction and set aside his conviction : S. C. W. N. 330 followed. (*Sanderson, C. J. and Walmsley, J.*) **MIR MOUZE ALI v. EMPEROR.**

31 C. L. J. 305.

56 I. C. 858 : 21 Cr. L. J. 554

CR. P. CODE, S. 464.

Ss. 439—Evidence—Power of High Court to go into evidence.

Where the Magistrate's appreciation of the oral evidence is influenced by the wrong admission of an inadmissible document, the High Court is entitled to go into the whole evidence in revision. (*Jwala Prasad, J.*) **BHIM BAHADUR SINGH v. EMPEROR**

1 P. L. T. 121 :

55 I C 854 : 21 Cr. L. J. 374.

S. 439—Finding—Alteration of.

The High Court, in the exercise of its revisional jurisdiction, has power to alter a finding under S. 323 of the Penal Code, to one under S. 325 of the same Code. **37 Mad. 119 foll. (Macnair, A. J. C.) ANANDRAO v. BAJA.**

57 I. C. 663 : 21 Cr. L. J. 647.

S. 439—Interference by High Court

Point not raised in Court below.

Where a point is not urged in the Court of first instance or before the Sessions Judge on appeal, the High Court will not interfere in revision unless there has been a miscarriage of justice. (*Coutts and Adami, J.J.*) **YUSUF ALI KHAN v. EMPEROR.**

54 I. C. 496 : 21 Cr. L. J. 96.

S. 439—Pending trial—Interference.

The High Court will not interfere with a pending criminal case unless there is some manifest and patent injustice apparent on the face of the proceedings and calling for prompt redress. (*Mittra, A. J. C.*) **KOHANRAJ VASANJI HALAI v. EMPEROR.**

55 I. C. 679 : 21 Cr. L. J. 343.

S. 439—Enhancement of sentence—Revision.

The practice of the court is not to enhance the sentence when the accused has completed his sentence of imprisonment except in exceptional circumstances as in the present case.

Held, that under S. 439 (3) of the Criminal Procedure Code the High Court has power to inflict any punishment which might have been inflicted for the offence by a Magistrate of the first class and is not limited to the powers of the trying Magistrate. **16 Cr. L. J. R. 712 foll. (Scott-Smith, J.) EMPEROR v. JAGAT SINGH.**

I Lah 453:

2 Lah L. J. 541 : 56 I. C. 861 : 21 Cr. L. J. 557.

Ss. 464 and 465—Procedure obligatory—Subsequent enquiry as to soundness of mind does not cure the defect—Irregularity.

When an issue is raised as to soundness of mind of an accused person the court is bound to enquire before it begins to record evidence whether the accused is or is not incapacitated by unsoundness of mind from making his defence. If it fails to do so, the subsequent enquiry about soundness or unsoundness of mind does not cure the defect.

CR. P. CODE, S. 471.

The question, whether an accused person is entitled to an acquittal, under the general exception of insanity under S. 84 I.P.C. can only arise when the procedure laid down by Ss 464, 465 Cr. P. Code was duly followed. (*Piggott and Dalal, J.J.*) *JHABBOO v. EMPEROR.* 42 All 137 : 18 A.L.J. 53 : 54 I.C. 483 : 21 Cr. L.J. 83

—S. 471—Amending Act X of 1914—*Criminal lunatic—Power of court to order detention in lunatic asylum.*

S. 471 of the Cr. P. Code as amended by Act X of 1914 no longer requires that the Court should report the case of a lunatic accused for the orders of the Local Government and that the Court can itself issue a direction for his detention in a lunatic asylum or if there is no accommodation in it, in jail or some other place of safe custody in British India. (*Kanhaiya Lal, J.C.*) *EMPEROR v. MAIKU AHIR.*

22 O.C. 269 : 54 I.C. 254 : 21 Cr. L.J. 46

—S. 476—Action under—Delay—Effect of.

No limit of time can be fixed as to when an order under S. 476 Cr. P. C. should be made, 5 Pat. L.J. 58 dissentient from.

1 Pat. L.J. 298 : 34 A. 393 ; 37 A. 344 ; 32 B. 184 ; 32 B. 184 ; 43 B. 300 Ref.

Where undue delay is established in passing an order under S. 476, the High Court may set aside the order and arrest further proceedings. Whether there is a delay or not is a question which must be decided on the facts of each case. 37 C. 642 ; 31 M. 40 Ref. (*Sultan Ahmad, J.*) *BIRAN RAI v. EMPEROR.*

(1920) Pat. 205.

—S. 476—Action under—Preliminary enquiry if necessary.

Before a court makes an order under S. 476 of the Cr. P. Code directing the prosecution of any person, it ought to have before it direct evidence fixing the offence upon the person whom it is sought to charge, either in the course of the preliminary enquiry referred to in that section or in the earlier proceedings out of which the enquiry arises. 16 Cal. 750 foll. (*Scott Smith, J.*) *GANDA MAL v. EMPEROR.*

57 I.C. 169 : 21 Cr. L.J. 601

—S. 476—Applicability of—Charge under S. 421—*Complaint by successor of Judge against insolvent.*

In the course of an insolvency proceeding the District Judge found that certain alienations by the insolvent were fraudulent and made only to defeat the creditors. The order was confirmed by the H'g'd Court. A few years later another District Judge (the successor of the officer who had made the order) wrote to the District Magistrate to prosecute the transferees under S. 421, 114—of the Penal Code making certain suggestions for proceeding with the trial. Held, that S. 476 Cr. P. C. did not apply to a charge under S. 421 I.P.C. and the District Judge could not make the report under that section.

CR. P. CODE, S. 476.

The report might however be treated as a complaint and the Dt. Magistrate could take action on it. (*Ryces, J.*) *MAHADEO SAHU v. EMPEROR.* 18 A.L.J. 50 : 54 I.C. 408 : 21 Cr. L.J. 56.

—S. 476—*Applicability of—Deputy Commissioner—Proceedings before, if Judicial*

A Deputy Commissioner after making departmental enquiries as Chairman of the District Board regarding certain anonymous letters received about a school master, and after calling for a report which showed that the charges preferred against the school master were untrue and one K was responsible for the letter, ordered the prosecution of K under S. 182, Ind'n Penal Code, after giving him time to show cause against the order. Held, that the proceedings which came before the Deputy Commissioner as Chairman of the District Board were not judicial proceedings, as he could not be deemed to be acting under S. 476, Cr. P. C., and the order was bad and must be set aside. (*Lindsay, J.*) *EMPEROR v. KUNWAR BAHADUR.* 23 O.C. 136 : 57 I.C. 984 : 21 Cr. L.J. 694

—S. 476—*Offence under S. 209—Prosecution when to be directed—Accused to be given opportunity to show cause.*

The mere dismissal of a suit without a clear finding that the suit was false and was brought with intent to injure deft. is not a justification for directing the prosecution of plft. under S. 209 I.P.C.

A plaintiff called upon to show cause why he should not be prosecuted under S. 209 I.P.C. should be afforded every opportunity of adducing evidence in support of his claim and remove any doubt in the mind of the Court as to the falsity of the case. (*Jwala Prasad, J.*) *CHAKAUNI RAI v. EMPEROR.* 54 I.C. 686 : 21 Cr. L.J. 158.

—Ss 476 and 439—*Order directing prosecution—Failing to disclose materials—Revision.*

An order under S. 476 of the Cr. P. Code should disclose the materials upon which it is based; such an order is a judicial order and if it does not show the basis upon which it was passed, it is liable to be set aside in revision by the High Court.

An order under S. 476 of the Cr. P. Code can only be passed if an offence is committed before a Court, or is brought to its notice in the course of a judicial proceeding. An order passed months after the termination of proceedings directing the prosecution of a person for having committed an offence in those proceedings, is bad if it appears that the Magistrate did not become cognizant of the offence during the pendency of the proceedings. (*Sultan Ahmed, J.*, *B. UNNATI RAI v. EMPEROR.* 1 Pat. L.T. 717 : 57 I.C. 457 : 21 Cr. L.J. 633.

CR. P. CODE, S. 476.

S. 476—Order for enquiry under, by Civil Court—District Magistrate's power to initiate inquiry under S. 202—Investigation by Magistrate other than the one entertaining complaint.

Where a case is submitted by a Civil Court for inquiry under S. 476 Cr. P. C. to a Magistrate who has no power to try the case, and he refers it to the District Magistrate the latter has no power to order an investigation under S. 202 Cr. P. C.

The expression "proceed according to law" in S. 476 (2) Cr. P. C. requires the Magistrate receiving the reference to proceed under Chapters XVIII to XXI of the Code according to the nature of the offence supposed to have been committed.

Obiter:—The investigation allowed by S. 202 Cr. P. C. should be a local one, and the term "investigation" as defined in S. 4 (1) of the Code expressly excludes an enquiry by a Magistrate other than the one entertaining the complaint. (*Drake-Brockman, C.J.*) *DEVIDIN v. NARAYAN RAO.*

55 I.C. 470 :
21 Cr. L.J. 310

Ss. 476 and 537—Order under—Notice to accused—if essential—Order without notice or enquiry, illegal.

Before making an order under S. 476 Cr. P. C. the Court is not bound to issue notice to the accused.

Where a Court after very careful consideration arrives at the conclusion that an order under S. 476 Cr. P. C. is called for, and that no preliminary inquiry is necessary, the omission to make such inquiry is a mere irregularity under S. 437 of the Code. (*Knox, J.*) *BABU ULFAT RAM v. EMPEROR.*

55 I.C. 292.

S. 476—Order under—Revision—Application for.

An application under S. 439 Cr. P. C. to interfere in revision with an order passed under S. 476, Criminal Procedure Code, can only be made by a party aggrieved thereby i.e., the person whose prosecution has been ordered (*Halifax, A. J. C.*) *RAMJIVAN v. FAKIRA.*

58 I.C. 926.

Ss. 476 and 195 Cl. (4)—Order under S. 476—Perjury—Particulars to be stated.

Magistrates passing an order under S. 476 of the Cr. P. C. should do so with extreme care and at least carry out the requirements of S. 195 cl. (4) of the Code. It may not be absolutely necessary that the said provision should be literally and fully carried out, but the record should satisfy the High Court that the order has been passed with due care and consideration.

An order was passed under S. 476 against four persons who had given evidence in a criminal trial. The order directed them to show cause why they should not be prosecuted for perjury, but it did not specify the Court or the place and the occasion on which the offence

CR. P. CODE, S. 476.

was committed. *Held*, that the order did not carry out the requirements of S. 195 (4) and was not one calculated to give the accused proper notice of the offence alleged against them; and the order was set aside. (*Knox, J.*) *RAM SAHAI v. EMPEROR.* 18 All. L.J. 381 : 18 A. L.J. 381 : 55 I.C. 1008.

Ss. 476 and 195—Persons not parties—Forgery—Order directing prosecution for—Legality of—Documents alleged to be forged not produced—Effect of.

The petitioner produced a bond in the course of a suit which was eventually compromised. The defendant in both suits, filed a complaint against petitioner under S. 417 I. P. C. alleging that he had been deceived into the compromise. Evidence was recorded and a warrant of arrest was thereupon issued. On the date of hearing, the defendant in the suit alone was examined but the bond was not produced by him or given in evidence and the petitioner was discharged. Subsequently the Magistrate commenced proceedings under S. 476 Cr. P. C. and finally ordered the prosecution of the petitioner under S. 471 I. P. C.

Held, that as the bond was not given in evidence during the proceedings to which the petitioner was a party the Magistrate had no jurisdiction to take action under S. 476, Cr. P. C. (*Broadway, J.*) *NANAK CHAND v. EMPEROR.* 3 P.L.R. 1920 : 54 I.C. 55 : 21 Cr. L.J. 7.

Ss. 476 and 202—Proceedings under—Complainant not allowed to adduce whole of his evidence—Investigation if judicial.

Exceptionally strong reasons are required to justify an order under S. 476 in cases where the complainant has not been allowed to adduce the whole of his evidence in support of his complaint.

21 M.L.J. 795 foll.

The order in question was open to objection also on the grounds (i) the Magistrate did not himself give any reason for holding that the complaint of the petitioner was false (ii) he did not record any evidence except the statement of the complainant, and proceeded entirely upon the result of the investigation made under S. 202, Cr. P. Code.

Quare: Whether an investigation under S. 202 Cr. P. C. can be regarded as a judicial proceeding, and may be used for supporting an order under S. 476.

21 M.L.J. 795 ; 22 M.L.J. 419 referred to: (*Shahid Lal, J.*) *Maqbul Ahmad v. EMPEROR.*

2 Lah. L.J. 239.

S. 476—Proceedings under—Preliminary enquiry—Necessity for notice.

S. 476 Cr. P. C. does not provide for any preliminary enquiry before making the order, though in some cases such inquiry is desirable. But when an inquiry has been started, whether it be a formal or informal one, it should be completed and full opportunity given to the

CR. P. CODE, S. 476.

person process led against to show cause against the order *Jwala Prasad, J*; AJODHYA PRASAD SAHU v. EMPEROR.

1 P. L. T. 342.
58 I. C. 62 : 21 Cr. L. J. 718.

Ss. 476 and 537—Proceedings under S. 476 when justifiable—Preliminary enquiry if necessary—Nature of enquiry under S. 476 Cr. P. C. if can be questioned in subsequent trial—Successor in office of Magistrate making order if competent to try

Proceedings under S. 476 Cr. P. Code should not be taken until the very close of the case in which false evidence has been given, inasmuch as taken earlier, such action is likely to intimidate subsequent witnesses and defeat the object of the trial.

As a rule a Magistrate should not make up his mind to start proceedings under S. 476 Cr. P. Code against a witness before he has heard all the evidence in the case.

The holding of a preliminary enquiry under S. 476 Cr. P. C. is discretionary, but it should be held, wherever it appears to be necessary to hold it in the interest of justice and wherever it is held, it must be a real enquiry and not merely a formal one, ample opportunity being given to the accused to show cause why he should not be prosecuted.

The only way in which the validity of an order under S. 476 Cr. P. C. can be challenged is by invoking the revisional jurisdiction of the High Court but inasmuch as the exercise of that jurisdiction is purely discretionary, such order cannot be challenged as a matter of right. Therefore, a person against whom an order under S. 476 is made is not precluded from challenging the validity of the order in the subsequent trial or in an appeal from the conviction obtained in the subsequent trial.

The successor-in-office of a Magistrate who has started proceedings under S. 476 Cr. P. Code cannot be said to be the nearest Magistrate indicated by the section to whom the case might be sent for enquiry or trial.

A direct disobedience of an express provision of the Criminal Procedure Code as to a mode of trial cannot be regarded as mere irregularity and in a case of this nature the question of prejudice does not arise. (*Das, J.*) RAMOO SING v. EMPEROR. (1920) Pat. 61.

: 54 I. C. 173 : 21 Cr. L. J. 29.

Ss. 476 and 195 (6)—Sanction to prosecute—Lapse of sanction—Substitution of proceedings under S. 476, illegal. See Cr. P. Code, Ss. 195 (6) AND 476.

5 P. L. J. 58.

Ss. 476 and 195 (6)—Sanction under S. 195—Expiry of—Order for prosecution under S. 476 Cr. P. C. Sec Cr. P. Code Ss. 195 (6) AND 476.

54 I. C. 894.

CR. P. CODE, S. 485.

S. 476—Stay of proceedings under Pending decision of appeal in Civil Court—Application to High Court—jurisdiction.

An application to the High Court to stay proceedings instituted by a Sub-Judge under S. 476 Cr. P. Code and arising out of a civil suit from which an appeal is pending in the High Court, cannot be regarded as governed by either the C. P. Code or the Cr. P. Code.

But it is not outside the jurisdiction of the High Court in exercise of its general powers of superintendence over the proceedings of all courts subordinate to it, to direct the presiding officer of any Civil Court Subordinate to it to adjourn for a time any proceeding, of whatsoever nature, initiated by him as such presiding officer i.e., proceedings under S. 476 Cr. P. C. When the criminal proceedings on the face of them raise a question of fact which is still under adjudication by a Civil Court, the tendency has been, whenever possible, to secure a final adjudication by the civil court before the actual trial of the accused persons in a Criminal Court, though not necessarily on the part of the High Court, to mitigate a proceeding by a subordinate Civil Court under S. 476 merely on the ground that an appeal on the same facts is pending before the High Court. (*Piggot, J.*) RAJ KUNWAR SINGH v. EMPEROR

18 A. L. J. 1011.

S. 487—Power of magistrate to try offence coming to his knowledge in the course of judicial proceedings.

A Magistrate who takes cognizance of an offence coming to his knowledge in the course of judicial proceedings pending before him is debarred from trying it himself, S. 487 of the Criminal Procedure Code (*Lindsay, J.*) EMPEROR v. KUNWAR BAHADUR.

23 O. C. 136:

57 I. C. 934 : 21 Cr. L. J. 694.

S. 488—Agreement as to maintenance—Order of Magistrate based on.

An order for maintenance based on an agreement by the husband to pay to the wife some cash allowance together with something in kind is not a proper order under S. 488 of the Cr. P. Code. Such an order cannot be said to be one fixing maintenance in accordance with S. 488 of the Cr. P. Code and could not be maintained. (*Scott Smith, J.*) MASTA v. EMPEROR.

57 I. C. 276 : 21 Cr. L. J. 612.

S. 488—Application for maintenance—Evidence

A Magistrate in a case under S. 488 Cr. P. Code instead of examining the applicant at length and her witnesses (if any) got her only to verify an oath on the truth and correctness of her application and then examining the husband and treating the application for maintenance as legal evidence against the husband passed an order of maintenance.

CR. P. CODE, S. 488.

Held, that the order of maintenance was bad as the application could not be used to supplement or to take the place of the applicant's examination on oath in the presence of her husband and was consequently no legal evidence against the husband. (*Lindsay, J.C.*) **KAMTA v. MANGAL DEI.** 23 O. C. 237

—**S. 488—Maintenance order—Subsequent divorce.**

An order for the maintenance of a wife under S. 488, Cr. P. Code, becomes inoperative in the case of Mahomedans on the expiry of the period of iddat if there is a divorce between the parties after the passing of the order. (*Twomey, C. J.*) **MAHMED HOSAIN v. MA PWA HUNIT.** 13 Bur. L. T. 43 : 56 I. C. 663 : 21 Cr. L. J. 503.

—**S 488—Maintenance—Second Application—Maintainability of. See (1919) Dig. Col. 457. MONMOHAN DEY v. SURABALA DASI**
54 I. C. 51 : 21 Cr. L. J. 3.

—**S 488—Order of civil court—Effect of**

The jurisdiction conferred by S. 488 of the Criminal Procedure Code is auxiliary to that possessed by the Civil Courts, and before enforcing an order for maintenance made under this section a magistrate is bound to take into consideration any subsequent order or a Civil Court which would entitle a wife to maintenance.

A magistrate ought to refuse to enforce an order for maintenance under S. 488 if after passing of the order a civil court has decided that the respondent was not the father of the child. (*Robinson, J.*) **Bo Gyi v. Ma NYEIN.**

13 B. L. T. 104.

—**S. 488 (3)—Order for maintenance—Enforcement of—Attachment of moveables—Objection—Procedure.**

In execution of a warrant issued under S. 488, (3) Cr. P. Code two cows were attached and an order for sale was issued. Before the Magistrate the defaulting husband's brother appealed and claimed that the cows were his. The Magistrate held a summary enquiry and came to the conclusion that the cows were the joint property of both the brothers.

Held, that the Magistrate ought to give the petitioner a further opportunity to establish his claim to the cattle in question in the Civil Court and next, that before he should proceed to sell the cattle the petitioner should be allowed an opportunity of bidding at the sale and only half, if that be the defaulter's share of the sale proceeds should be retained against the balance due from him. (*Teunon and Walmisley, J.J.*) **DURLABH CHANDRA KARAR v. INDRAMANI DASI.** 32 Cal. L. J. 64

—**S. 494—Accused—Withdrawal of case—Competency as witness.**

An accused person is, after a withdrawal under S. 494 Cr. P. C. Code and discharge, a

CR. P. CODE, S. 517.

competent witness. (*Shamshul Huda and Duval, J.J.*) **KASEM ALI v. EMPEROR.**

47 Cal 154 : 31 C L J. 192 : 55 I. C 994 : 21 Cr. L. J. 386.

—**S. 494—Withdrawal of criminal prosecution—Right of public prosecutor—Complainant if can proceed with case.**

An order passed under S. 494 Cr. P. Code by a Magistrate is a judicial order and if the discretion vested in that section is arbitrarily exercised the High Court is entitled to interfere and justified in passing the order, which ought to have been passed by the Magistrate.

A court Sub-Inspector is the 'public prosecutor' under S. 4 (t) Cr. P. Code and when the case has been started upon a police report, and if the Court Sub-Inspector wants to withdraw the case, the court acts w/out jurisdiction in rejecting the praye for withdrawal simply because the complainant wants to proceed w/ the case, the complainant having no *locus standi* to control the proceedings. 26 C. L. J. 208, 4 P. L. J. 616, followed (*Sultan Ahmad, J.*) **GOPIBARI v. EMPEROR.**

1 P. L. T. 400 : 57 I. C. 657 : 21 Cr. L. J. 641.

—**Ss. 494 and 495 (2)—Withdrawal of prosecution—Joint application of police sub-inspector and private vali conducting prosecution—Discharge of accused—Examination as witness thereat. See (1919) Dig. Col. 459. SITAL SINGH v. EMPEROR.**

54 I. C. 53 : 21 Cr. L. J. 5.

—**S 514—Personal Bond—Forfeiture—Non-appearance in another Court.**

Certain accused persons executed personal bonds themselves to attend on the dates on which the case might be heard in the Court of a certain Magistrate named therein or in the Court of Session if the case should be committed to that Court. The Magistrate (being then on tour) ordered them to appear on one particular date in the Court of another Magistrate as the evidence of the Civil Surgeon was to be recorded before the latter on that date. Some of the accused failing so to appear their bonds were ordered to be forfeited. *Held*, that if the bonds did not require them to appear in the Court of the other Magistrate the order of forfeiture was wrong. (*Knox, J.*) **MAHABIR PANDE v. EMPEROR.** 18 A. L. J. 631 : 57 I. C. 456 : 21 Cr. L. J. 632.

—**Ss. 517, and 524—Disposal of property produced in Court or served by police—Suit to contest order—Maintainability of—Limitation—Wrongful forfeiture.**

The power of a Criminal Court with regard to property dealt with in S. 517, or 524 of the Code of Criminal Procedure, 1898, is limited to making arrangements for the custody and protection of the property while in the custody of Government and making a transfer of possession to such person as it thinks proper.

CR. P. CODE, S. 517.

These sections do not empower the Government to confiscate the property or conclude the right of the person from whose possession the property has been taken or of any other person, to contest the decision of the Criminal Court by civil suit. 9 B. 121; 40 B. 200; S.W.R. 207; 9.W.R. 13; 19 B. 658 Re¹

Such an order of confiscation being illegal and without jurisdiction the plaintiff's suit for recovery of possession is not barred by reason of their omission to institute a suit within one year of the order for the purpose of having it set aside (*Mullick and Sultan Ahmed, JJ.*) SECRETARY OF STATE FOR INDIA IN COUNCIL v. LOWN KARAN MARWARI

5 P. L J. 321 1 Pat. L. T. 451 :
1920 Pat 253 : 56 I.C. 507 :
21 Cr. L. J. 475.

Ss. 517 and 522—Immoveable property—What is—Restoration of possession to person dispossessed—Forcible ejection.

S. 517, of the Criminal Procedure Code, 1898 applies to moveable property only and does not extend to immoveable property to which the section applicable is S. 522, 18 C. W. N. 1146; 36 Cal. 44 foll.

In order that S. 522 may be applicable it is not necessary that force should be an ingredient of the offence of which the accused is convicted and it is enough if the use of force appears from the evidence. (*Oldfield, J.*) ADEPU REDDI v. RAMAYYA. 12 L. W. 227.

S. 517—Property produced before Court—Power of disposal over.

Under S. 517 of the Cr. P. C. it is not necessary that the property to be disposed of should have been used for the commission of an offence or that some offence should appear to have been committed regarding it. The Court has power to make an order for the disposal of any property "produced before it or in its custody." (*Drake-Brockman, J. C.*) GANPAT v. BANI

56 I. C. 62 :
21 Cr. L. J. 414

Ss. 523 and 439 — Action of Magistrate—Procedure—High Court—Revision

A Magistrate is not bound to make a judicial enquiry by examination of witnesses on oath before making an order under S. 523. All that the law requires is that he should have materials before him to satisfy him who is entitled to possession.

The High Court has power in revision not only to set aside a Magistrate's order for the disposal of property seized by the police but also to order restitution of the property to the person entitled thereto. 4 L. B. R. 14 Ref. (*Rutledge, J.*) MA THEIN NU v. MA THE HNUIT. 12 Bur. L. T. 265:

57 I. C. 81 : 21 Cr. L. J. 561.

CR. P. CODE, S. 528.

S. 526—Criminal case—Transfer of—Grounds for

Ordinarily, the transfer of a Criminal case ought not to be allowed. Where, however, there is some degree of association between the Magistrate and one or other of the parties to a case as, for instance, where a party has a financial hold on the Magistrate, the case ought not to be tried by that Magistrate. (*Mears, C.J.*) SHAMLAL v. EMPEROR.

58 I. C. 923.

S 526—Parties interested—Criminal case—Transfer of Application by complainant—Complainant not a prosecutor. See (1919) Dig Col. 461. JAMUNA KANTHA JHA v. RUDRA KANTH JHA. (1920) Pat. 42.

S. 526—Transfer of case—Fair and impartial—Apprehension—Delay in examining Complainant.

In dealing with an application for the transfer of cases each case must be decided upon its own circumstances.

It is not every kind of apprehension that will entitle an accused person to a transfer of the case against him; there must upon the record be reasonable grounds for apprehending that the trial would not be fair and impartial. Inordinate delay in examining the complainant, or a disregard of the preliminaries prescribed by the Cr. P. Code for dealing with complaints and awaiting the consideration of the evidence in another case with which the accused has no concern in order to decide whether any action should be taken upon the complaint are matters which afford reason to the accused to apprehend that he will not have a fair and impartial trial, and such a case is a proper one in which to direct a transfer. (*Jwala Prasad, J.*) REKHA AHIR v. EMPEROR

1 P. L. T. 494. 56 I. C. 664 :
21 Cr. L. J. 504.

S. 526—Transfer of case—Reasonable apprehension—Arrest without complaint.

Where C made a verbal statement before the District Magistrate in his chamber charging D, a Sub-inspector of Police of bribery and the Magistrate forthwith arrested D, and ordered further enquiry under S. 202 Cr. P. Code by the Dy. Supt. of Police.

Held, that the Magistrate had no jurisdiction to arrest D before deciding whether process should issue after the result of the inquiry to be made under Ss. 202 Cr. P. Code. Ss 64 and 65 not being applicable and a case under S. 161, I. P. C. being one in which a summons should only issue in the first instance.

The suspicion of the accused about prejudice in the mind of the Magistrate may or may not be correct but all that is necessary for transfer of a case is that there must be reasonable ground for suspicions for the purpose.

The following facts put together afforded reasonable suspicion. Verbal statement in

CR. P. CODE, S. 526.

chambers before the District Magistrate himself who does not entertain complaints; or immediate action of the Magistrate in arresting the accused before enquiry; likelihood of the Magistrates of the District figuring as witnesses, and the accused having lost faith in the head of the District and in the Subordinate Magistrates the case ought therefore to be transferred to another district altogether. (*Jwala Prasad, J.*) **DIN DAYAL SINGH v. EMPEROR.** 1 P. L. T. 522: 58 I. C. 523: 21 Cr. L. J. 795.

S. 526—Transfer—Grounds for Displeasure of Magistrate.

The fact that a Magistrate by his attitude shows that he is displeased with an accused person is not a sufficient ground for transferring a case. (*Knox, J.*) **SITAL PANDE v. EMPEROR.** 58 I. C. 681.

S. 526—Transfer—Grounds for Refusal to grant copies—Cancellation of bail bond—Cumulative weight.

Where after the application of the accused for adjournment of the case to enable them to move the High Court for transfer the amount of bail of the accused was raised from Rs. 100 to Rs. 250 and the bail bonds of some were cancelled the action of the Magistrate might be absolutely *bona fide* but it was sufficient to create a reasonable apprehension in the mind of the accused that they would not have a fair and impartial trial before him.

5 C. W. N. 101 (1900) foll.

When on the application of the accused for copies of depositions, the Magistrate ordered that copies could not be given because depositions had not been recorded as the trial was summary:

Held, that although there were no depositions of the witnesses yet there was the substance of their statements on the record and the Magistrate would have exercised a judicious discretion if he had granted the petitioner copies of those notes.

Although the grounds taken for transfer of a cause may not be sufficient if considered separately yet a transfer would be justified where having regard to all the circumstances taken together the accused might not reasonably apprehend that he would not have a fair trial. 9 C. W. N. 619 foll. (*Sultan Ahmed, J.*) **TITTU SAHU v. EMPEROR.** 1 Pat. L. T. 652: (1920) Pat. 283: 57 I. C. 454: 21 Cr. L. J. 630.

S. 526 (8)—Transfer—Grounds for Examination of witness after mention of intention to apply for transfer.

At the commencement of the hearing of a case under S. 500 I. P. C. the accused applied for an adjournment under S. 526 (8) of the Criminal Procedure Code, on the ground that

CR. P. CODE, S. 537.

he intended to apply to the High Court for transfer of the Case. The Magistrate summarily rejected the application and proceeded to hear the prosecution witnesses and to examine the accused; after which the complainant was permitted to put in a fresh list of witnesses and the case was adjourned to another date.

Held, that under S. 526 (8) Cr. P. C. it was not incumbent on the court to stay all proceedings in the case as soon as an application for adjournment was made under that section, but the court was only bound to give such an adjournment as would afford a reasonable time for the application for transfer being made and an order passed thereon, before the accused was called on for his defence. As the accused had not yet been called on to enter upon his defence, the proceedings that had taken place in the Magistrate's court were not illegal.

Where it appeared that a person who had lately been the peshkar of the trying Magistrate was an enemy of the accused and an active pairokar of the complainant, and that the Magistrate had summarily rejected an application by the accused for adjournment under S. 526 (8) of the Criminal Procedure Code, had refused him copies of that application and of the order passed thereon, and had hurried to take the statement of the accused before all the evidence for the prosecution had been finished:—*Held*, that these circumstances were enough to create a justifiable apprehension in the mind of the accused that he would not have a fair trial in that Magistrate's court, and the case was transferred to another court. (*Gokul Prasad, J.*) **ABDUL RAB v. AZMAT ALI.** 18 A. L. J. 1145.

S. 528—Transfer of case after hearing parties—Re-transfer without notice to complainant.

Where at the instance of the complainant a Sub-divisional Magistrate after hearing all the parties transferred a criminal case from the file of one Sub-Magistrate to that of another, it is not open to the District Magistrate to re-transfer the case at the instance of the accused without notice to the complainant. (*Abdur Rahim, J.*) **IN RE MANIKKAM PILLAI.** 39 M. L. J. 714: 12 L. W. 633: (1920) M. W. N. 767.

S. 537—Accused instituting two false suits—Dismissal of suits—Sanction to prosecute in one—Magistrate's wrong interpretation of order as covering both suits—Irregularity—No prejudice. See (1919) Dig. Col. 465. *EMPEROR v. BABU RAM.*

42 All. 12.

Ss. 537 and 476—Scope of—Disobedience to express provision of the Cr. P.

CR. P. CODE, S. 537.

Code as to the mode of trial not a mere irregularity. See Cr. P. CODE Ss. 476 AND 537.

54 I C 173

—S. 537—Scope of—Magistrate referring complaint to accused for report—Dismissal of complaint—Ilegality.

It is not merely irregular but illegal for a Magistrate to whom a complaint is made to call upon the person accused for a report as to the truth or falsity of the charge preferred against him. Such an illegality *ipso facto* renders void an order made in consequence of it.

S. 537 Cr. P. Code deals merely with irregularities in procedure so far as such irregularities involve breaches of the rules of procedure provided by the Code itself (*Atkinson and Adami, JJ.*) HARNARAIN HALWAI v. KARIMAN AHIR.

5 P. L. J. 61:
1 Pat. L. T. 609 : 57 I. C. 285.
21 Cr. L. J. 621.

—S. 556—Cantonment Magistrate—Order for prosecution for disobedience of provisions of the Cantonment Code—Trial by same Magistrate without allowing option to the accused to choose another irregular. See CANTONMENT CODE, Ss 92 AND 107

55 I. C. 1002.

—S. 556—Power of District Magistrate to try case under Indian Factories Act, where he himself as Inspector ordered inquiry and sanctioned prosecution.

A District Magistrate who as Inspector of factories ordered an enquiry to be made and in the same capacity sanctioned the prosecution is disqualified by S. 556 Cr. P. C. from trying the case 5 P. W. R. 1919 ref 42 Mad. 238, dist. (*Scott-Smith and Dundas, JJ.*) LORINDA RAMSEWA RAM v. EMPEROR.

1 Lah. 35 : 1 Lah. L. J. 95 :
55 I. C. 997 : 21 Cr. L. J. 389.

—S. 562—Interpretation and scope of.

S. 562 Cr. P. Code describes the offences to which it applied by the short marginal descriptions given in the Penal Code in the sections dealing with those offences and the section does not warrant the construction that dishonest misappropriation and cheating include every offence under the headings of "Criminal Misappropriation" and "Cheating" in the Penal Code.

23. Ind. Cas. 743 diss 10 Ind. Cas 114; 31. Ind. Cas. 381, approved. (*Mullick and Sultan Ahmed, JJ.*) EMPEROR v. DEVA KANTA JHA.

5 P. L. J. 267 : 1 P. L. T. 297 :
(1920) Pat. 224:
56 I. C. 500 : 21 Cr. L. R. 468.

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required See EVIDENCE, CIRCUMSTANTIAL.
58 I. C. 457.

—Bench Magistrates—Trial commenced by three—Judgment and conviction by two—Conviction illegal and void See Cr. P. CODE S. 16.

22 Bom. L. R. 154.

—Complaint—Magistrate referring complaint to accused for report—Dismissal of complaint—Ilegality. See Cr. P. CODE, S. 537.

5 P. L. J. 91.

—Conviction—Evidence necessary to sustain—Mere balance of probability, not enough See (1919) Dig. Col. 468. RAM SUNDAR SAHAY v. EMPEROR.

1 P. L. T. 115.

—Defence—Denial of connection with offence charged and plea of private defence in the alternative.

An accused person is not debarred from denying that he committed the act of which he is accused and at the same time pleading the right of private defence. (*Coutts and Adami, JJ.*) FAUDI KEOT v. EMPEROR.

5 P. L. J. 64 : 1 P. L. T. 79 :
58 I. C. 527 : 21 Cr. L. J. 799

—Duty of prosecution—Eye witnesses—Examination of.

It is the duty of the prosecution to examine important witnesses, who are presumably eye-witnesses of the occurrence and the failure of the Public Prosecutor to do so requires explanation. (*Coutts and Das, JJ.*) KESHWAR GOPE v. EMPEROR.

1 P. L. T. 491 :

58 I. C. 247 : 21 Cr. L. J. 743.

—Duty of prosecution—All relevant evidence to be placed before the Court—Duty of the Court—Weighing oral testimony.

The direct evidence of the witnesses must be tested and weighed in the same manner whatever the numerical strength of the witness may be and the conscience of the Court must be satisfied as to the guilt of the accused persons before they can be convicted of any crime.

It can by no means be laid down as a general maxim that the assertion of two witnesses is more convincing to the mind than the assertion of one witness.

The only legitimate object of a prosecution is to secure not a conviction but that justice be done. The prosecutor is not free to choose how much evidence he will bring before the Court. He is bound to produce all the evidence in his power directly bearing upon his charge.

It is the duty of the prosecutor to call every witness who can throw any light on the enquiry whether they support the prosecution theory or the defence theory. It is for the Court to choose which theory is correct, not for the prosecutor.

The duty of the public prosecutor is to represent not the police but the Crown, and

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his duty should be discharged by him fairly and fearlessly, and with a full sense of the responsibility that attaches to his position 8 Cal. 121 at p. 124; 42 Cal. 428 at p. 429. (*Das, J. v. BRAHAMDEO SINGH v. EMPEROR.*)

(1920) Pat 24 : 1 P. L. T. 161 :
54 I. C. 241 : 21 Cr. L. J. 33.

Evidence—Disallowance of questions in cross-examination—Duty of Court to allow reasonable time for defence.

Where in cross-examining a witness for the prosecution, questions are disallowed by the Court on the ground of irrelevancy or on other grounds the evidence should show what the questions are and the reason for disallowing them.

Where a large number of witnesses are examined for the prosecution the accused is entitled to a reasonable interval for considering what evidence he should produce by way of rebuttal. A demand of two days time for this purpose is not unreasonable. (*Mullik and Sultan Ahmed, JJ v. RAMESHWAR DUSADH v. EMPEROR.*) 1 Pat. L. T. 632 : 55 I. C. 593 : 21 Cr. L. J. 321.

Evidence—Drawing up of charges—Prosecution witnesses—Right of accused to summon for cross-examination without paying process fee. See Cr. P. CODE Ss. 256 AND 257

(1920) Pat. 59.

Evidence—Investigating officer summoned by accused—Duty of Court to record evidence.

If an investigating officer is summoned as a witness by the accused he is entitled to have the evidence of that officer recorded and if he fails to appear, the Court should enforce his attendance. (*Das, J. v. AMRIT MANDER v. EMPEROR.*) 1 Pat. L. T. 490 : 55 I. C. 608 : 21 Cr. L. J. 336

Evidence—Mode of recording—Summons case—Magistrate making pencil record of evidence in loose scraps of paper and then fair copying—Procedure illegal and unjustifiable. See Cr. P. CODE, Ss. 241, 243 AND 245

1 P. L. T. 63.

Evidence—Record, how made.

A Magistrate should record the evidence for the defence with the same amount of care and precision as that for the prosecution, as otherwise his opinion that the evidence is false is not easy to test. (*Walsh, J. v. MAHBOOB v. EMPEROR.*) 56 I. C. 856 : 21 Cr. L. J. 552

First information report—Meaning and importance of—Information recorded in station diary.

Where R started for the Police Station after the occurrence and the Writer-Head-Constable made an entry of his statement in the station diary and R returned to his village but L who had received the blow, having died, R started again for the Thana and having met in the way the Writer Head Constable who

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was going to the place of occurrence for investigation, R gave another information, which was also recorded and the Sessions Judge treated it as the first information in the case

*Held, that the first information was the first statement made to the Police and the statement made subsequently to the Police was not the first information and being merely a statement recorded by a police officer in the course of the investigation was inadmissible in evidence. A Court acts improperly in admitting a document "subject to objection" and not deciding the objection. (*Coutts and Das, JJ v. KESHWAR GOPE v. EMPEROR.*) 1 P. L. T. 491 : 58 I. C. 247 : 21 Cr. L. J. 743.*

Identity of accused—Parade—Evidence of.

Where a jail identification is held in the presence of a Magistrate, the Magistrate should be produced at the trial as a witness, and it is the duty of the Court to call him before the conclusion of the trial. (*Mears, C. J. and Refugee, J. J. v. EMPEROR v. SUNDAR.*)

56 I. C. 771 : 21 Cr. L. J. 515.

Judgment—Contents of—Embodying prosecution statement prepared for argument—Impropriety of.

It is generally undesirable to make documents prepared by the parties to a case part of the judgment, but where a statement of the prosecution evidence was checked by the trial court before being embodied in the judgment he could not be prejudiced. (*Huda and Duval, JJ v. KASEM ALI v. EMPEROR.*)

47 Cal. 154 : 31 C. L. J. 192 :

55 I. C. 994 : 21 Cr. L. J. 386.

Judgment in—Separate trials—Summary trial.

In the case of two separate trials where the law requires a judgment to be written in each, it is improper to record a single judgment.

In a summary trial, where a non-appealable sentence is passed the Magistrate need only record a finding and his reasons therefor. (*Piggot, J. v. BHOL NATH v. EMPEROR.*)

56 I. C. 234 : 21 Cr. L. J. 442.

Jury—Misdirection—Accomplice—Evidence of—Omission to warn jury against credibility of. See (1919) Dig. Col. 470. SURYA KANTA BHATTA CHARYYA v. EMPEROR.

31 C. L. J. 20 : 58 I. C. 674.

Jury—Misdirection—Omission to warn a jury not to be influenced by previous proceedings.

An omission by a learned Judge to warn the jury to pay no attention to the result of the previous proceedings, amounts to misdirection (*Sanderson, C. J. and Walmsley, J. v. MIR MOUZE ALI v. EMPEROR.*) 31 C. L. J. 305.

56 I. C. 858 : 21 Cr. L. J. 554.

Local inspection by Magistrate—Propriety of—Procedure,

It is not only not objectionable but in many cases highly advisable for a Magistrate trying

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a criminal case to inspect the scene of occurrence in order to understand fully the bearing of the evidence given in court. If he does so he should be careful not to allow any one on either side to say anything to him which might prejudice his mind one way or other. (*Kanhaiya Lal, J. C.*) FAIRY LAL v. EMPEROR. 54 I.C. 774 : 21 Cr. L.J. 166.

—Notice of hearing—Appeal—Sufficient time to be given.

The notice for hearing of an appeal was served in the afternoon of 21-3-1919 on the appellants' pleader at Amalner asking him to be present on the 22nd March 1919 at Jalgaon or any other place where the camp of the District Magistrate might be. On the day in question the District Magistrate was encamped at Edlabad which being at a considerable distance from Amalner the appellants' pleader could not appear on the day fixed.

Held, that the order dismissing the appeal should be set aside since the appeal had been disposed of in the absence of the appellants and there was no sufficient notice to their pleader of the date and the place of hearing (*Shah and Hayward, J.J.*) ARJUN TATHOO IN RS. 22 Bom L.R. 188 : 55 I.C. 853 : 21 Cr. L.J. 372

—Perjury—Presumption under S. 118 of the Negotiable Instruments Act—Not applicable. See NEG. INS. ACT, S. 118.

18 A. L.J. 1151.

—Plea of guilty—Mistake of law—Court not to accept plea but to try case on the merits

—Waiver or right to question legality of conviction by pleading guilty. See Cr. P. CODE S. 412 31 C. L. J. 122

—Pleader—Appearance without vakalat namah—Procedure.

When an accused person is represented by a pleader in an appeal, but the pleader has no vakalatnamah, the proper course is to adjourn the hearing of the appeal until one is forthcoming, and thus afford the accused an opportunity of being represented. (*Sanderson, C. J. and Walmsley, J.*) JASIR KHAN v. EMPEROR. 56 I.C. 61 : 21 Cr. L.J. 413.

—Proof of guilt—Circumstantial evidence—To be inconsistent with innocence of accused. See Cr. P. CODE, S. 307.

55 I.C. 294.

—Proof of guilt—Onus on prosecution.

In a criminal case the onus is on the prosecution to prove beyond reasonable doubt the guilt of the accused. That onus never changes. (*Sanderson, C. J. and Walmsley, J.*) HATHEM MONDAL v. EMPEROR. 24 C.W.N. 619 : 31 C.L.J. 310 :

56 I.C. 849 : 21 Cr. L.J. 545.

—Right to begin—Question referred to Full Bench under Cl. 25 and 26 of the Letters Patent—Objection to admissibility of evidence

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—Right of counsel for accused to begin and reply. See LETTERS PATENT (C.I.L) CLS. 25 AND 26. 25 C. W. N. 501.

—Session trial—Refusal to summon defence witnesses—Trial improper.

Where in a Sessions case the judge refused to enforce the attendance of some defence witnesses who had been summoned by the Committing Magistrate but who did not appear on the ground that the application should have been made at an earlier date, the High Court in appeal set aside the conviction and sentence holding that the trial was vitiated. (*Sanderson, C. J. and Walmsley, J.*) FOIZUDIN v. EMPEROR. 47 Cal 758 : 24 C. W. N. 527 . 58 I. C. 922.

—Stay of Civil Appeal pending in High Court—Proceedings under S. 476 Cr. P. Code initiated by Sub-Court—Procedure. See Cr. P. CODE S. 476. 18 A. L.J. 1011.

—Stay of—Civil suit instituted subsequently—Discretion.

Ordinarily the subsequent institution of a civil suit relating to the matter in dispute is not a good cause for stay of Criminal proceedings. If however the cause of action did not arise till after the filing of the criminal complaint the criminal proceedings should be stayed pending the decision of the civil suit in the first Court. (*Chevis, O. C. J.*) SHIB DAYAL v. HANS RAJ. 55 I.C. 1007 : 21 Cr. L.J. 399.

—Stay of—Pending civil dispute—Discretion—Interference.

The question whether criminal proceedings should be stayed pending the disposal of a civil suit is primarily a matter for the discretion of the Magistrate before whom they are pending and the High Court will not lightly interfere with the exercise of this discretion.

Where the matter is purely a civil matter and can more fully and adequately be dealt with in a civil proceedings, criminal proceedings ought to be stayed pending the decision of the civil suit. (*Robinson, J.*) SOORAYA v. SHWE BWIN. 13 Bur. L.T. 41 : 55 I.C. 721 : 21 Cr. L.J. 353.

—Stay of—Pendency of civil dispute—Prejudice.

Where the executant denied the execution of the sale deed, and the District Registrar on appeal registered the deed and ordered prosecution of the executant under S. 82 (a) of the Indian Registration Act, whereupon she instituted a suit in the civil court for a declaration that the sale deed was a forged one, and moved the High Court for stay of the Criminal proceeding.

Held, (1) that the issue in the civil suit being substantially the same as in the criminal case, and there being no chance that the evidence might, by lapse of time, become stale or unobtainable, the High Court was justified in ordering the stay of the criminal proceedings.

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as otherw're there was a danger of a manifest and irreparable injustice being done to the accused, in the event of her conviction by the criminal case, even though she ultimately succeeded in the civil suit (*Jwala Prasad, J.*) **MUSAMMAT PHULESHRA KUER v EMPEROR.**

1 P. L. T. 697

—*Stay of Pending civil suit—Discretion of Magistrate—High Court—Revision—Power of interference.*

The power to postpone criminal proceedings until the disposal of a civil suit in respect of the property which is the subject matter of the criminal case, is entirely within the discretion of the magistrate; and where in the right exercise of that discretion a Magistrate refuses to stay a criminal case, the High Court will not interfere. (*Coutts, J.*) **RAGHUBAR SINGH v. EMPEROR.**

1 Pat. L. T. 489 : 55 I. C. 678 : 21 Cr. L. J. 342.

CRIMINAL TRIBES ACT (III of 1911) S 5—Order of Magistrate refusing to remove name from register if a judicial order—Revision.

The District Magistrate in granting or refusing an application to take the name of a person out of the register kept under S. 5 of the Criminal Tribes Act does not perform judicial functions; his functions are administrative and the High Court is not entitled to interfere with any order made by the Magistrate in this respect. (*Shamsul Huda and Ghose, JJ.*) **HASAN ALI BEPARI v. EMPEROR.**

47 Cal. 843 : 24 Cal. W. N. 624 : 57 I. C. 101 : 21 Cr. L. J. 581.

—*S. 22 (2) (b)—Change of residence—Omission to report—Previous conviction—form of.*

The failure by a member of a criminal tribe notified under S. 10 of the Criminal Tribes Act to report himself and to give information of his residence or intended change of residence renders him liable to conviction under S. 22 (2) of the Act; if he has been previously convicted, he is liable to conviction under S. 22 (3) of the Act. (*Tudball, J.*) **EMPEROR v. BHAGELU DOM.** 56 I. C. 226 : 21 Cr. L. J. 434

CROWN—Religious endowment—Appointment of trustees.

The endowments belonging to a temple having been mismanaged the Government resumed the endowments and subsequently donated the lands to the temple committee on condition that they made satisfactory arrangements for the due performances of the services of the temple." The committee appointed a trustee to manage the temple and the properties.

Held, that the government had power to invest the temple committee with the power to appoint the trustee and the appointment by the temple committee was valid. 45 I. A. 134 and 24 Mad. 219 ref. (*Sadasiva Aiyyar and Moore,*

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JJ) PILLAIMUTHU PILLAI v. VEYINDRAMUTHU PILLAI. 12 L. W. 324.

CUSTOM—Adoption—Brother's daughter's son—Jats—Jullunder—Tahsil—Onus—Riwaj-i-am.

The plaintiff's adopted son on whom the onus lay had failed to prove that by custom among Jats of Mauza Manko Tahsil and District Jullundur the adoption of a brother's daughter's son is valid. 50 P. R. 1893. (F. B.) 20 I.C. 830; 94 P. R. 1912; 90 P. R. 1914. Ref. (*Shadi Lal and Dundas, JJ.*) **JAMAT SINGH v. UJAGAR SINGH.** 1 Lah 15 : 55. I. C. 838.

—*Adoption—Brother—Hindu Jats, Ludhiana Dt.—Riwaj-i-am.*

Among Hindu Jats of the Ludhiana District a sonless proprietor who happens himself to have been an adopted son, is not debarred from exercising the general power possessed by a proprietor in the central and eastern parts of the Punjab of appointing one of his kinsmen to succeed him as his heir 99 P. R. 1914; 50 P. R. 1893 dist.

The plaintiff's collaterals on whom the onus lay had failed to prove that the adoption of a brother is invalid among these Jats.

44 P. R. 1913 ; 205 P. L. R. 1913 ref.

Sensible: The suggested rule that no adoption can be valid in which the mother of the person adopted is debarred from marrying the adoptive father does not apply amongst agriculturists of Ludhiana, (*Rattigan, C. J. and Dundas, J.*) **JIWA SINGH v. CHANDL.**

1 Lah. 39 : 2 Lah. L. J. 119 : 55 I. C. 935.

—*Adoption—Dhusars of Gurgaon—Central Provinces—Migration to.*

In matters of adoption Dhusars of Gurgaon, a non-agriculturist tribe, who settled in the Central Provinces, are governed by the Customary Law of the Punjab and there is nothing to prevent the adoption of an orphan among them. (*Batten and Stanyon, J. C.*) **JAINARAIN DHUSAR v. RAM KISHORE.** 56 I. C. 822.

—*Adoption—Mahesris of Delhi—Power of widow to adopt without husband's authority or collateral's consent.*

In the matter of adoption Mahesris follow custom and not strict Mitakshara Law.

Among them a widow can adopt to her deceased husband in cases as in the present one, where her husband had separate property and was not a member of a joint family and neither the authority of her husband nor the consent of collaterals is necessary to validate the adoption. (*Shadi Lal and Beera-Petman, JJ.*) **KALU RAM v. PIARI LAL.** 1 Lah. 92 : 55 I. C. 953.

—*Adoption—Stranger—Jats of Tahsil Fatehabad—Hissar Dt.—Onus.*

The onus of proving that the adoption of a stranger viz., the illegitimate child of the widow of the brother is valid by custom among

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jats of Bangroon, Tahsil Fatehabad District Hissar, rests on the adopted child. (*Broadway, J.*) **MOMAN v. DHANNI.** 1 Lah. 31 : 55 I C 869.

Alienation — Abadi — Mortgage of house by non-proprietor — Suit for possession.

The initial presumption is against a non-proprietor being able to alienate the site and his right of residence in his house without the consent of the proprietary body.

In the case of such an alienation the proprietors are entitled to a decree for possession. (*Martineau, J.*) **AHMAD YAR v. SADULLAH.** 56 I.C. 11.

Alienation — Awans of Jullundur Tashil — Gift to sister's son or mother's sister's son.

Among Awans of the Jullundur Tahsil, a gift by a sonless proprietor of ancestral land partly to his sister's son and partly to his mother's sister's son is valid (*Broadway and Wilberforce, J.J.*) **ABDULLA v. KHAIR DIN.** 2 Lah. L.J. 546 : 57 I.C. 248.

Alienation — Ancestral land — Mortgage — Necessity — Proof — Onus.

Where a usuryructuary mortgagee of certain ancestral lands, leased the lands to the mortgagor and subsequently enhanced the rates and obtained subsequent mortgages from the mortgagor for such arrears.

Held, that the onus was on the mortgagee to prove that the rent charged was fair and that there was necessity for enhancing the rate of rent after every three years.

The mortgagor having been proved to be extravagant and it not being shown that he managed his property well and carefully, it could not be said that the subsequent three mortgages were for necessity and that, therefore they were not binding on the sons of the mortgagor. (*Abdul Raof, J.*) **HAKO v. NIGAHIA.** 55 I.C. 307.

Alienation — Arains of Jullundur city — Presumption — Custom or personal law — Proof of.

To apply the initial presumption against the power of alienation under the customary law it is necessary to prove not merely that the family belongs to an agricultural tribe but also that its main occupation is agriculture. That presumption does not exist in the case of a family which though originally belonging to an agricultural tribe have altogether drifted away from agriculture as its main occupation and has settled for good in urban life and adopts trade, industry or service as its principal occupation and means and source of livelihood, 55 P.R. Ref.

There is no presumption that Arains of Jullundur city are governed by custom 122 P.R. 1916 Ref. 48 P.L.R. (*Petman, J.*) **GHULAM MAHOMED v. BURA.** 8 P.I.R. 1920 :

2 Lah. L.J. 27 : 54 I.C. 387.

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Alienation — Gift — Oral gift followed by deed of confirmation — Delivery of possession — Effect of.

A widow executed a deed of gift on her behalf and that of her adopted son who was then a minor stating therein that she had already made an oral gift of certain lands in favour of her daughter. The daughter applied for mutation and her name was mutated. Having obtained mutation she filed suits against tenants for recovery of rent. The adopted son then intervened and challenged her right to file the suits alleging that as the adopted son of his adoptive father he was the owner of the property and was in possession as such. He was directed by the Revenue court to have his title declared by the Civil Court.

In a suit for a declaration that he was the proprietor and in possession of the land

Held, having regard to the fact that the donee never obtained possession either before or after the mutation of her name, that the widow continued in possession inspite of the gift during her life time and that after her death the plaintiff had been in possession by receipt of rent from tenants and by payment of revenue to the Government, the decision of the Lower Appellate Court declaring plaintiff to be owner was correct. (*Broadway and Abdul Raof, J.J.*) **MUSSAMMAT NEM KAUR v. AMRIK SINGH.** 1 Lah. L.J. 64.

Alienation — Necessity — Proof of — Enquiry — Knowledge of alienage — Antecedent debts — Discharge by alienee — Subrogation.

An alienee discharging an antecedent debt is not required to make an enquiry into the nature thereof.

But an alienee paying off an antecedent creditor gets no advantage if he has knowledge of the true nature of the debt or acts in bad faith.

An alienee who is identified with the antecedent creditor so that he and the creditor cannot be viewed as two separate persons, is in the same position.

Per *Le Rossignol, J.* — It is the duty of an alienee of ancestral land to make enquiry not merely as to the existence of antecedent debts but also as to their nature if the result of the first enquiry would raise doubts in the mind of an ordinary man as to the morality or reasonableness of the debts. (*Shadilal and Le Rossignol, J.J.*) **JHANDU v. NIAMAT KHAN.** 1 Lah. 472 : 54 I.C. 842.

Alienation — Necessity — whether male alienor can anticipate his need. See (1919) Dig. Col. 474. KHAZAN SINGH v. SUHEL SINGH. 54 I.C. 923.

Alienation — Sale — Consideration — payment of, not proved — Sale if liable to be set aside.

A Court should not set aside a sale merely because the payment of an item of consideration recited in the deed of sale has not been

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made or because its payment is doubtful, especially if the consideration found to be actually paid represents a reasonable sale price. (*Scott-Smith and Le Rossignol, JJ.*) PIYARE LAL v. CHAKAR. 6 P. L. R. 1920:

1 Lah. L. J. 215 : 54 I. C. 362

—Alienation — Setting aside — After born son.

Plif. an after born son, has a *locus standi* to dispute the validity of the will which has no effect against the legitimate son of the deceased testator. (*Broadway and Dundas, JJ.*) GURDIT SINGH v. SUNDAR.

2 Lah. L. J. 505.

—Alienation — Sonless proprietor — Will — Daughter — Absolute estate — Jhelum Dt. Mair Min has — Chakwal Tahsil.

One W made a will bequeathing the land and house in suit to his daughter B. The latter in 1890 made a will leaving the property to the defendants, her sister's son and son-in-law. B died, and the pliffs, collaterals of W, sued for possession of the property, contending that it reverts to them and that B had no power to make a will in favour of the defendants. The will executed by W was not produced. It appeared however, that its validity was contested in a prior suit and the appellate court in that case had expressly decided that B had full powers of alienation.

Held, that the judgment of the appellate court in that case though it does not operate under S. 11, C. P. C. as a bar to the trial of the issue, is certainly an important piece of evidence in the defendant's favour.

Under W's will, the validity of which is not now questioned, B took an absolute estate and that she was competent to bequeath the property to the defendants. (*Shadi Lal and Martineau, JJ.*) ANWAR KHAN v. NUR KHAN.

2 Lah. L. J. 666

—Alienation — Widow — Consent of reversioner — Acquiescence — Mutation effected — Improvements by alienee — Silence — Effect of

A widow allowed an occupancy tenant to exchange one of his occupancy fields with a non-occupancy one. Plaintiff who was one of the collaterals of the last male holder and a *lambardar*, not only did not object to the exchange but was present when mutation was sanctioned and affixed his seal to the patwar's report. Subsequently the occupancy tenant sank a well in the field obtained by him under the exchange but the piff. did not object. Six years after the exchange had been effected, he sued for a declaration that the exchange would not affect his reversionary rights.

Held, that the plaintiff having acquiesced in the exchange and having failed to object to the sinking of the well by the defendant was equitably estopped from now objecting to the exchange. (*Abdul Raoof, J.*) ILA-UD-DIN v. AMIR-UL-LAH. 56 I. C. 874.

—Alienation — Will in favour of brother's grand sons — Status of son's widow to contest

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the alienation — Jats of Ludhiana District See (1919) Dig Col. 476 HARNAMAN v. MUSSAMAT DEWAN 1 Lah. L. J. 32 : 54 I. C. 908.

—Ancestral Property — Onus — Succession

The *onus* is upon the plaintiffs to prove strictly that the land is ancestral and in the absence of any proof, it must be assumed that the land is not ancestral.

42 P. R. 1910 P. C. 101.

The decision in the case of self-acquired property, that a daughter's son excludes a nephew depended upon a finding as to custom which cannot be disputed in second appeal, without a certificate (*Scott Smith, J.*) FATEH MUHAMMED v. IMAM-UD-DIN.

2 Lah. L. J. 188.

—Applicability of — General custom — Exemption — Onus.

The burden of proving that a general custom is not recognized in a particular locality lies upon the person who makes the allegation. (*Mittra, A. J. C.*) SITARAM MAHARAJ v. MAROTI. 57 I. C. 381.

—Applicability of — Jats — Agriculturalists.

The parties being *jat* agriculturists and residents of the village are presumably governed by custom and its custom and not Hindu Law which must be held to govern the case (*Chavis, A. J. C. and Wilberforce, J.*) MAHARAN v. BASU. 2 Lah. L. J. 370.

—Applicability — Non-agricultural Hindus.

As the parties are high class Hindus and do not depend upon agriculture for their livelihood the ordinary presumption is that they are governed by the provision of the Hindu Law, and the *onus* rests heavily upon the defendant to establish the existence of a custom at variance with that law. (*Shadi Lal and Broadway, JJ.*) GANESH DEVI v. DARSHAN SINGH.

2 Lah. L. J. 377 : 55 I. C. 478.

—Evidence of — Family custom — Trial custom, evidence relating to, if relevant.

Where only a family custom is set up, evidence as to a tribal custom may in certain circumstances be relevant as showing that a family belonging to that tribe observed it (*Kanhaiya Lal, J. C.*) CHAURAS KUNWAR v. JAGANNATH SINGH. 56 I. C. 287.

—Evidence — Wajib-ul-arz — Property in possession of Government.

The Government confiscated certain property in 1857. While it was in the possession of Government in 1860 an entry was made in the wajib-ul-arz rendering a custom of pre-emption. The entry was repeated in 1870. *Held*, that the two entries were not good evidence of custom (*Tudball and Rafique, JJ.*) RAM SARUP v. RAM-DEL. 18 A. L. J. 118 : 54 I. C. 788.

—Family custom — Proof of instances.

The most cogent evidence of a custom is not that which is afforded by expressions of

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opinion as to its existence but instances where the alleged custom has been acted upon and by the proof, afforded by judicial or revenue records, or private accounts and receipts, that the custom has been enforced. (*Drade Brockman and Prudeaux, A. C. J.*) MUSSAMMAT ZUNKARI v. BUDHMAL. 57 I. C. 252.

—Gift—Consideration—Donee dying Childless—Revert to grantor's heirs

Where a gift is made to a stranger for consideration the gifted property does not revert to heirs of the donor in the event of the donee dying childless. (*Broadway, J.J. NUR v. FATEH MOHAMMAD.*) 55 I. C. 187.

—Grove—Rights of tenant to sell trees.

There is a general custom by which the tenants of a grove have the right to dispose off the trees, and this right must be presumed to exist in the absence of custom or contract to the contrary. (*Hopkins, S. M. and Porter, J.M. MUSSAMMAT RAM DULARI v. RAM ADHIN LAL*) 58 I. C. 496.

—Inheritance—Sister whether an heir—Clause in *wajib-ul-arz* referring to proprietors being *lawaris*—Right of proprietors of *Thulla* to exclude sister of last male owner.

Having regard to the fact that a sister's rights have been recognised in many instances under the Customary Law of the Punjab, it cannot be said that a sister is not an heir.

Consequently the clause in the *Wajib-ul-utarz* which refers to proprietors dying *lawaris* does not apply to the case of the proprietor who dies leaving a sister.

In the absence of collaterals, the proprietors of the *Thulla* are not entitled to exclude the sister of the last male owner. 63 P.R. 1908 rel. 141 P. R. 1893; 5 P. R. 1910 ref. (*Seoot Smith and Martineau JJ.*) JAGAT SINGH v. PARTAB SINGH. 1 Lah. L. J. 46.

—Land-tenure—Inalienability—Proof of—Right of escheat to landlord on failure of heirs of grantee—Not conclusive of the question. See LAND TENURE. 38 M. L. J. 275.

—Mercantile usage—Proof of.

To establish a mercantile usage it is enough if the usage appears to be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract.

7 M. I. A. 253 (282) P. C. Ref (*Shadi Lal and Bevan-Petman, JJ.*) PANNA LAL LACHMAN DAS v. HARGOPAL KHUBI RAM.

1 Lah. 80 : 55 I. C. 931.

—Onus—Khanadamad—Hindu jars of village Bottar—Tahsil Kharian District Gujrat—Riwaji-am. See (1919) Dig. Col. 477. HARICHAND v. MATHIRA DAS.

54 I. C. 900.

—Pasturage right—Extent of—Excessive—Rights of proprietor.

In cases where area over which grazing rights extend is larger than that required by

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the persons with those rights a proprietor may use the excess for his own purposes. The persons having grazing rights cannot prevent him from developing any excess area and using it to its best purposes. 31 C. 503 P. C. 86 P.R. 1911; 160 P.L.R. 1912; 119 P.R. 1859; 100 P.R. 1881 Relied on. (*Wilberforce, J.*) KARTAR SINGH v. RALLA.

2 Lah. L. J. 44.

—Pre-emption—Confiscation of village and subsequent grant to strangers by Govt.—*Wajib ul-arz*, entry in—Value of.

In 1857 at the time of the Mutiny, a village was confiscated by Government who held it for twenty-one years and then gave it in grant to a stranger and not the original proprietor. One year after this, *wajib-ul-arz* was prepared but it did not state the actual facts. In a suit for pre-emption an entry in the *wajib-ul-arz* was relied on to prove existence of a custom of pre-emption.

Held, that as the *wajib-ul-arz* did not state the actual facts, the entry, was no proof of the custom of pre-emption but that it was merely a record of the wishes of the Zamindars. (*Tudball and Rafique, JJ.*) RADHA KISHEN v. GULZARI LAL. 18 A. L. J. 569 : 56 I. C. 73.

—Pre-emption—Preferential right—Relationship—Onus of proof.

A person who claims a preferential right of pre-emption over another co-sharer by reason of the relationship must prove that fact.

The expression "hissadar garibi" in a *wajib-ul-arz* does not necessarily indicate a blood relation. (*Tudball and Rafique, JJ.*) BHAGWAN DAS v. TEJ RAM. 56 I. C. 148.

—Pre-emption—Proof of *Wajib-ul-arz*—Entry in—Value of.

The mention of the existence of the custom of pre-emption in two *wajib-ul-arzs* drawn up at a considerable interval of time between each, the facts that the co-sharers in the village admit the existence of the custom, and the fact that previous sales have been in favour of co-sharers are sufficient to establish the existence of the custom. (*Tudball and Rafique, JJ.*) THAKUR ATRAJ SINGH v. MOOLOO SINGH. 54 I. C. 875.

—Proof of—Local custom—Tribal custom—Family custom—Onus.

If a local custom pertaining not only to the person belonging to the sub-caste of the parties to the case but also to the persons belonging to the other sub-castes of the same caste is alleged to exist, it is sufficient to prove the custom so far as the particular sub-caste under consideration is concerned and it is not necessary for the purposes of that case to prove the custom so far as the other sub-castes are concerned.

Where a local or tribal custom is pleaded and it is proved that it exists in the tribe of the locality there is a very strong presumption that any particular family of the tribe in that

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locality is bound by that custom although evidence may not have been adduced to prove that the custom pertains to that particular family. In such a case the burden of proving that the custom does not obtain in that particular family lies on the person who says so. (*Kanhaiya Lal, J. and Lyle, A. J. C.*) MAKUND SINGH v. KALKA SINGH 54 I.C. 856

—*Proof of Succession—Instances not supported by documents.*

To establish a custom at variance with Hindu Law in which the interests of a female are in conflict with those of a male it must be shown by clear and cogent evidence that there was actually an assertion of her claim by the female and a denial by the male. Mere inaction which may be due to various causes, e.g., mutual good will or ignorance of the law, affords no indication of the fact that the rule of Hindu Law has been abrogated and a custom at variance with it has taken its place. Instances not supported by documentary evidence are not satisfactory (*Shadi Lal and Broadway, JJ.*) GANESH DEVI v. DARSHAN SINGH

2 Lah. L.J. 377 · 56 I.C. 478

—*Religious office—Darbar Sahib—Office of Granthi—Son or Chela—Infant.*

Plff. sued for a declaration that he, as son of Harnam Singh, the late Granthi of the Darbar Sahib, Amritsar, was entitled to succeed his father in the office of Granthi in preference to the deft., a brother of Harnam Singh, who claimed to have been duly appointed as chela and nominated by deceased as his successor and duly elected and installed.

Held, that the office of Granthi to the Darbar Sahib, Amritsar, is of a religious character and not secular.

The question of succession to the office must be decided by the custom and practice of the institution as proved by the evidence, and a son, merely as such, had no right to succeed.

It had been established that one of the qualifications for the office of the Granthi is that the candidate must be a good Sikh and a properly initiated Singh, and next he must become a chela and be nominated by his predecessor and this must be followed by an election and installation. 4 P.R. 1870 and 49 P.R. 1892.

There is no clear rule laid down as to the initiation of a chela or as to the nomination of a successor or election of a Granthi, but a person is created a Singh by the ceremony called Khandaka Pahaul or Baptism by the Sword and the candidate must have reached an age of discrimination and capacity to remember obligations, so that plff. as an infant less than a year old, could not have been created a Singh. (*Scott Smith and Abdul Raoof, JJ.*) INDAR SINGH v. FATEH SINGH. 1 Lah. 511.

—*Religious office—Golden Temple—Darbar Sahib—Amritsar—Succession to properties in the hand of a Granthi—Son or Successor to the office—Relevancy of prior decisions.*

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The plff. as duly appointed successor to Harnam Singh, the late Granthi of the Sikh religious institution known as Durbar Sahib or Golden temple at Amritsar, sued the son of Harnam Singh for possession of certain properties and the question was which of the properties in possession of Harnam Singh were dedicated to the office of Granthi and which were his self acquired property and not dedicated to the religious uses. A previous judgment which was given in a suit contesting the right of the then Granthi Jawahir Singh (the predecessor of Harnam Singh), to alienate certain shops was referred to by plff. as proving that these shops were waqf and attached to the gaddi as found by the Court. Dett. objected to the relevancy of this judgment.

Held, that in regard to properties dedicated to the office of Granthi of the Durbar Sahib, Amritsar, succession goes to the person succeeding to the office, while the properties acquired by the Granthi himself out of his income and not proved to have been dedicated to the office descend to his natural heirs. There is a presumption that property which has descended from one Granthi to another to the exclusion of natural heirs has been dedicated to religion even if there is no positive evidence of actual dedication. 136 P.R. 1889 and 31 P.W.R. 1916 Apr.

Held, also that a previous Judgment in a suit contesting the right of the then Granthi to alienate certain shops, where it was held that these properties were waqf and attached to the gaddi and could not be alienated by the Granthi could only be treated as admissible in evidence for the purpose of showing that at that time also the right of the Granthi to alienate certain property was called in question. The finding of the Court that the property was waqf and was attached to the gaddi is not relevant in the present case. 6 Cal. 171, 12 Mad. 9; 31 Bom. 143 foll. (*Scott Smith and Abdul Raoof, JJ.*) INDAR SINGH v. FATEH SINGH. 1 Lah. 540.

—*Succession—Ancestral property—Daughter—Collaterals in 7th degree—Riwi-jam—Birk Jats of Phillour Tahsil.*

As the Riwi-jam was against the plaintiffs-appellants collaterals in the 7th degree, the onus was upon them to prove that by custom among Birk Jats of the Phillour Tahsil, they excluded the daughter from succession to ancestral property, and this onus they have decidedly failed to discharge. 89, P.R. 1908; 32 P.R. 1911; 96 P.R. 1913; 41 P.R. 1914; 94 P.R. 1918; 52 I.C. 152; 45 P.R. 1917. P.C.; Rel.

The plaintiffs cannot be allowed to turn round now and rely on alienors' will seeing that they have already obtained a declaration that it is invalid in a suit against the same defendants. (*Chavis and Dundas, JJ.*) BHOLA SINGH v. BABU. 1 Lah. 464: 2 Lah. L.J. 421.

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—Succession—*Aroris of Taunsa a town—Widow—Son's widow and daughters or collaterals in 3rd degree.*

As the deceased belonged to a mercantile community and was a resident of town the presumption is that he though possessed of some ancestral landed estate was governed by his personal law in the matter of alienation and the *onus* is heavily on the plaintiffs to establish the existence of custom overriding the personal law.

The *Riwaj-i-am* contains merely an expression of opinion which cannot be raised to the dignity of a custom, unless it is followed in practice for a sufficiently long period and recognised as binding by the member of the community.

A sweeping provision in the *Riwaj-i-am* that a gift cannot be made in favour of a daughter in the presence of near collaterals relating to all the Hindus was not intended to govern the Hindus of high caste or trading classes residing in towns.

The plaintiffs have not succeeded in proving that the *Aroris* of Taunsa are governed in the matter of alienation by agricultural custom. (*Shadi Lal and Wilberforce, JJ.*) ASA NAND v. ROSSHNI BAL. 2 Lah. L. J. 178

—Succession—Collaterals—Sister—*Rajputs of Chomon village—Jullandur Dt.—Riwajam*

The plaintiff failed to prove a custom whereby among Mussaliman Rajput of village Chomon Jullandur District, a sister excludes collaterals in the 6th degree.

35 P. R. 1999; 104 P. R. 1914 d'st.

The plaintiff as plaintiff was bound to prove her case and the *riwaj-i-am* is against her and makes no distinction in its express exclusion of sisters between ancestral and self-acquired property.

One of the canons of agricultural custom is that in regard to immoveable property collaterals exclude female connections of the prepositus except the widow, the mother and, in some cases, the daughter. (*Le Rossignol and Broadway, JJ.*) MUSSAMMAT JIWJI v. SANDHI.

1 Lah. 433 : 2 Lah. L. J. 384 : 58 I C 986.

—Succession—Daughters — Married and unmarried.

Except in the case of a daughter succeeding to her father's property only as an unmarried daughter entitled to hold it until her marriage there is no custom whereby a daughter who is entitled to succeed is not also entitled to pass the succession on to her sons (*Chevris and Dundas, JJ.*) SHAH MUHAMMED v. FAZL ILAHI. 2 Lah. L. J. 475 : 56 I C 913.

—Succession—Female cousin and collaterals—*Mahomedan Rajputs of Hindu Nawanshahr Tahsil—Jullundur Dt.*

Among, Muhammadan Rajputs of Hindu Nawanshahr Tahsil Jullundur District a

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female cousin of the deceased male proprietor has no right of inheritance as against collaterals in the 7th degree. (*Shadi Lal and Wilberforce, JJ.*) SOHNE KHAN v. MIAN.

2 Lah. L. J. 233 : 55 I. C. 26.

—Succession — Gifted land — *Khanadamat*.

Gifted land reverts to the donor or his collaterals only when the line of descendants of the donee, both male and female, has entirely died out 20 Ind. Cas. 451 ; 13 P. R. 1914 ; 286 P. L. R. 1913 ; 191 P. W. R. 1913, foll.

The same rule applies where property is gifted to a *khanadamat*, 68 P. W. R. 1913 overruled (*Chevris and Dundas, JJ.*) SHAH MAHOMED v. FAZL ILAHI.

2 Lah. L. J. 475 : 56 I. C. 913.

—Succession—*Jats of Jullandur Dt.—Daughters versus collaterals of 5th degree—Preference.* See (1919) Dig. Col. 479. MUSSAMMAT ISHRI v. BHOLA SINGH.

1 Lah. L. J. 148.

—Succession—*Khanadamat—Langaryal Jats—Kharian Tahsil—Gujrat District.*

The practice of making a khanadamat is recognised among Langaryal Jats of Tashil Kharian in the Gujrat District. Where the practice of making a khanadamat is recognised by a widow, who has received instructions in that behalf from her husband, has full power to make a particular person khanadamat. (*Rattigan, C. J.*) MUSSAMMAT ALAM Br v. LATTU. 1 Lah. 245 : 57 I. C. 204.

—Succession—*Land gifted to son-in-law—Reversion—Donee's male and female line extinct—Daughters or daughter's Sons—Onus*

Land gifted to a Khanadamat only reverts when the line of descendants of the donee, both male and female has entirely died out and that consequently it does not revert in the presence of the daughters or the daughters' sons of the donee who has died sonless, 13 P. R. 1914 foll. 12 P. R. 1892 F. B. expl; 197 P. L. R. 1913 diss.

The *onus* is on the collaterals to prove that the custom of gifted land reverting to the donor's family applies to the present case in which the donee has left daughters but no sons.

A daughter who is entitled to succeed is also entitled to pass succession on to her sons except in the case of a daughter, who succeeds to her father's property only as an unmarried daughter entitled to hold it until her marriage. (*Chevris and Dundas, JJ.*) SHAH MUHAMMAD v. FAZL ILAHI. 2 Lah. L. J. 475 : 56 I. C. 913.

—Succession—*Pagwand or Chundward Mekans of Kot Bhai Khan—Shahpur Dt.—Formation into groups—Presumption—Collateral succession—Whole blood and half blood Preference.*

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According to the custom prevailing among Mekans of Kot Bhai Khan in the Talsil and District of Shahpur, the rule of distribution is the *pagwand* one and there being no provision in the *wajib-ul-arz* for any specific rule in the case of collateral succession the presumption would be that the whole blood and half blood would be on an equality and would succeed together.

When subsequent to a distribution according to the *pagwand* rule the whole blood brothers, form into separate groups becoming joint in food and cultivation among themselves and entirely separate from that of half brothers, the whole blood excludes the half blood in subsequent collateral successions. (*Broadway and Martineau, JJ.*) AHMAD KHAN v. NABI BAKHSH. 2 Lah. L. J. 489 : 55 I. C. 171.

Succession—Self-acquired property—Acquisitions by father and his ascendants—Daughter—Sister—Right of.

Daughters are generally preferred to collaterals in regard to the acquired property of their father and no distinction is made between property acquired by the father and property acquired by his ascendants.

By acquired property is meant property not necessarily acquired by the father himself but property acquired by him or any of his ancestors short of the common ancestor, 18 P. R. 1896; 64 P. R. 1893; 73 P. R. 1896; 103 P. R. 1900: 2 P. R. 1902; 25 P. R. 1912 Relied on.

Held, further that the agnatic theory reposes on the principle that collaterals descended from the common ancestor derive their title from that common ancestor but when the common ancestor had no interest in the property in dispute his descendants derive from him no more right than he had i. e., they acquire no right.

Consequently in this case the collaterals derive no right to the property from the common ancestor and in accordance with custom are not to be preferred to a daughter of the last male owner.

The plaintiff was entitled to the whole property of her father, inasmuch as her sister, though arrayed as a defendant did not defend the suit. (*Chavis C. J. and Le Rossignol, JJ.*) JAINAN v. NUR MUHAMMAD. 1 Lah. 365 : 2 Lah. L. J. 265 : 58 I. C. 793

Succession—Self acquired property—Awans of Rawalpindi—Daughter's sons and collaterals.

Among Awans of the Rawalpindi District the collaterals of the last male owner are not entitled to succeed to his self-acquired property in preference to his daughter's son. The onus is on the collaterals to prove that they are entitled to inherit non-ancestral property in the presence of the daughter's son. (*Shadi Lal, C. J. FATEH DIN v. MARDAN ALLI.*

57 I. C. 78.

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—Succession—Self acquired property—Compartition between daughter and collaterals—Entries in wajib-ul-arz and ritwaj-i-am.

In the case of self-acquired property the general custom is that daughters are preferred to collaterals

The portions of a *wajib-ul-arz* that refer to custom are not provisions intended to ensure for the duration of the settlement only but are statements that a certain custom exists.

There is a presumption as to the correctness of such entries in a *wajib-ul-arz*, but though such entries are evidence the presumption as to their correctness is rebuttable.

The *ritwaj-i-am* carries with it a certain presumption of correctness but the presumption is rebuttable and when positive instances are given the *ritwaj-i-am* cannot be regarded as overriding them (*Broadway and Petman, JJ.*) GULAM MUHAMMAD v. GAUHAR BIBI.

1 Lah. 284 : 10 P. L. R. 1920 : 54 I. C. 419.

—Succession—Self-acquired property—Sister or collaterals in 8th degree—Mahomedan Rajputs—Tahsil Nakoduri—District Jullundur—Ritwaj-i-am.

In questions of succession to self-acquired property between collaterals of the 8th degree and sisters the onus of proving that they have a preferential right is in the first instance on the latter, 134 P. R. 1907 and 98 P. W. R. 1912, Ref. 35 P. R. 1909 d'st,

Held, that in regard to Muhammadan Rajputs of the Jullundur District the onus is on the sisters and in view of the entries in the *Ritwaj-i-am* of the district and that they had failed to discharge that onus 45 P. R. 1917 (P. C) Ref. (*Scott Smith and Martineau, JJ.*) MUSSAMMAT HUSSAIN BIBI v. NIGAHIA.

1 Lah. 1 : 1 Lah. L. J. 89 : 55 I. C. 828.

—Succession—Widow—Childless woman—Nature of estate—wajib-ul-arz.

A *wajib-ul-arz* purporting to record custom prevailing in the family of the proprietors of a particular village contained an express direction that a childless widow can hold the property of her husband for her life to the exclusion of the heirs of her husband who get it after her death.

Held, that the widow took a life estate merely and consequently had no power of alienation (*Kanhaiya Lal, A. J. C.*) HAFIZUDDIN v. MUBARAK ALI. 56 I. C. 699.

—Validity of—Essentials requisite to.

The requisites of custom are that it should be ancient and invariable, uniform, reasonable not immoral, certain and consistent. About its being ancient it must have existed "so long that the memory of man runneth not to the contrary. (*Chaudhury and Cuming, JJ.*) NITYA GOPAL BANERJEE v. PROVAS CHANDRA MUKHERJI. 24 C. W. N. 309 : 31 C. L. J. 37 : 56 I. C. 19.

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—Validity of—Marriage—Bride price.
A custom by which a person marrying a girl who is *suijuri* is bound to pay her relatives a sum of money as bride price is immoral, in restraint of marriage and opposed to the principle of S. 26 of the Contract Act and cannot therefore, be enforced. (*Scot-Smith and Dundas, JJ.*) *ABBEAS KHAN v. RASUL.*

1 Lah 574 : 58 I. C. 167.

DAMAGES—Assessment of — Committee of experts—Adjudication by when binding on parties.

The appellant entered into a contract to deliver certain quantities of cotton, and having failed, sought to have the price of the amount not delivered fixed at the ordinary market rate. It was found however, that the transaction, though purporting to be an ordinary contract was in reality in the nature of speculations on the rise and fall of the cotton market and dealt with goods which had no real existence in the market; also that in such transaction it was customary for the prices to be settled by a Skilled Committee of merchants engaged in similar transaction. In the present case, the committee settled a higher rate than that actually prevalent in the market.

Held, that in the absence of proof of fraud either in the inception or in the proceedings of the Committee, the appellant was bound by its decision.

Mere error would not be sufficient to upset the decision of an expert tribunal voluntarily set up for the decision of matters of skill. (*Lord Robertson, J.*) *PESTRONJI JEHANGIRI v. JAI-SINGHDAS HANSRAJ.*

(1903) 22 Bom. L. R. 420. (P C)

Breach of contract — Delivery by instalment—Anticipatory breach—Remedy by breach—Damages—Measure of.

A breach of contract may take place before the time fixed for performance of the contract has arrived, where the promisor has repudiated the contract. In such an event, the promisee may elect to sue him for breach of the contract without waiting for the time fixed for performance. This principle applies where the contract has to be performed in instalments.

Where there is a breach of a contract to be performed in instalments by an unqualified and positive refusal to perform the contract, though the performance thereof is not yet due, the injured party may bring his action at once for recovery of damages. The damages for breach of a contract by renunciation thereof before performance is due are measured by what the injured party would have suffered by the continued breach of the other party down to the time of complete performance less any abatement by reason of circumstances of which he ought reasonably to have availed himself.

Though the plaintiff sues at once for an anticipatory breach of a contract, his damages are to be assessed according to the cost of performance, not at the time and place of the

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breach, but at the time and place set for performance.

The defendants agreed to pay the plaintiff Rs. 50,000 as brokerage on account of services rendered by him in securing them a certain contract. The sum however was not payable in one instalment on a single specified date: the payment was to be distributed over twenty years at the rate of Rs. 2500 a year. The defendants wrongfully rescinded the contract before the time for performance had arrived.

Held, that the effect of renunciation by the defendants was that the plaintiff became forthwith entitled at his election, to sue for damages for breach of the entire contract and the damages should be so calculated that he might be placed, so far as pecuniary benefit was concerned, as nearly as possible in the position he would have occupied if the defendants had carried out the contract. The qualification that the damages were to be abated to the extent that the plaintiff might have mitigated his loss, did not apply in the circumstances of this case, where a definite sum was payable by the defendants to the plaintiff as the value of services already rendered by him. The plaintiff was therefore entitled to the present value of the annuity of Rs. 2,500 for twenty years.

When repudiation of a contract by the promisor has been acted upon by the promisee who has treated the contract as ended though damages are to be measured by ascertaining what would have arisen by non-performance at the appointed time they should be abated by reason of circumstances of which the promisee should have reasonably availed himself. This principle is applicable to the case where the promisee is to be paid not a fixed salary but a share of the profits.

A suit does not cease to be an ordinary cause merely because witnesses are examined at inordinate length or because the true agreement between the parties has to be spelt out of a lengthy correspondence. (*Mookerjee, C. J. and Fletcher, J.*) *MAATARAJAH MANINDRA CHANDRA NANDY v. ASWINI KUMAR ACHARYA.*

32 C L J 168.

Breach of contract — Marriage — Damages measure of.

An action to recover damages for breach of a contract of marriage abates on the death of the plaintiff.

Under Hindu Law if there is good cause for the retraction of a marriage contract the offender is not liable to be fined; but he must pay the expenses incurred by the bridegroom or his father during the betrothal. (*Macleod, C. J. and Heaton, J.*) *BALUBHAI HIRALAL v. NANALAL BHAGUBHAI.* 44 Bom. 446:

22 Bom. L. R. 143 : 54 I. C. 624.

Cause of action—Institution of civil suit.

No suit lies for damages against a defendant for maliciously and without reasonable and probable cause, instituting a civil action; 14

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C. L. J. 515 and R. 42 Cal. 550; 21 C. L. J. 68 appr. (*Asutosh Mukerjee, Fletcier, N. R. Chatterjee, Teunon and Chudhuri, JJ*) NORENDEA NATH KOER v. BHUSAN CHANDRA PAL. 31 C. L. J. 495 : 57 I. C. 375

Cause of action—Malicious initiation of legal proceedings

In the absence of proof of malice a suit will not lie for damages for obtaining the appointment of a receiver. (*Maung Kin, J*) M. M. P. L. K. CHETTY v. SAPAYA MAISTRY,

12 Bur. L. T. 239 : 56 I. C. 960

Contract—Breach—Goods to be delivered under contract to be manufactured of a particular mill—Contract conditional and not absolute—No implied warranty to get the goods from the particular mill and supply—Condition not fulfilled—Right of parties—Damages.

The plaintiffs and the defendants entered into a contract under which the defendants undertook to supply to the plaintiffs 864 bales of dhoties manufactured in a particular mill on or before 31st December 1918. The material clause of the contract was:—"Delivery by the 31st December 1918. Goods to be manufactured (Bunto) are sold. The same are to be taken delivery of as and when the same may be received from the Mills." The defendants supplied a certain number of Dhoties but failed to supply the number contracted for. The plaintiffs thereupon sued to recover Rs. 70,216-12-9 as damages for failure on the part of the defendants to supply the full number. The defendants contended the contract was conditional as the foundation of the contract was that the goods if supplied by the mill were to be delivered by the defendant to the plaintiffs. The Court of first instance awarded the plaintiffs Rs. 2875 as damages on the ground that the defendants had failed to supply a certain number of bales which they ought to have supplied but refused a part of the damages claimed on the ground that the contract was not to be interpreted as an absolute undertaking to supply the whole number contracted for. On appeal by the plaintiffs:—

Held, confirming the decree of the lower Court, that as the goods to be delivered were goods which were to be manufactured or were under manufacture the foundation of the contract disappeared if the goods were not supplied to the defendants by the mill; that, on the true construction of the contract, the vendor did not warrant the manufacture and supply by the mill of the goods in question; and that as the implied condition was not fulfilled both parties were released *quoad* those manufactured goods and neither party had any claim against the other for damages. (*Heaton and Marten, JJ*) HURNANDRAI FULCHAND v. PRAGDAS. 22 Bom. L. R. 343 : 56 I. C. 632.

Contract of indemnity—Breach—Assessment of damages—Principle—Costs of

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litigation—Recovery of. See C. C. CODE, SCH. II. PARA. 16. 38 M. L. J. 470.

Contract of service—Broker employing under-broker for a term—Termination of broker's appointment—Dependent contract.

Where a firm trading in sugar employed by an agreement certain brokers for the sale and purchase of sugar for a period of five years from the date of the agreement or for such other period as should be mutually agreed unless the agreement should be sooner determined under provisions therein contained and the brokers in their turn appointed under-brokers on an agreement which was to be in force during the subsistence of the prior agreement of brokerage and the prior agreement was ended before the expiry of five years.

Held, (1) that the agreement of underbrokerage came to an end under the very terms of the contract the moment the agreement of brokerage was terminated;

(2) that even apart from the language of the agreement the agreement of underbrokerage would come to an end with the termination of the brokerage agreement as the agreement of underbrokerage was only in respect of the sugar bought and sold by the brokers under their agreement with the firm;

(3) that the underbrokers would however be entitled to damages between the date of their dismissal and the date when the agreement of brokerage came to an end and note for the whole unexpired portion of the period of underbrokerage agreed to; and

(4) that a new and different agreement entered into by the brokers with the firm for the purchase and sale of sugar for a further period and under fresh terms would not enure to the benefit of the underbrokers so long as it was not ended simply as a means of defeating the underbroker's rights. (*Lord Buckmaster, J*) LACHMANDAS KHANDELWAL v. RAGHU MULL. 47 Cal. 290 : 24 C. W. N. 577 : 11 L. W. 551 : 58 I. C. 851. (P. C.)

Easement—Light and air—Obstruction—When actionable.

To constitute an actionable obstruction of ancient lights, it is not enough that the light is less than before: there must be substantial privation of light enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind, and, in the case of business premises, to prevent the plaintiff from carrying on his business as beneficially as before.

The easement acquired by ancient light is not measured by the amount of light enjoyed during the period of prescription, but the owner of the dominant tenement obtains a right to so much of it as will suffice for the ordinary purpose of inhabitancy or business according to the ordinary notions of mankind having regard to the locality and surroundings.

Where the raising of a compound wall by the defendant had rendered the habitation

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of the plaintiff's room a most uncomfortable one for a gentleman in the position of the plaintiff, he is entitled to get so much of the wall demolished as had produced that effect (*N. R. Chatterjee an Panton, JJ*) HIRALAL DUTTA v MOHENDRANATH BANERJEE

57 I. C. 706.

—Interference with exercise of proprietary rights—Liability

A person, who unlawfully interferes with the exercise of the property rights of another, commits an act in the nature of trespass to property and is liable for damages in an action for trespass: (Mookerjee, O.C.J. and Fletcher, Chatterjee, Teunon and Chaudhuri, JJ) NORENDRA NATH KOER v. BIUSAN CHANDRA PAL

31 C. L. J. 495 : 57 I. C. 875

—Lease—Breach of covenant—Mining lease—Omission to leave barrier.

A lessee of a coal mine, covenanted with the adjacent owner in the following terms—

"It is settled for the convenience of carrying on the business of both parties as well as to obviate chance of future disputes a 30 feet broad barrier or a Bund of coal will be kept on the southern boundary of the land settled with me. Out of the same 30 feet I shall work after leaving out 15 feet towards my own boundary and you will also similarly work after leaving out 15 feet towards your own boundary. If any of the two parties encroach upon the said Bund and loss thereby is caused to the other party at fault will be liable for the loss to the other party and vice versa. If both the parties agree, then he will be able to remove or alter the Bund."

The deft. lessee cut through the barrier but no actual loss was caused to the plaintiff's mine. Plaintiff's sued the deft. for damages on the ground that he had to leave another barrier coal 30 feet wide between the two mines

Held, that the deft. was liable only for such loss as might actually accrue to the plff. and not to any loss which he might put himself to prevent the accrual of loss

A trespasser may be liable not only for the coal which he was actually taken away but also for the damage which he has occasioned thereby (and otherwise) to the coal which is left in the mine, and to the mine generally as, for example, for coal rendered unworkable by reason of the trespass. But such a claim, if it has any foundation at all, must be based on trespass and not on the covenant. (*Das and Adami, JJ.*) THE LONDA COLLIERY CO., LTD., v. BEPIN BEHARY.

57 I. C. 307.

—Malicious attachment — Malice—Proof of, essential.

To sustain a claim for damages for wrongful attachment of property, plff. must establish not only want of reasonable and probable cause but also malice in fact on the part of the person attaching the property. 12 Ind. Cas. 507; 35, Mad. 598; 10 M.L.T. 365; 21 M. L. J. 1052.

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Foli (*Shadi Lal, J.*) HUKAM CHAND v UMAR DIN. 21 P. L. R 1920 : 54 I. C. 827.

—Malicious prosecution—Malice—Absence of reasonable and probable cause—Onus on plff. See MALICIOUS PROSECUTION.

56 I. C. 161.

—Measure of Coal mine—Wrongful extraction of Coal.

On the question as to the basis on which damages for wrongful extraction of coal from an adjacent mine ought to be assessed. Held that as it was not shown that the deft. acted fairly and honestly or inadvertently or under a mere mistake or under a *bona fide* belief of title, the plff. company was entitled to the value at the pits mouth of the coal worked and gotten by the deft. from the plff.'s mine, making to the deft. all just allowances for the cost and expenses incurred by him in bringing that coal to the pit's mouth, but not including the cost of getting or sending the coal. (*Das and Foster, JJ.*) THE LONDA COLLIERY CO., LTD. v. BEPIN BEHARY BOSE.

1 P. L. T. 84 : 55 I. C. 113.

—Measure of—Contract for sale of goods—Breach—Mode of assessment of damages. See CONTRACT ACT, S. 73. 31 C. L. J. 93.

—Measure of—Contract—Subsequent variation—Breach of contract See CONTRACT, BREACH OF 22 Bom. L. R. 838.

—Measure of—Dispossession of purchaser at execution sale—Decree on usufructuary mortgage.

Where an auction-purchaser in execution of a decree based on a usufructuary mortgage is dispossessed and claims damages for the period of his dispossession, the purchase money paid by him is not to be taken into consideration in assessing the amount of damages. He can either get interest on the basis of the mortgage or damages to the extent of the rent of the property of which he has been deprived. (*Kanhaiya Lal, J. C.*) NAWAB SAIYAD WILAYAT HUSAIN v. ZAMANI BEGAM. 54 I. C. 112.

—Measure of—Sale of goods—Breach of contract—Date for supply.

The plaintiff entered into a contract with the defendants to purchase 50 tons of wheat of a particular description and quality at Rs. 8-2-0 per cwt. The delivery was to be in May or June 1918. The railway receipts relating to the wheat were handed over to the plaintiffs within the contract time. The plaintiffs took delivery and warehoused the goods about the 13th of July 1918. The Plaintiffs found on examining the wheat that it was not a proper and fair tender against the contractor. Surveyors of both the parties held a survey and adjudged that the wheat tendered was not according to the contract. The plaintiff rejected the wheat and on 23rd August 1918 bought 49 tons of wheat of the quality and description mentioned in the contract and sued the defendants to recover Rs. 2,250-15-0 the difference between

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the contract price and the purchase price of the 49 tons. The court of first instance decreed the claim holding that where there was an attempted performance of the contract the date of the breach must be taken as the date when the parties actually found that the goods tendered were not of the contract quality:—

Held, reversing the decree of the Lower Court (1) that the date of the breach must be considered as the date when the seller ought to have tendered goods of the contract quality and failed to do so;

(2) that the plaintiffs had failed to prove that the date must not be taken to be the date of the breach and they had not proved that there was any difference between the contract rate and the market value at the due date. (*MacLeod, C. J., and Heaton, J.*) RAMCHANDRA KAMVALLABH v. VASANJI SONS & CO.

22 Bom. L. R. 874: 57 I. C. 978.

—Measure of—Sale of Specific area of land—Eviction of vendee from part—Damages. See VENDOR AND PURCHASER. 1 Lah. 380

—Over flow of the rain water through water embankment to prevent rain entering over land—Washing away of land on the bank of the water course—*Damnum sine injuria*.

The plaintiff and the defendant owned lands on the opposite banks of a *nalla*-water course. These were on a lower level, and rain water from the higher lands used to pass through them in the rainy season. Both parties erected dams on the extremity of their lands, which penned back the rain water and forced it to flow through the *nalla*. The large volume of water that thus swept through the *nalla* washed away a portion of the plaintiff's land abutting on his bank. The plaintiff thereupon asked the defendant to remove the dam on his land and to restore the land washed away.

Held, dismissing the suit, that both the plaintiff and the defendant had equal rights to protect their own properties by turning the water which threatened to flow over their land in times of flood, into the *nalla* and, if in consequence of that the combined water, which would otherwise have gone on to the land of the parties, caused damage to the banks of the *nalla*, it was the business of both the parties to protect themselves against damage which might result when there was excessive flow of water in the *nalla*.

An owner of the property is entitled to protect himself against water which he has not brought on his land himself. He is entitled to divert water which threatens to do damage to his land. Likewise his neighbours have a right to protect themselves against water which threatens to do damage to their properties. (*MacLeod, C. J., and Heaton, J.*) SHIDRAMAPPA MARIAPPA v. MAHOMED YUSAF.

22 Bom. L. R. 1107.

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—Quantum of—Appellate Court when justified in interfering with decision of trial Court

Per *Sanderson, C. J.*—The Court of Appeal should not interfere unless the decision of the trial Judge on a question of damages appears to be clearly erroneous 57 C. 760 Rei.

Per *Woodroffe, J.*:—The English cases which deal with the question of revision of damages by the Court of Appeal have no application in this country where the jury system does not prevail. Here the question of damages is to be dealt with by the Court of Appeal as any other portion of the case. (*Sanderson, C. J., and Woodroffe, J.*) JUSTAIN HULL v. ARTHUR FRANCIS PAULL. 24 C. W. N. 352: 58 I. C. 421.

—Trespass—Liability of person in possession and abettor.

In a suit for mesne profits on the ground of possession damages can only be recovered for the time possession was actually retained by the defendant. But if he is himself out of possession he cannot be held liable for the profits which he has not received unless he has abetted the trespass by the person in actual possession of the land. (*Mittra, A. J. C.*) SONI v. MAGJASHIRAM. 55 I. C. 48.

—Vendor and Purchaser—Costs of purchaser in defending title to property—Liability of vendor.

Upon a covenant by a vendor of lands to indemnify the purchaser against all losses that latter might be put to in defending his title or enjoyment of the lands, from adverse claims, the vendor is bound to pay the purchaser not merely taxed-costs as between party and party, of suit in which he had to defend his title, but the actual costs which he had to pay his legal advisers, and which are reasonable in the circumstances of the case. *Smith v. Compton* (1832) 3 B & Ad., 407 followed. (*Wallis, C. J., and Seshagiri Iyer, J.J.*) VENKATARANGAYYA APPA ROW v. VARAPRASADA ROW.

43 M. 898.

—Vendor and vendee—Material Defect in title—Omission to disclose—Refund of purchase money by vendor. See T. P. ACT S. 55 (1).

58 I. C. 529.

—Voluntary offerings—Suit for compensation for loss of—Maintainability—Archaka—Wrongful dismissal by Dharmakartha—Archaka's suit for compensation for loss of emoluments during exclusion—Effect. See (1919) Dig. Col. 485. BALASUBRAMANIA SASTRI v. PONNUSWAMI AIYER. 54 I. C. 721.

—Wrongful attachment—Costs of proceedings for releasing.

Where in an execution proceeding a person not a party to the suit objects to an attachment of property and under an erroneous decision is ordered to pay the costs of the other side, he is

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entitled to recover the sum so paid as damages.
(*Stuart, J. C.*) MAIKU LAL v. NIZIR A'IMAD

55 I. C. 657.

—Wrongful attachment—Liability of decree-holder

A suit for damages is maintainable against a decree-holder for wrongful attachment of moveable property which was pointed out by him as the property of his judgment-debtor (1910) 2 K.B. 244 Ref. (*Mukherjee and Fletcher, J.J.*) BHUSHAN CHANDRA PAL v. NORENDA NATH KOER. 32 C. L. J. 236.

—Wrongful attachment—Proof of Malice if essential.

To sustain a claim for damages for wrongful attachment of property plaintiff must establish not only want of reasonable and probable cause but also malice in fact on the part of the person attaching the property. (*Shadi Lal, J.*) HUKAM CHAND v. UMAR DIN. 21 P. L. R. 1920 : 54 I.C. 827

DEBTOR AND CREDITOR—Interest on debt—Creditor on alien enemy firm—Interest whether suspended from the date of hostilities to the date on which creditor obtained license to trade. See (1919) Dig. Col. 486. VALLI MAHOMED ABU v. BERTHOLD REIF,

44 Bom. 1.

DEBUTTER PROPERTY—Purchase of by Shebait benami at court sale in execution of decree against debutter property. See HINDU LAW DEBUTTER PROPERTY,

24 C. W. N. 478.

DECREE—Amendment of—Costs—Provision as to—Insertion of. See. C. P. CODE. S. 152.

54 I. C. 827.

—Amendments—Small cause decree—Revision—Application for amendment to be made to lower court.

A decree of a Small Cause Court is final and not appealable, and although in certain circumstances it may be set aside or modified by a High Court in virtue of its revisional powers, it must remain the decree of the Court which originally passed it when the High Court declines to interfere with it on the revision side and the Lower Court is accordingly competent to entertain an application for its amendment. (*Rattigan, C. J.*) KHUDA BAKSH v. ALLAH DITTA. 1 Lah. 342 : 58 I. C. 630.

—Construction—Conditional clause—Trial clause—Trial conditional on payment of costs.

A suit for partition was dismissed for non-inclusion of all joint properties in the plaint and the trial Court dismissed the suit. The Court of Appeal set aside the order of dismissal of the suit and remanded the case on condition that plff. appellant should pay to deft. resp. the sum of Rs. 200 as costs both in the Lower Court and of the appeal:—

Held, that the proper construction of the order was that the case should be remanded

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and heard upon the issues not already decided only on condition that plff paid deft. the sum of Rs. 200 and that the trial court should refuse to proceed with the case until the condition imposed by the Appellate Court had been complied with. (*Miller, C. J. and Coutts, J.*) JOGES CHANDRA CHAKRAVARTI v. MAKUNDALAL.

(1920) Pat. 65.

—Construction—Conditional decree, what is. See (1919) Dig. Col. 488 KANSHI RAM v. TAGRA. 2 Lah. L. J. 125.

—Construction—Execution proceedings—Ancillary relief not granted expressly in decree—Enforceable in execution.

Plffs. sued to set aside a sale for default of payment of Government Revenue on the ground that the deft who was auction purchaser and who was an usufructuary mortgagee of part of the property had fraudulently withheld payment of the revenue. Plffs. also prayed that the deft. should convey the property to them and give them possession. The High Court declared the sale to be invalid and ordered the property to be conveyed to the plff. on a payment by them of the purchase money and interest. The Privy Council held that the High Court's description of the sale as invalid was a misconception of the legal position and substituted therefor a declaration that the property purchased must be held for the benefit of the plaintiffs and the auction purchaser according to their respective interest. With this variation the decree of the High Court was confirmed. When the plffs. applied for execution of the decree the deft. objected that the plffs. had not been awarded delivery of possession. Held, that the High Court and the Privy Council both intended that the relief as to the delivery of possession being ancillary should be included in the relief as to the execution of the necessary conveyance, and that delivery of possession could be made in the execution proceedings. (*Mullick and Sultan Ahmed, J.J.*) DEO NANDAN PRASAD SINGH v. JANKI SINGH. 5 P. L. J. 314 : 1 P. L. T. 325 : (1920) Pat. 266 : 56 I. C. 322.

—Construction—In favour of—Executability of decree—Ambiguity—Reference to pleadings and judgment.

A decree must be construed in a fair and reasonable spirit so as to advance and not to impede its execution.

An execution Court cannot vary or alter a decree under execution but it must be satisfied as to what it is called upon to execute, and in order to find that out, when the decree is not clear and it is an appellate decree, the Court is justified in referring to the pleadings and the decree of the trial Court. (*Sultan Ahmad, J.J.*) TRALOKHYA NATH MAZUMDAR v. SARAT KUMAR SINGH. 1 Pat. L. T. 526 : 56 I. C. 283.

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Construction—Instalments for payment—Default—Forfeiture—Waiver

The plaintiff obtained a decree in 1894 which directed that interest should be recovered at the rate of Rs. 262-8-0 per annum before 31st of May every year from 1893 and that the principal amount should be recovered in twenty-five years. It further directed that if the judgment-debtors obstructed the plaintiff in attaching the cash allowance till his principal was paid or obstructed the plaintiff in getting his interest every year till the principal was paid or obstructed him in any other way or if the plaintiff did not get the interest every year from the Judgment-debtor the plaintiff should recover the whole amount, principal and interest by sale of the mortgaged cash allowance. The Judgment-debtor made default in payment of annual instalments of interest. Execution of the decree was taken out in 1902 and Rs. 171 odd recovered in 1903 and Rs. 165 odd in 1908. Another Darkhast was filed in 1903 but was infructuous. In 1904 one more Darkhast was filed but it was dismissed. In none of those Darkhasts was the point taken that the plaintiff was barred from executing the decree because he had not taken advantage of the default clause. The present Darkhast was filed in 1916 praying for execution for the whole amount, principal and interest:—

Held, that, inasmuch as the previous conduct of the parties showed that the plaintiff should not be barred absolutely from executing the decree merely because he had sought to execute the decree for the instalment in arrears, it was open to him after 1914, when continued default in the payment of interest was made, to take advantage of the decree and execute for that instalment which was in arrears and for the principal amount. (*MacLeod, C. J. and Heaton, J.*) *AMRIT KAHANDEROO v. GOVIND RAMACHANDRA*. 44 Bom. 840.

22 Bom. L. R. 919 : 58 I. C. 65.

Execution of—Indefiniteness—Shares of Judgment-debtors not specified.

A decree is not incapable of execution merely because it omits to specify the shares of the judgment-debtor in the property decreed, if the decree-holder has secured possession. (*Mitra, A. J. C. J. AMU: ALI v. GOPAL DAS*)

54 I. C. 924.

Form of—Ejectment suit—Trespassers—Trust property—Co-trustees Notice to quit by one of the trustees—Effect See TRUST MANAGEMENT. 39 M. L. J. 685.

Form of—Legal representative—Suit against.

When a suit is brought against the legal representative of a deceased person on a bond executed by the deceased and proved to be genuine the court ought not to dismiss the suit on the ground that the deceased has left no assets but should pass a decree against the

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assets of the deceased, if any, in the hands of the defendant. (*Rafique, J.*) *BISTI RAM v. RUSTAM SINGH.* 56 I. C. 518.

Setting aside—Decree of civil creditor as fraudulent and collusive—Fraud and collusion—What constitutes—Decrees on perjured evidence—Not a nullity nor liable to be set aside. See C. P. CODE, S. 73. 11 L. W. 31.

Setting aside—Ex parte decree obtained by fraud—Onus.

In a suit to set aside a decree on the ground of fraud the plaintiff must prove that the decree was obtained by some fraud practised upon the court. The dishonesty of a claim, on which a plaintiff obtains a decree, after following strictly and honestly the procedure laid down for the trial of suits, cannot justify the setting aside of the decree in a subsequent suit. Therefore if the plaintiff cannot prove that the decree was fraudulently obtained, he cannot succeed whether the original claim against him was true or false. (*Sultan Ahmed, J.*) *MAHANT KRISHNA DAYAL GIR v. LAKSHMI NYRAIN.* 1 P. L. T. 486.

Setting aside—Fraud Ex parte decree—Perjury.

An ex parte decree which has become final cannot be reopened in another suit, except upon the ground of fraud as an extrinsic collateral fact vitiating the proceedings in which the decree was obtained. It is not sufficient to allege that ex parte decree was obtained from a false claim. (*Jwala Prasad, J.*) *MAHARANI JANKI KUER v. MAHABIR SINGH.*

58 I. C. 317.

Setting aside—Fraud—Perjured evidence—Not a ground—Ex parte decree.

It is settled law that the mere fact that the claim in a suit decreed ex parte was supported by perjured evidence is no ground for the maintainability of another suit to set it aside. 16 C. W. N. 1002; 18 C. W. N. 447; 38 Mad. 203 foll.

The principle is also equally applicable to a false case, where the opposite party has been duly served with notice and owing to laches has not appeared and the suit has been decreed ex parte. If notice had not been served or if the defendants were prevented by the plaintiff from appearing by tricks or misrepresentation, there would be some extrinsic collateral act in the nature of fraud vitiating the previous adjudication. 25 Q. B. D. 310; 10 Q. B. D. 295; 2 Sm. L. cases 745; 3 Ch. Ap. 203, referred to. (*Coutts and Adami, J.J.*) *KRIPASINDU PANIGRAHI v. NANDU CHARAN.* 1 P. L. T. 239 : (1920) Pat. 209 : 56 I. C. 615.

Setting aside—Fraud—Perjury not a ground for setting aside decree—Ex parte decree

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—Dismissal of application under O 9, R 13—Bar to juries suit. See C. P. CODE O. 9, R 13.

1 P. L. T. 735.

—Setting aside—Fraud—What—Constitutes—False evidence—Decree obtained on—it liable to be set aside. See (1919) Dig Col 489. MANINDRA NATH MITRA v. HARI MONDAL

24 C. W. N. 133 : 54 I. C. 626.

—Setting aside—Grounds for—Error if enough.

A suit to set aside a decree on the ground of error is not maintainable. (S C. W. N. p. 473 dss. 17 C. W. N. p. 82 and 3 C. W. N. p. 572 followed.) (Lindsay, J.) SCAJ BAKSH SINGH v. RAJAT & BRIKJAI KUNWAR.

23 O. C. 140

—Setting aside—Grounds for—Fraud—What constitutes.

A suit to set aside a previous judgment on the ground of fraud was not maintainable in the absence of any contrivance by which the person suing was prevented from placing his case before the Court in the previous suit. Fraud is no doubt an extrinsic collateral act, which vitiates the most solemn proceedings of Courts of Justice but fraud must first be established as a fraud in relation to the proceedings in Court before the record can be examined for the purpose of giving one Court the opportunity to differ from another Court on a question of fact. 10 Ch. D. 327 followed. 18 C. W. N. 447 ; 10 Q. B. D. 295; 25 Q. B. D. 310 dist. (Das and Adami, JJ.) RAM NARAIN LAL SHAW v. TOOKI SAO.

5 P. L. J. 259 : 1 P. L. T. 119 : (1920) Pat. 98 : 58 I. C. 182.

—Setting aside suit for—Fraud—Effect of—Minor ex parte decree.

Where the decree is not tainted with fraud, no suit lies to set it aside as regards parties who were majors at the time. 3 C. W. N. 375 foll.

The objection that the decree was ex parte could only be taken by an appropriate proceeding in the suit itself, e.g., by an application under O. 9, R. 13 of the C. P. Code or an application for review, or an appeal to a superior Court.

As regards the two minor plaintiffs, the decree was held not binding on them as the sanction of the court to the compromise was obtained under a misapprehension of a material fact. 6 Cal. 687 foll. (Shadi Lal and Wilberforce, JJ.) JHANDA SINGH v. MUSSAMMAT LACHMI. 1 Lah. 344;

2 Lah. L. J. 623 : 56 I. C. 878

DEED—Construction—Agreement between Zemindar and Jagirdar for commutation of customary dues—Nature of grant.

Under an agreement entered into by a jagirdar with certain Zemindars holding permanent rights in the jagir's land, he agreed to accept certain rates in cash and kind in consideration of the customary dues he was entitled to receive as jagirdar. The Jagirdar died and his son

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brought a suit to avoid this agreement alleging that by the terms of the grant conferring the jagir a limited estate only was conveyed, the grantee's rights to alienate being restricted for his lifetime.

Held, that the intention of the grantors was to confer a hereditary estate in perpetuity without imposing any condition restricting alienation, and that upon a proper construction of the agreement the intention was to make a permanent settlement and that the plaintiff was bound thereby. (Crump and Kemp, A. J. C.) MIR SIER MAHAMED v. JETHOMAL.

56 I. C. 484.

—Construction—Ambiguity—Extrinsic evidence.

If the terms of the contract are ambiguous the rights of the parties may be determined with reference to the conduct of the parties but in any case where the terms are unambiguous no evidence can be given of the conduct of the parties in contravention of the terms of the contract. 3 P. C. 605 (650) (1871); (1900) A. C. 260 Ref. 63. (Mookerjee and Fletcher, JJ.) BHUPENDRA CHANDRA SINGH v. HARIHAR CHACKRAVARTI.

24 C. W. N. 874.

—Construction—Ancient grant—Subsequent conduct of grantor and his subordinates—Admissibility of to show extent of grant—Grant by Govt. See GRANT, CONSTRUCTION.

11 L. W. 256.

—Construction—Assignment or sublease.

When the question is raised as to whether a transaction amounts to an assignment or to an under-lease the proper test is to see whether the lessee under the headlease has parted with his whole interest or with a greater interest than he himself possessed. If he has, then the instrument of transfer, or whatever name it may be called, is in reality an assignment. A lease of the entire interest of the lessee subject to a power to surrender, operates as an assignment and not as an under-lease. (Das and Foster, JJ.) THE LONDA COLLIERY CO., LTD. v. BEPIN BEHARI BOSE.

1 P. L. T. 84 : 55 I. C. 113.

—Construction—Boundaries and area—Conflict.

Where in deeds regarding land there is a variation between measurements and plan it is a well recognized principle of construction that reliance should ordinarily be placed on the latter. (Bevan Petman, J.) JOHRI v. JOWAHR.

91 P. L. R. 1919 : 58 I. C. 67.

—Construction—Boundaries and area—Conflict between.

Where there is a conflict between the area given in a *kabuliyat* and the boundaries which are firm, ascertained and definite, the boundaries must prevail but if the boundaries are uncertain the intention should be taken to be to

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demise the specified quantity of land within those boundaries. (*Sultan Ahmed, J.*) RIT LAL MAHTO v. SHILINGFORD. 57 I C 2

—Construction—Boundaries and area—Description by reference to map.

Where the case is on a map and the map exhibits the boundaries of the demised land the map is decisive on the question of boundaries unless it contradicts the unambiguous description of boundaries in the lease (*Das and Foster, JJ*) THE LONDA COLLIERY CO LTD. v. BIPIN BEHARI BOSE.

1 P. L. T. 84 : 55 I. C. 113

—Construction—Conduct of parties,

The terms of an unambiguous document cannot be controlled by the conduct of the parties. (*Mookerjee, C. J. and Fletcher, J.*) KIRANSASASHI v. ANANDA. 32 C. L. J. 15.

—Construction—Conduct of parties—Ambiguous terms.

If the terms of the contract are ambiguous the right of the parties may be determined with reference to the contract of the parties L. R. 3 P. C. 605 (610) Ret. But when the terms of the contract are unambiguous, no evidence can be given of the conduct of the parties in contradiction to the terms of the contract, (1900 A. C. 260 (263) Ref. (*Mookerjee, C. J. and Fletcher, J.*) RAJA NIROD CHANDRA SINGHA SARMA v. HARIHAR CHAKRAVARTI CHOWDHURY. 32 C. L. J. 19 : 58 I. C. 867.

—Contract—Further charge—Compound interest.

Where a deed of further charge does not contain any covenant to pay compound interest, the fact that there is such a covenant in the deed of mortgage, is no ground for allowing such interest on the further charge. (*Kanhaiya Lal, A. J. C.*) HARIHAR DUT v. MATURKA PRASAD. 57 I C 599

—Construction—Instalment bond—Waiver—Interest to run in case of default—Irregular payment from time to time.

A mortgage bond was executed by the defendant in favour of the plaintiff. It was payable by nine half yearly instalments of Rs. 10 each without interest, but in case of default the mortgagee could cancel the arrangement and charge interest at a certain rate. The first instalment was paid beyond time. The mortgagee credited it partly towards the interest which had begun to run and the balance towards the principal. The second instalment was paid in time but the mortgagee apportioned it in the same way. Thereafter from time to time irregular payments of varying sums were made, and were credited in same way. In a suit on the mortgage, held that the mortgagee was entitled to treat the payments made on account generally and by accepting them he did not waive his right to charge interest, (*Ryves and Gokul Prasad, JJ*) WEZARAT HUSAIN v. MOHAN LAL.

18 A. L. J. 776 : 58 I. C. 7.

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—Construction—Intention of parties—Language.

Where Courts are asked to decide the construction of one or more documents taken together and to declare the legal result two essential considerations have to be borne in mind: (1) What is reasonably to be taken to have been the intention of the parties when they made the contract in question, assuming them to be ordinary reasonable business people. (2) Does the language used by the parties themselves fairly represent or carry out that intention.

Where the language is ambiguous or a party has been trapped into using language which, probably does not represent his real intention it may be that the Court is forced by the terms actually used to give effect to what it may consider inflicts hardship, but there's no straining of language and there can be no hardship in a case where the party seeking to escape from his liability has, by his own language, undertaken, that he would not dispute it. (*Walsh, J.*) MAHABIR SINGH v. JAG MOHAN LAL. 57 I. C. 569.

—Construction—Mortgage—Stipulation for payment of interest—Period.

A mortgage deed provided for the payment of the mortgage money with interest compoundable half-yearly after the expiry of five years. It further stated that if the mortgage money was not paid the mortgagee would be entitled to obtain foreclosure. Here, the mortgagee was entitled to claim interest for the period subsequent to the expiry of five years for which the mortgage money may remain unpaid. (*Kanaliya Lal, A. J. C.*) RAMESHAR BAKSHI v. PRABHU DAYAL. 57 I C 533

—Construction—“Person” includes corporation. See CAL. HIGH COURT RULES CH. XIII R. 9' 24 C. W. N. 1007.

—Construction—Sale—Certificate—Subsequent conduct.

Two rules of construction apply to documents of title, such as sale certificates: “One of these rules is” falsa demonstratio non nocet; another is non accipi debent verba in demonstrationem falsam, quae comprehendit in initio veram.” The first rule means, that if there be an adequate and sufficient description with convenient certainty of what was meant to pass, a subsequent erroneous addition will not vitiate it. The characteristic of cases within the rule is, that the description, so far as it is true, applies to one only. The other rule means, that if it stand doubtful upon the words whether they import a false reference or demonstration, or whether they be words of restraint that limit the generality of the former words, the law will never intend error or falsehood. If, therefore, there is some land wherein all demonstrations are true, and some wherein part are true and part false, they shall be intended words of true limitation to pass only those lands wherein circumstances are true.”

DEED.

Evidence of conduct subsequent is admissible when the terms of the contract are ambiguous: (*Mucrjee A C. J. and Fletcher and Teunon, JJ.*) THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. KUMAR NARENDRA NATH MITTER. 32 C. L. J. 402

—Construction—Sale or mortgage—Unregistered agreement to reconvey—Evidence Act, S. 92.

The plif purchased some lands under a sale-deed. At the same time he passed an unregistered agreement to reconvey the lands at the end of five years. He leased the lands to the vendor Plif having sued to recover possession of the property, the vendor deft contended that the sale was in effect a mortgage and relied on the agreement to reconvey. The trial court held that the agreement being unregistered, could not be looked at and passed a decree for possession. On appeal, the lower appellate court held that the transaction was a mortgage, since the defendant would never have passed the sale deed if plif had not assured him that his ownership was not lost and that he would be allowed to redeem. The plif, having applied

Held, (1) decreeing the suit, that the view that the transaction must be considered a mortgage, because there had been a misrepresentation at the time the document was signed, could not be upheld.

(2) that the defts' case which was one for specific performance of an agreement to reconvey, could not succeed.

Per Macleod, C. J.—Where the question is whether a sale deed and an agreement to reconvey make together a mortgage by conditional sale, the court has, strictly speaking, to look to the actual contents of the documents and construe them accordingly. But it may be that there is such extrinsic evidence and circumstances which show the relation of the written language to existing facts, that it would be possible to come to the conclusion that the documents which on the face of them constitute a sale and an agreement to reconvey within a certain period or after a certain period, amount to a mortgage. (*Macleod, C. J. and Heaton, J.*) NAMDEV v. DHONDU. 22 Bom. L. R. 979 : 58 I. C. 406.

—Construction—Shankalap, grant by way of—Grantor reserving no right to herself—Grantee to hold bitta lagan, with heritable and transferable rights—Under proprietary rights—Declaratory suit cause of action.

A Hindu widow executed a *Shankalapnam* deed in favour of the family priest reciting that her husband had made a gift by way of *Shankalap* in his favour in certain *Sir Mataiti* and grove-land and that she was also giving him a *shankalap* grant of 25 bighas of land *bitta lagan*. The lady declared in that deed that at the date of the deed she was to have no sort of right or claim to the property and that the transee was to hold it for ever with heritable and transferable rights.

DEFENCE OF INDIA ACT.

Held, that the deed conferred only under proprietary rights. (*Lindsay, J.*) GANESH PRA-SAD v. BISHUNATH. 23 O. C. 30 : 56 I. C. 354.

—Construction—Will or deed inter vivos—Registration

Where a document styled a will contains nothing more than a declaration of an intended adoption which was however never carried out and a statement of the wishes of the executant thereafter, and is in the nature of a transaction *inter vivos* and the document is not registered, it has no legal validity whatever.

Calling a document a will does not make it so. (*Lord Moulton*) TIRUGNANAPAL v. PON-NAMBAL NADATHI. 28 M. L. T. 190 : (1920) M. W. N. 559:

12 L. W. 660 : 58 I. C. 228 (P. C.)

—Execution—Date of—Document signed some days after it is written.

The mere fact that a document is signed and attested a few days after it is written does not invalidate it or in any way alter the nature of the case set upon its basis though the date of actual execution as established by the evidence is found to be slightly at variance with the date entered in the plaint. (*Kanhaiya Lal and Lyle, A. J. C.*) NAZIR BIBI v. RAM RATAN. 54 I. C. 877.

—Execution—Date of—Presumption,

There is a presumption that a document was executed on the date it bears. (*Kanhaiya Lal and Lyle, A. J. C.*) LALA PARSHTOTAR DAS v. NAZIR HUSSAIN. 54 I. C. 846.

—Material alteration—Deed becomes void—Suit for moneys advanced—Maintainability of—Suit for damages for breach of contract evidenced by document materially altered not maintainable. See CONTRACT ACT, 65. (1920) M. W. T. 187.

DEFAMATION—Examination as witness

—Question put to witness—Compelled to answer—No defamation. See EVIDENCE ACT, S. 132, 18 A. L. J. 112.

DEFENCE—Bar of Limitation to—See LIM. ACT. ART 12 (a) Ss. 26 and 28.

22 Bom. L. R. 1082.

DEFENCE OF INDIA ACT—Rr. 25

(1) and (2)—Offence under—Report of police on direction of District Magistrate—Conviction if bad for want of proper complaint—Police Superintendent—Delegation of powers.

Where a District Magistrate is empowered to order or authorise, complaints to be made in respect of such offence as came within the purview of R. 25, (1) of Defence of India Rules 1915 directed the superintendent of police to make an enquiry, complete the case and send it up for trial and in due course the police put up a chalan before the District Magistrate who sent to the trying Magistrate who had disposed of it.

DEKHAN AGR. R. ACT, S. 10

Held, that the conviction of an offence under R. 25, (1) of the Defence of India Rules of 1915 was not bad in law under sub-R. 2 of the said rule and the mere fact that the information which had been laid was prepared in the same form as a chalan does not render the information anything other than a complaint 26 B 150 F. B. foll. 28 P. R. 1883 Cr.; 16 P.R. 1890 Cr.; 2 P.R. 1892 Cr.; 3 P.R. 1892 Cr.; 20 P.R. 1894 Cr.; 37 C 467. Referred to The superintendent of police was competent to authorise any of his subordinates to make the report or lodge the information. (*Broadway, J.*)

KHUSHAL SINGH v. EMPEROR.

2 Lah. L.J. 707.

DEKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879) S 10 A—
“Agriculturists” definition of—*Extension of S. 2—Whole Act if applicable—Oral evidence to vary terms of written document.*

The defendants executed a sale deed of lands to the plaintiff in Dharwar in 1903, sometime after Ss. 3 and 20 of the Dekhan Agriculturist's Relief Act were extended to that District. The whole Act was made applicable to it in 1905. The plaintiff sued in 1916 to recover possession of the lands sold to him by the defendants. The defendants contended that the sale was in reality a mortgage desired to adduce oral evidence to prove it under S. 10 A of the Dekhan Agriculturists' Relief Act 1879 :—

Held, that the defendants were not entitled to adduce oral evidence, for S. 13 A of the Dekhan Agriculturists' Relief Act did not apply, since the defendants were not agriculturists as defined by S. 2, of the Act, the Act not having been extended to the Dharwar District in 1903, when the liability came into existence. (*Macleod, C. J. and Heaton, J.*) **CHANBASAYYA v. CHENNAPOGAVDA.** 44 Bom: 217:

22 Bom. L. R. 44: 54 I.C. 693.

S. 10-A—2nd Proviso sale or mortgage—Bona fide transfer for value without notice of less than twelve years standing affected by S. 10-A.

The Dekhan Agriculturists' Relief Act, S. 10-A, 2nd proviso, does not protect a bona fide transferee for value without notice of the real nature of a transaction if he holds under a registered deed executed less than twelve years before the institution of the suit, (*Macleod, C. J. and Heaton, J.*) **PRANJIVANDAS NARSIDAS v. MIA CHAND BAHADUR.**

22 Bom. L. R. 1123.

S. 13—Account—Separate transactions between parties amounting to one set of dealings—Principle of taking accounts.

The plaintiffs passed a usucrary mortgage to defendants in 1885 for Rs. 3,000. In 1891 they borrowed Rs 700, and in 1895 Rs. 200 more from defendants on the same security. It was found that the advance made in 1885 was not paid off when the second advance was made in 1891; and the transaction was still open between the parties, when

DEKHAN AGR. R ACT, S 23.

the third advance was made in 1895. At the plaintiffs' suit, the Court took an account, under S. 13 of the Dekhan Agriculturists' Relief Act 1879, on the footing that there was a series of transactions between the parties which together amounted to one set of dealings. The defendants having appealed :—

Held, that the procedure followed was correct for the series of transactions between the parties was exactly the kind of series of transactions contemplated by S. 13 of the Dekhan Agriculturists' Relief Act, and it was intended that accounts should be taken of the whole series of transactions between the parties as if they were one entire transaction (1897) P. J. (87 dist.) *Macleod C. J. and Fawcett, J.* (*GURUNATH v. SADASHI.*

22 Bom. L. R. 1190.

S 15 B. (1)—Decree for redemption—Payment of redemption money with interest from date of suit till payment—Mortgagor's liability to account for mesne profits.

A redemption decree passed under the Dekhan Agriculturists' Relief Act, 1879, directed the mortgagor to pay in instalments mortgage amount with interest at six per cent. from the date of suit and ordered the mortgagee to account for profits received from the date of the suit till restoration of possession to the mortgagor.

Held, that having regard to the concluding portion of S. 15 B (1) of the Dekhan Agriculturists' Relief Act, 1879, the direction as to the payment of interest and the accounting for mesne profits were proper. (*Macleod, C. J.*) **MAHAMAD IBRAHIM v. SHAIKH MAHAMAD.**

44 Bom. 372:

22 Bom. L. R. 124: 55 I. C. 557.

S. 23—Redemption of mortgage—Suit for account; mode of taking accounts.

In a suit to redeem a mortgage for Rs. 600 passed in 1905, the court took accounts of the transaction under S. 18 of the Dekkan Agriculturists' Relief Act 1879, and traced cash advances long before 1899 in which year the Act was extended to the District. Eventually the court held that the amount due under the mortgage was Rs. 600. The lower appellate Court reversed the decree on the ground that there was no clear evidence to determine the amounts of principal and interest. On second appeal :

Held, restoring, the decree of the trial court, that it was not intended by the framers of the Dekhan Agriculturists' Relief Act 1879, that in a case where the mortgage was admitted plaintiff should leave everything because he could not go back far enough to a period before the Act was in force to distinguish what was principal and what was interest. 19 Bom. 593. Dist. (*Norman Macleod, C. J. and Fawcett, J.*) **KONDAN DAMU v. INDARCHAND.**

22 Bom. L. R. 1299.

DIVORCE.

DIVORCE—*Parties residing separately from each other within jurisdiction of Court at the date of petition—Jurisdiction to hear petition—Divorce Act, S. 3 (1).*

The High Court has jurisdiction to hear a petition for divorce where the parties last resided together outside its jurisdiction but at the date of the presentation of the petition are residing within its jurisdiction separately from each other.

The word "together" in S. 3 (1) of the Indian Divorce Act governs only the words "last resided" and not the word 'reside' (1892) P. J. 153 not followed (*Marten, J.*) DAISY AMELIA BORGONHA v. WILFRED CHURCHILL

22 Bom L R 361.

DIVORCE ACT, (IV of 1869) S. 2—Dissolution of marriage—Finding as to date and place of marriage.

Though there is a duly verified petition for dissolution of marriage containing a statement that the parties were married to each other in British India according to Christian rites, the Court nevertheless before making a decree for dissolution of the marriage, should come to a distinct finding upon the question whether the marriage was solemnized in India and the date on which it was so solemnised (*Sanderson, C. J. Mookerjee and Fletcher, J.J.*) SINGRAI SANTHAL v. PURAIGI SANTHA LNI

31 C. L. J. 340 : 57 I. C. 43.

—S. 3 (1)—*Last resided together—Divorce—Jurisdiction—Permanent residence.*

In a petition for dissolution of marriage where the husband and wife had no permanent residence, but last lived together in an hotel at Bombay for the greater portion of a month, the husband being then on leave from active service in Mesopotamia. Held, that there was a sufficient residence within the meaning of the Act to give the Court jurisdiction to entertain the suit. 36 Mal. 964 fol. 42 All. 203 and 38 B 135 Dist. (*Marten, J.*) MABEL FLORA MURPHY v. JAMES LLOYD MURPHY.

22 Bom. L. R. 1077.

—S. 3 (1)—*Residing together, meaning. See.*

22 Bom. L. R. 361.

—S. 7—*Procedure—Court to act on principles of English Law—Service of petition.*

S. 7 of the Divorce Act applies not only to the grant of relief but also to questions of procedure.

Under S. 50 of the act manner in which service of petition is to be effected is to be regulated not by the C. P. Code but by general or special orders of the High Court.

In the absence of general orders on the subject the proper course when service cannot be effected on the respondent is to apply to the Court for a special order as to how it is to be effected. (*Robinson, J.*) Low v. Low.

12 Bur. L. T. 199 : 55 I. C. 269.

DIVORCE ACT, S. 14.

—Ss. 12, 13 and 14—*Divorce—Adultery—Condonation—Resumption of co-habitation—Subsequent desertion—Effect of—Petition by husband—Unreasonable delay.*

It is well settled that resumption or continuance of co-habitation with complete knowledge of all the circumstances operates as condonation.

Mere forgiveness is not condonation; to be condonation, it must completely restore the offending party and must be followed by co-habitation. This is essentially the view adopted by the Indian Legislature in S. 14 which requires that no adultery shall be deemed to have been condoned, unless where conjugal co-habitation has been resumed or continued. The expression conjugal co-habitation or its equivalent connubial intercourse, should not be given a restrictive meaning but should be so interpreted as to leave the nature of the co-habitation or intercourse to be adapted to the varying conditions and circumstances of different parties : 41 Cal. 1091 referred to.

Condonation of past matrimonial offences is however impliedly conditioned upon the future good behaviour of the offending spouse, and it follows that if after condonation the offences are repeated, the right to make the condoned offences a ground for divorce revives; to constitute a revival of the condoned offences, the offending spouse need not however be guilty of the same character of offence as that condoned; any misconduct is sufficient which indicated that the condonation was not accepted in good faith and upon reasonable conditions implied.

Desertion subsequent to condonation that would receive the effect of the original adultery exists if one party to a marriage without the consent or against the will of the other wilfully causes or without reasonable excuse makes the other live apart. The Courts look with great suspicion on petitions for dissolution of marriage presented on the ground of adultery, after long delay by a husband and relief is given to the *Vigilantibus* and *Dormientibus* yet delay will generally be excused if it is really due to poverty. Even in the latter case there is a lapse of time where the wife should be drawn and relief refused. (*Mookerjee and Fletcher, J.J.*) CONSTANCE CATHERINE MORENO v. HENRY WILLIAM BUNN MORENO.

31 C. L. J. 435 : 57 I. C. 216.

—S. 14—*Marriage—Solemnization—Proof of date-of marriage.*

In a divorce case before a final decree is made the Court must come to a distinct finding upon the question whether the marriage was solemnized in India and upon what date, though there is a statement in a verified petition for dissolution of marriage that the parties were married to each other in British India according to the doctrine of Christianity. (*Sanderson,*

DIVORCE ACT, S. 19.

Mookerjee and Fletcher, JJ.) SINGRAI SANTHAL v PURAIGI SANTHAL.

31 C. L. J. 340 : 57 I. C. 48.

—**S. 19—Nullity of marriage—Grounds for Impotency—Loathsome disease—Syphilis—Physical examination—Refusal to undergo.**

Where syphilis was contracted prior to but was not known to exist at the time a contract to marry was entered into or where such disease was contracted subsequent to the marriage of the Defendant, its existence furnishes a good defence to an action for breach of promise.

Capacity for sexual intercourse must exist at least in posse, at the time that the marriage is entered into. It is for this reason that permanent and incurable impotency existing at such time and of such nature as to render complete and natural sexual intercourse between the parties practically impossible is recognised as a ground for the annulment of marriage.

Concealment of a loathsome and incurable form of syphilis is recognised as a fraud sufficient to warrant divorce or annulment, specially where the existence of the disease is discovered by the other party before the marriage is consummated and the parties immediately separate. Such disease must be actually and probably incurable but annulment has been granted notwithstanding a more remote possibility of a cure rendering complete and natural sexual intercourse between the parties practically impossible is recognised as a ground for the annulment of the marriage.

Impotency means physical and incurable incapacity to consummate the marriage. The capacity for sexual intercourse is not necessarily affected by the existence of syphilis, and yet such disease may render coition practically impossible.

The existence of syphilis in one of the parties to the marriage may furnish good ground for divorce to the other on the ground of cruelty. To constitute such a ground or cruelty, it is usually required that the disease should have been actually communicated to the complainant that the complainant should have been ignorant of the existence or nature of the Defendant's disease at the time of its communication, and that the Defendant should have infected the petitioner knowingly and wilfully.

The Courts have a wide discretion in ordering physical examination of the party suffering from the disease and always do so subject to such conditions as will afford protection from violence to natural delicacy and sensibility.

Where a party refuses to attend for medical inspection the Court may probably draw an unfavourable inference. English and American cases referred. (*Mookerjee, C. J. and Chaudhuri, J.*) BIENDRA KUMAR BISWAS v. HEMLATA BISWAS. 24 C. W. N. 914.

EASEMENT.

DOWL KABULIYAT, Construction of, customary incidents, evidence of, admissibility of See. 25 C. W. N. 13.

EASEMENT—Acquisition of—Grant—Prescription.

A right of way may be acquired as regards a portion by grant and as regards another portion by prescription. (*Tuncor and Huda, JJ.)* KALA CHAND MUKHOPADHYA v. JOTINDRA NATH CHAKRABRTY. 57 I. C. 852.

—**Alteration of—Increase of burden—Hut—Two storied building.**

No man can impose a new or increased restriction or burden on his neighbour by his own act, and for this purpose an owner of an easement cannot, by altering his dominant tenement increase his right.

The burden is on the person who claims the easement to prove that when a hut was replaced by a two-storied building no additional burden was imposed upon the servient tenement.

A right of easement does not exist in respect of a two-storied building replacing a hut having that right and increasing the burden of the servient tenement. (*Mookerjee and Fletcher, J.)* SURESH CHANDRA BISWAS v. JOGENDRA NATH SEN. 24 C. W. N. 896 :

32 C. L. J. 27 : 58 I. C. 854.

—**Alteration of—Increase of burden on the servient tenement.**

The owner of a dominant tenement had the right to let rain water from the roof of his house drop from the eaves on to the roof of the servient tenement from a distance of 7 feet. Subsequently, he raised the height of his roof to about 21 feet and, instead of allowing the water to drop from the eaves he poured it down through pipes: Held, that the burden on the servient tenement had increased and that, therefore, the easement was extinguished. (*Adami, J.)* KESHRI SAHAY SINGH v. HIT NARAYAN SINGH. 58 I. C. 967.

—**Natural right—Claim to be specific and distinct—New case.**

The right of the owner of high land to drain off its surplus surface water through the adjacent low grounds is a right incident to the ownership of land. But such a right must be specifically claimed when the right is put forward as an easement. The right of easement and a natural right are distinct rights, and where one is claimed the other does not rise.

Where a plaintiff claims a right as an easement and fails to establish that right, it is not open to the Court to make a new case from him. (*Das, J.)* MOHENDRA NATH GHOSE v. NABIN CHANDRA GHOSE. 57 I. C. 504.

—**Privity—Custom of in Gujarat Invasion of.**

In the province of Gujarat there is a customary usage which makes an invasion of privacy an actionable wrong; and a man may not open

EASEMENT.

new doors or windows in his house or make any new apertures or enlarge old ones in a way which will enable him to overlook those portions of his neighbour's premises which are ordinarily secluded from observation. (*Mackrod, C. J. and Heaton, J.*) **MANEKLAL MOTILAL v. MOGANLAL NAROTAMDAS.** 44 Bom. 496

22 Bom. L. R. 226 : 55 I. C. 949.

Right of way—Prescription.

Once the plaintiff has established his right to pass along the way, it would be inequitable merely on the ground of inconvenience to any particular individual to place any restriction on that right. 6 W. R. 222, and 22 W. R. 302, ret. (*Broadway, J.*) **FATTE I. MAHOMED v. MUSSAMMAT AMIN DEVI.**

2 Lah L. J. 499

Right of way—Public and private—Common right—Suit—Form of.

A right to a private way and a right to a public way over the same soil cannot be pleaded together, as the two are inconsistent. The private right, if pre-existing, can be relied on, for there is no compulsion in such a case to resort to the public right which might possibly be disputed by contradicting evidence.

A right of way common to several persons is not necessarily a public right.

In pleading a public right of way it is not necessary to set out the *termini* because the public have a right to use the way for all purposes and at all times, whereas in pleading private rights of way, the *termini* or the way and the course which it takes must be shown with reasonable precision and exactitude. (*Das, J.*) **RAM MANOHAR SAHI v. MITTILALA PRASAD SAHI.** 57 I. C. 151

EASEMENTS ACT, S. 12—Right to easement—Tenant having permanent interest on the land if can acquire right by prescription in other lands of lessor. See (1919) *Dig Col. 591.* **BASAVANAGUDI NARAYANA KAMTHY v. LINGAPPA CHETTY.** 38 M. L. J. 28 : 11 L. W. 34 : 54 I. C. 943.

Ss. 13 and 47—Easement—Extinguishment of—Right to take water from another well—Easement of necessity—Adverse possession—Lim. Act 144—Dominant owner building well with permission—Fresh grant.

The defts. had ancient right of the nature of an easement to take water from a well which was in the plaintiff's land; but that easement became extinguished by non-user for a period of more than twenty years. Subsequently, the defts. repaired the well at their own expense, with the permission of the plff. in order to irrigate their land, and began to use the water for the purpose. The plaintiff having sued to restrain defts. from so using the water.

Held, that the easement in question was not an easement of necessity, but was an ordinary easement liable to be extinguished by non-user for more than twenty years under S. 47 of the Easements Act;

EASEMENTS ACT, S. 15.

The right was not an interest in immoveable property which only would be liable to be lost by proof of twelve years' adverse possession against the defendants, under art. 144 of the Lim. Act

The plaintiff, in giving permission to the defendant to rebuild the well has practically granted a fresh easement to the defendants to the extent of the use of half the water of the well for the irrigation of their adjoining land, and that grant was accepted and actually used by the defendants

The plaintiff having by his conduct permitted the defendants to believe that they would have that right upon the repair of the well and the defendants relying upon the permission had acted upon the belief that they would be entitled to that right, the plaintiff was estopped from denying the right of the defendants under S 115 Evidence Act (*Shah and Hayward, JJ.*) **ANANTA MURARRAO v. GANU VITAU.** 22 Bom. L. R. 415 : 57 I. C. 143.

S. 15—Easement — Peaceable and uninterrupted enjoyment of right for 20 years—Non enjoyment for 4 years before suit owing to interruption of servient owner—Interruption protested against, effect—English and Indian Law.

Under S 15 of the Easements Act in order that a right of easement may be acquired, the enjoyment of such right for a period of twenty years must not only be peaceable open and without interruption, but such enjoyment must extend to within two years before the institution of the suit. Where therefore in a suit to establish a right of way it was found that though plaintiff had enjoyed the right peaceably and without interruption for a period of 20 years he did not enjoy the right for four years before the institution of the suit, being effectively prevented from doing so by the defendant, held that the plaintiff's suit failed by virtue of the above mentioned provisions of S. 15 of the Act notwithstanding that plaintiff never submitted to the obstruction but protested against it. English and Indian Law compared. (*Abdur Rahim and Oldfield, JJ.*) **NACHIPARAYAN v. NARAYANA GOUNDAN.**

39 M. L. J. 574 : 12 L. W. 713

S. 15—Landlord and tenant—Easement—Acquisition by prescription.

A tenant in a zemindary cannot by prescription acquire the right to irrigate his land held by him as a tenant, with water from the landlord's tank. (*Sadasiva Iyer and Spencer, JJ.*) **BAYYA SAHU v. KRISHNACHANDRA GAJAPATI.** 11 L. W. 600 : 56 I. C. 598.

S. 15—Right of way—Uninterrupted enjoyment—Plea of—Onus of proving non-submission of servient owner.

Knowledge of the fact of enjoyment on the part of the owner of the servient tenement is an essential condition to the acquisition of an

EASEMENTS ACT, S. 28.

easement where the court is asked to presume a grant. The fact that there has been active obstruction on the part of such owner would negative any such presumption.

In order to negative submission to an interruption the party interrupted need not have brought a suit.

The question whether there has been submission to, or acquiescence in an obstruction is a question of fact, the burden of negativing submission being on the party alleging that he did not submit. (*Drake Brockman, J. C.*) RAMA CHANDRA RAO v. VENKAT RAO

16 N. L. R. 76 : 54 I. C. 936.

S. 28—Extent of easement—Right of way for carts, cattle etc. does not include right of way for bangis.

In 1912 the defendants established their rights of passage for persons, cattle, carts etc. over the open ground in front of plaintiff's houses. Five years later, they claimed that they could use the passage as a way for sweepers and other persons of untouchable class to remove night-soil from their privies. The plaintiffs having sued to restrain the defendants from using the way as a way for sweepers:—

Held, that the right established in the earlier suit did not include a right of passage over the way for sweepers carrying night-soil, because there was no evidence whatever that the defendants had used the passage for their sweepers. (*MacLeod, C. J. and Heaton, J.*) CHINTAMANI v. RATANJI.

22 Bom. L. R. 1131.

S. 43—Decree nisi orders as to the custody and maintenance of children property of. See (1919) Dig. Col. 502. IN THE MATTER OF THE INDIAN DIVORCE ACT.

2 Lah. L. J. 39 : 54 I. C. 943

S. 44—Customary easement—Extinction of—Non-user owing to natural causes.

A tenant may have customary right or customary easement to irrigate his lands, with water from his landlord's tank but where owing to natural causes the tank became unfit for use as an irrigation source, such right becomes extinguished under S. 44 of the Easements Act. (*Sadasiva Aiyar and Spencer, J.J.*) BAYYA SAHU v. KRISHNACHANDRA GAJAPATI.

11 L. W. 600 : 56 I. C. 598.

EJECTMENT—Cause of action—Expiry of lease—Subsequent change of case.

In a suit for ejectment defendant set up that he had acquired occupancy rights. To rebut this, plaintiff produced a lease to cover a period of 8 years. Defendant objected in appeal that the lease should have been made the basis of the suit and that the suit ought to have been under S. 58 of the Agra Tenancy Act. The objection was allowed and the suit dismissed on the ground that plaintiff ought not to have been allowed to change his cause of action.

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EJECTMENT.

Held, that the plaintiff had not changed his cause of action and that he was not bound to base his claim on the lease. (*Hopkins S. M. and Porter, J. M.*) CHAUDHURI GAVRI SHANKAR v. MEWA.

56 I. C. 977.

Possession—Proof of, within 12 years.

In a suit for possession upon a dispossession the plaintiff is bound to establish a subsisting title and possession within 12 years immediately preceding the commencement of the suit. 25 M. L. J. 95 (P. C.) followed. (*Drake Brockman, J. C.*) EKOJI KUNBI v. AKAJI KUNEL.

54 I. C. 131.

Possession within 12 years—Proof of—Evidence of user. See ALLUVION AND DILUVION.

1 Pat. L. J. 229.

Possession within 12 years—Proof of—Necessary—Submerged land—Possession presumed to be with owner. See BENGAL REGN. XI of 1825.

5 P. L. T. 632.

Possessory title—Suit on—Maintainable against trespasser.

Previous possession even for a period short of the statutory period of 12 years entitles the plff. to a decree for possession in a suit against a trespasser. (*Sultan Ahmed, J. J. AJODHYA SINGH v. AWAD BEHLKI DAS.* 57 I. C. 320.

Title—Admission of—Claim of raiyati interest—Burden of proof.

In a suit for recovery or possession of land plff. was admitted to be the landlord and it was further found that he had raiyati interest in respect of some of the suit lands but there was nothing to show which of the lands were raiyati. *Held*, that the title of the plff. being admitted it was for deft. to identify the lands which he claimed as his raiyati land. (*Coutts and Das, J.J.*) BHAIYAN SUNDARDAS v. KHAWAS DILWARI SAHU. (1920) Pat. 39.

Title—Proof of by plff essential—Payment of govt revenue.

In a suit for possession by one trespasser on government land against another the one who has paid government revenue on the land has a better title than the one who has never paid any revenue.

Assessment to government revenue converts the trespasser's possession into legal possession. (*Maung Kin, J. J. TUN AUNG v. MA HTEE*

12 Bur. L. T. 263 : 56 I. C. 935.

Title—Strict proof of essential—Confused boundaries.

In 1803 plff. sued to eject deft. from certain lands as being part of the r Moulih P'ngaldaha. Both parties, claimed under leases granted by the Zamindars dated 1834 and 1838 respectively. The locality of P'ngaldaha except as a belt was already unknown at the time of the Thakbust survey in 1856 and very same disappeared in 1880. The High Court in decreeing the Plaintiff's suit determined its area not by any positive finding of its boundaries but by conjecture.

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ing the boundaries of defendant's land and giving the rest to the plaintiff's. The defendants being the parties in possession. Held (referring to the High Court's judgment) that the Plaintiffs could not succeed. (*Lord Phillimore v. Gopal Chandra Chaudhuri v. Rajani Kanta Ghose.*)

47 Cal 415 : 24 C W N. 553 (P C)

Trespassers, joint property—Notice to quit by one of the co-trustees—Eject—Decree, form of. See **TRUST MANAGEMENT**

39 M. L J. 685

ELECTION—Validity of—Number of votes recorded exceeding maximum.

When the number of votes recorded exceeds the maximum that can be given the election by majority of votes, in the case of any elective body is invalid and void, specially when there are no rules providing for any such contingency. (*Sanderson, C J., Woodroffe and Mookerjee, JJ. v. Nagendra Nath Sen v. J. Vas Esq., Chairman, District Board, Khulna.*)

32 C L J 124

ENGLISH LAW—Applicability of—Right of justice, equity, and good conscience.

Where there is no prescribed law to which the decision of a Court must conform, and the Court must proceed according to justice, equity, and good conscience the court may follow the principles of English Law applicable to a similar state of circumstances. (*Kotval, A. J. C. v. Keshimal v. Kadhai.*)

55 I. C. 152.

EQUITY—Private body—Committee—Expulsion of members—Duty to inquire—Rules of natural justice. See **CORPORATION**.

31 C. L. J. 247.

ESTOPPEL—Admissions—Title—Compromise of previous litigation—Fraudulent dealing.

A was in possession as *darmokararidar*, and B obtained a fraudulent lease of the same lands from the *mokararidar* ignoring A's rights. Disputes followed which ended in a compromise by which B recognised and admitted the interest of A. They and their successors in interest then continued to hold and enjoy the land in accordance with the terms of the compromise. In a suit by the successors-in-interest of A for recovery of possession of the land against B's successors-in-interest.

Held, he was entitled to a decree as the debtors could not set up their fraudulent lease against plaintiff's interest in the land which was admitted and recognised by the compromise. (*Fletcher, J. v. Srikant Chandra v. Dharamdhara Ghose.*)

55 I. C. 463.

By conduct—Adoption—Recognition of

Where the defendant who challenged the adoption was the grandson of a party to the compromise under which the adoption was made and under which he received a material benefit and who was present and consenting when the ceremonies were performed. Held,

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that defendant was estopped from disputing the adoption and was bound by his grandfather's action. (*Broadway, J. v. Moman v. Dhanni.*)

1 Lah. 31. 55 I.C. 869.

By conduct—Arbitration—Arbitrator seeking to upset award.

A dispute was settled by arbitration. Subsequently two of the arbitrators purchased the interest of one of the parties to the dispute and sought to upset the arrangement arrived at as a result of the arbitration.

Held, that they were estopped from doing so. (*Stuart, A. J. C. v. Budhai Singh v. Karan Singh.*)

55 I. C. 506.

By conduct—Consent to mutation proceedings—Subsequent impugning.

When a person appeared at the time of the mutation in respect of the sale in dispute and expressed his consent to it he cannot subsequently come forward and impugn it. (*Shai Lal and Martincau, J. v. Muhammad Umar v. Walli.*)

2 Lah. L J. 306.

By conduct—Hindu joint family—Father—Eshani transfers—Sons recognising transaction.

In a joint Hindu family consisting of the plaintiffs and their father, the latter as manager of joint family properties entered into several *bhumi* transactions for the purpose of saving a portion of the estate from the hands of a mortgagee execution purchaser. These transactions were accepted by plaintiffs and on that footing rights had sprung up, based on those transactions. Held, that plaintiffs had accepted the transactions entered into by the head of the family and they were bound by the effect of such transactions. (*Chattarjea and Duwal, J. v. Sadhan Chandra v. Nanda Prosad Singh.*)

55 I. C. 222.

By conduct—Person taking share of properties on the footing they were self-acquired—Not entitled to set up joint acquisition. See **MAHOMEDAN LAW**—ACQUISITIONS.

24 C. W. N. 321.

By judgment-debtor and creditor—Creditor bound by judgment obtained by rival creditors against debtor—Fraud and collusion, only grounds for avoidance—Judgment on perjured evidence—Not liable to be set aside. See **C. P. CODE**, S. 73.

11 L. W. 81.

Community—Representatives of—Dealing with—Pre-emption—Villagers if bound by Act of their representatives. See (*1919 Dig. Col. 509. Idris v. Jane Skinner.*)

56 I. C. 723.

Contract for sale of land—Conveyance not executed—Transferee put in possession—Vendor not entitled to eject vendee. See **T. P. ACT**, S. 54.

31 C. L. J. 75.

Doctrine of—No prejudice to party misled—Effect of.

ESTOPPEL.

In the absence of an allegation or proof that relying upon the recitals in a sale-deed a person has acted to his detriment the plea of estoppel is not available to him.

The doctrine of estoppel cannot be applied to a witness who is not a party to the suit where the party calling him is not estopped. (*Mittra, A. J. C.*) **RABIB HUSSAIN v. ZINGKALI.** 54 I. C. 962.

Execution sale—Decree-holder failing to notify encumbrance in his own favour—Subsequently estopped from asserting it as against purchaser. *See.* 55 I. C. 189.

Judgment—Suit for possession—Death of plff.—Abatement of suit—C. P. Code, O. 22, R. 9—Subsequent suit by creditor of deceased plff. for possession—Bar.

R brought a suit for possession aga'inst A and his alieees. R died and the suit was allowed to abate. S a creditor of R obtained a decree aga'inst the estate of R making the legal representatives parties to the suit, and sought to execute the decree against the properties in the hands of A as being the properties of R.

Held, the the suit by R against A having been allowed to abate R could not so long as the abatement was not set aside re-agitate her rights to the properties and the decreee-holder aga'inst R could not be allowed to set up the right of R to the properties as against A, and his heirs. (*Seshagiri Aiyar and Moor, JJ.*) **RAHUMUN-NISSA BEGAM v. SHINIVASA AVYANGAR.** 38 M. L. J. 266 : 11 I. W. 189 : 54 I. C. 565

Knowledge of facts essential—Acquiescence—Pre-emption—Good faith of pre-emptor—Proof of

In a pre-emption suit if estoppel by acquiescence as distinct from that by the prescribed notice is pleaded, it must be proved that the pre-emptor had full knowledge of what was going on and not merely the knowledge that there was a proposal to sell the property to some one or another for a certain price.

A formal offer to the pre-emptor is not necessary when it is obvious from the attendant circumstances, that the pre-emptor is neither willing nor able to pay the purchase money. (*Lyle and Ashworth, JJ.*) **HANUMAN SINGH v. ADIYA PRASAD.** 22 O. C. 323 : 54 I. C. 520.

Landlord and tenant—Tenant describing his landlord as raiyat in kabuliyat—Not estopped from pleading that landlord was really tenure holder and not raiyat—Evidence Act, S. 115.

A tenant who described his landlord as a raiyat in the kabuliyat executed by him in his favour is not estopped from pleading in a suit by the landlord for his ejection that in fact the landlord was a tenure-holder and a raiyat and that he, the tenant, himself has acquired occupancy right in the holding.

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S. 115 of the Evidence Act refers to the title of the landlord and not his status. (*Coutts and Das, JJ.*) **LOKORAM v. EIDYA RAM MAHATA.** (1920) Pat. 15.

Minor—Execution of promissory note by—Minor not liable.

A minor is not liable on a promissory note executed by him. Estoppel cannot overrule a plain provision law. (*Spencer and Bakerwell, JJ.*) **JAMBAGATHACHI v. RAJAMANNARSAMI.** 11 L. W. 596 : 57 I. C. 678.

Minor—False representation as to age.

Plff sued to recover the principal and interest due on a bond executed by deft. on 4th February 1912. Deft. pleaded inter alia that he was not 18 years old as he was a minor on that date. Deft. was born on 10th December 1891 and he was therefore about 20 years and 2 months old when the bond was executed. A guardian has been appointed for him, but the guardian resigned on the 18th May 1910 the Dt. Judge passed an order that though the minor was 18 or 19 years of age and minority would continue till the age of 21, as the appointment of a fresh guardian was discretionary and as the minor did not wish a fresh guardian to be appointed and was old enough by appearance to act for himself no fresh guardian need be appointed. After that the deft. managed his own affairs and acted as a man who has attained majority would do. The plaint alleged that the dealings were entered into on deft's assurance that he had become an adult. This was disputed by deft. but the High Court found on the evidence (contrary to the finding of the Dt. Judge) that the deft. did represent himself to be of full age and that the plff. was misled by false representation. *Held,* that S. 115 of the Evidence Act applied to the case and that the deft's. plea of minority could not be heard. 21 Bom 198 foll. 25 Cal. 616 and 30 Cal. 539 Dist. 26 Cal. 381 ; 25 Cal. 371 and 76 P. R. 1910 not foll. (*Chevins, A. C. J. and Le Rossignol, J.*) **WASINDA RAM v. SITA RAM.** 1 Lah. 389.

Minor—Sale by—Vendee aware of minority of vendor—Subsequent suit to set aside—Maintainability of—No duty to refund consideration. See EVIDENCE ACT, S. 115.

22 Bom. L. R. 49.

Mortgagee informing vendee amount due on mortgage and vendee retaining the same out of purchase money—Mortgagee whether can claim larger amount. See (1919) Dig. Col. 512. SECRETARY CHIEF KHALSA DEWAN AMRITSAR v. THE PUNJAB NATIONAL BANK LTD.

55 I. C. 492.

Negotiable instrument—Hundi—Indorser and indorsee—Indorser not estopped from setting up invalidity of instrument against indorsee. See NEG. INSTRUMENT.

39 M. L. J. 573.

ESTOPPEL.

Parties and privics—Auction purchaser bound by estoppel—Attaching debtor.

A mortgagee who purchases the property at a sale in execution of his decree on the mortgage is bound by an estoppel that would have bound his mortgagor.

A decree-holder who is bound to notify before the execution sale all encumbrances on the property about to be sold cannot subsequently set up an encumbrance in his own favour not set up in the execution proceedings. (*Mookerjee and Panton, JJ v. Kalidas v. Prasanna Kumar.*)

55 I.C. 189.

Parties and privics—Subsequent mortgagee bound by representations of mortgagor.

A subsequent mortgagee is bound by the representations made by the mortgagor to prior mortgagees and is estopped from challenging the validity of the prior mortgagee so far as it affects the share which was subsequently mortgaged. (*Stuart and Kanhaiya Lal, A.J.C.*)

Gundayal v. Taid Husain.

54 I.C. 766

Subsequent conduct—Effect of.

A mere ex-post facto submission to what has already taken place, not amounting to a ratification, does not amount to an estoppel, for the submission cannot change the past. (*Kanhaiya Lal, A.J.C.*)

58 I.C. 165.

Trustee—Alienation of trust—Property in breach of trust—Suit by alienor to recover trust—Property from bona fide purchaser—Maintainability of. See (1919) Dig. Col. 514. *Senayasim Sahib v. Kadur Ekambara Aiyan.*

54 I.C. 497.

EVIDENCE—Admissibility of—Dakhlas

The fact that certain dakhlas were not produced in a previous criminal case between the parties to a suit is not a good reason for refusing to admit them in evidence in a suit, although it would be one of the considerations going to affect their value. (*Tenon and Newbould, JJ.*)

Sorman Fakir v. Molla Abdul Aziz.

57 I.C. 949.

Admissibility—Draft record of rights
See B.T. ACT, Ss. 102, 103 B.

1 P.L.T. 224.

Admissibility of—Ejectment—Suit by landlord—Judgment in suit not inter partes if admissible.

In a suit to contest a notice of ejectment the only evidence of the existence was an appellate judgment in a suit not *inter partes*. Held, that the lease could not be held to be binding between the parties to the ejectment suit. (*Harrison, J.M.*)

54 I.C. 574.

Circumstantial—Value of—Murder—Admissions of Counsel.

EVIDENCE ACT, S. 5.

In the case of circumstantial evidence where the failure of one link destroys the chain, it is of the utmost importance to get on to the record every piece of evidence which makes the chain. Otherwise the Appellate Court might not understand how a particular conclusion has been reached and there is a danger of miscarriage of justice resulting. It is better in a capital case not to take admissions from the Counsel for the defence at all. Every fact ought to be strictly proved on the record. (*Knox and Walsh, JJ.*)

Sheo Narain Singh v. Emperor. 58 I.C. 457:

21 Cr. L.J. 777.

Circumstantial, value of—Serious offence.

The fundamental rule by which circumstantial evidence is estimated is that in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any reasonable hypothesis other than that of his guilt (*Jwala Prasad and Sultan Ahmed, JJ.*)

Ragunandan Koer v. Emperor.

1 P.L.T. 684.

Criminal trial—Accused—Who is—Disclosure of offence during examination of witness.

Neither in the complaint nor in the Police Chalan was mention made of a person as one of those who committed the offence. Held the examination of such a person as a witness to the prosecution would not vitiate the trial merely because the court discovers, for the first time when he gives his evidence, that he might have been prosecuted. (*Batten, O.J.C.*)

Local Government v. Jham Singh.

58 I.C. 820.

Criminal trial—Duty of prosecution to let in all available and relevant evidence—Duty of Court to weigh evidence. See CRIMINAL TRIAL (1920) Pat. 24.

Judgment—Recitals in—Admissibility of.

The statements of the plaintiff's age in a decree to which the defendants or their predecessors were no parties are not conclusive and binding against them (defendant) (*Tenon and Newbould, JJ.*)

Nilarattan Mittler v. Abdul Gafur.

32 C.L.J. 75.

True case—Supported by admixture of false evidence—Duty of Court to sift. See WILL.

24 C.W. 626.

EVIDENCE ACT, (I of 1872) Ss. 5, 32 and 167—Evidence—Omission to object to admissibility does not make it relevant.

Mere omission to object to a document which is not in itself admissible as evidence does not constitute such document evidence so as to be available to either side at the trial.

It is the duty of the court apart from any objection by the parties or their pleaders to exclude all irrelevant evidence.

EVIDENCE ACT, S 8.

Where the lower court has based its decision partly on irrelevant evidence the High Court will not in second appeal decide whether the other evidence in the case is sufficient to support the findings arrived at. S. 167 is not a bar to such a case being remanded. (*Dawson, Miller, C. J. and Mullick, J.J.*) **MUSAMMAT SUMITRA KUER v. RAM KUER CHOWBEY.**

**5 P. L. J. 410 : 1 P. L. J. 702 :
57 I.C. 561**

—**S. 8—Offence under S. 147 I. P. C.—Evidence of subsequent conduct—Relevancy of**

Where the evidence against a person charged with an offence under S. 147 I. P. C. is open to doubt his conduct some time after the occurrence cannot be taken to be such evidence of conduct under S. 8 of the Evidence Act as can be used against him in the case. (*Adami, J.*) **ENAYET KARIM v. EMPEROR.**

54 I. C. 775 : 21 Cr. L. J. 167.

—**Ss. 8, 9, 14 and 15 Ills. (o) Relevancy of evidence—Evidence to show motive—Preparation—Conduct—Practice**

The accused conspired together, murdered a person and implicated their enemies into the offence. The persons so implicated absconded as soon as their names came to be known. The truth came ultimately to light and the accused were tried for the offence. At the trial evidence was led to show that in the two previous trials of 1915 and 1916 for different murders, innocent persons who happened to be enemies of the accused were falsely involved into the offence and that some of the present accused had really committed the offence:

Held, (1) that the evidence was not admissible under S. 8 of the Indian Evidence Act, 1872, inasmuch as though the fact of enmity might be proved, yet the real truth about the previous murders could not be said to constitute a motive or preparation for any fact in issue in the present proceedings; (2) That in order to explain the conduct of the falsely implicated persons in absconding when they received the news that they were mentioned as offenders, the belief on the part of some of them that on previous occasions false charges of that character had succeeded or had been brought would be relevant under S. 9 of the Indian evidence Act, 1872, to explain their conduct, but it would not be relevant in the present case to show that on the previous occasions some of the accused were concerned in similar murders and charged others falsely;

(3) that such evidence was also not admissible as it amounted to evidence of similar acts and therefore of habit on the part of the present accused and was therefore inadmissible under S. 14, Ills. (o) and (p) of the Indian Evidence Act;

(4) that such evidence also was not admissible as it amounted to evidence of bad character of the accused and as such irrelevant

EVIDENCE ACT, S. 11.

under S. 54 of the Indian Evidence Act and such line of proof was excluded by the Indian Evidence Act and should not be allowed.

Held, by *Crump, J.* that such evidence even if it corroborated the confessions in the present case was irrelevant, a circumstance corroborating the confession upon immaterial points were in themselves equally immaterial. (*Shah and Crump, JJ.*) **EMPEROR v. GANGARAM.**

22 Bom. L. R. 1274.

—**Ss. 9, 12 and 15—Evidence of association and joint action on other occasions—Admissibility of—Trial for murder and robbery.**

On a charge against two persons of murder and of a conspiracy to rob the victim and for abetment of the offences, the prosecution wanted to adduce evidence of association of the two accused, of their association in connection with other charges of the theft in the town, and generally of a series of incidents from 1914 to 1918 that they used to go about together under different names, the one taking the other as his durwan and introducing himself as a rich landlord to several rich women who subsequently lost ornaments and cash which were gradually recovered. The accused objected to the admissibility of the evidence. *Held*, that evidence was not admissible and was improperly admitted.

Per Mookerji, J.—S. 15 of the Evidence Act was not applicable inasmuch as there was no question of the act being accidental or intentional of forming part of a series of similar transactions: and S. 14 of the Act did not also apply: as the defence was a complete denial and no question of the character contemplated in S. 14 did or could possibly arise. (*Sanderson, C. J., Mookerjee, Fletcher, Chaudhuri and Walmsley, JJ.*) **EMPEROR v. PANCHU DAS.**

**47 Cal. 671 : 24 C. W. N. 501 :
31 C. L. J. 402 : 58 I. C. 929.**

—**Ss. 10 and 30—Statement of accused made after arrest and not amounting to confession—Admissible only against himself. See (1919) Dig. Col. 518 *SITAL SINGH v. EMPEROR.***

54 I. C. 53 : 21 Cr. L. J. 5.

—**Ss. 11, 13 and 43—Custom—Evidence of—Prior judicial decisions as regards succession to office—Relevancy of. See CUSTOM, RELIGIOUS OFFICE.**

1 Lah. 540.

—**Ss. 11 and 13—Lunacy proceedings under Act 34 of 1858—Orders, reports and statements inadmissible.**

Where the question was whether proceedings in lunacy held under Act XXXIV of 1858 are admissible in evidence in a subsequent suit to show that the defendant was a lunatic at a particular time it was held that the orders and reports made under the Act by the Judge before whom the lunacy proceedings were had, were admissible in evidence. (*Graves, J.*) **SIRIMATI PADMABATI DASSI v. BONOMALI SEAL.**

24 Cal. W. N. 378 : 58 I. C. 506.

EVIDENCE ACT, S. 11.

—S. 11—Scope of—Statement of wounded person on day of occurrence when admissible—Trial by jury—M. direction *Scc (1919) Dig Col 518.* EMPEROR v. ABDUL SHEIKH. 54 I C 887 : 21 Cr L J 183.

—S. 13—Decisions under Ss. 103 and 106 of the B. T. Act—A *lmitissibility in evidence*.

A decision in a case under S. 103 and a judgment in a case under S. 107, B. T. Act, regarding certain other tenants in the same village are relevant in the case under S. 13 of the Evidence Act (*Mallik and Sultan Ahmed, JJ.*) MAHARANI JANKI KOER v. SAUDAGAR RAM. 1920 Pat. 177 :

1 P. L. T. 221 : 56 I C 417.

—Ss. 18 and 19—*Suit to declare property joint family property—Statement by alleged co-sharer in prior suit—A admission*

Plaintiffs who were two out of five brothers sued to establish their right to a two-fifths which were sold in execution of a money decree against another brother U and purchased by the defendant on the allegation that the properties when sold, were the joint family properties of the five brothers.

The defendant's whose case was that the brothers were not joint at the date of the sale and that the properties were exclusively owned by U put in a deposition given by another brother K in the suit in which the money decree against U was passed in the course of which K stated that the family was not joint and the properties belonged exclusively to U.

Held—that the deposition of K. in the previous suit was not admissible as admission against the plaintiffs (*Newbould and Ghose, JJ.*) NAGENDRA NATH GHOSE v. LAWRENCE JUTE CO., LTD., 25 C. W. N. 89.

—S. 19—*Admissions in prior litigation—Value of.*

The mere fact that certain admissions made in previous suits constituted a good defence to the suits in which they were made, cannot lead to the conclusion that they were untrue. (*Wazir Hasan, A. J. C.*) SHEO DAYAL v. LALTA PRASAD 23 O. C 184 : 58 I. C. 608.

—S. 21—*Admissions—Value of, as evidence.*

What a party admits to be true may reasonably be presumed to be so, and until the presumption is rebutted the fact admitted must be taken to be established 29 All. 184. P. C. 106 P. R. 1917 p. 418. ref. (*Beran Petman, J.*) VIR SINGH v. HARNAM SINGH:

1 Lah. 137 : 56 I. C. 191.

—S. 23—*Admission before arbitrators—Admissibility of.* *Scc (1919) Dig. Col. 52.* PANJAB SINGH v. RAMAUTAR SINGH.

(1920) Pat. 52.

—S. 24—*Confession—Admissibility of—Inducement from investigating police officer—Tender of pardon—Statement by*

EVIDENCE ACT, S. 24.

approver in terms of confession—Trial of investigating police officer for accepting bribes.

The accused made a confession in which he implicated three persons into an offence of murder. At the trial of those three persons for murder, the accused was granted a conditional pardon and examined as a witness for the prosecution. He repeated the story told by him in his confession; but his story was disbelieved and the three persons acquitted. The pardon granted to the accused was, however, not specifically withdrawn. The police officer was next tried for receiving a bribe from the accused; in the course of the trial, the accused was examined as a witness when he deposed that the confession was made by him under an inducement offered to him by the police officer and that the murder was really committed by him and two other persons whose names he was not willing to disclose. The accused was then tried for the offence of murder; and the confessions as well as the statements made by him at the former trials were given in evidence against him.—

Held, that the confession made by the first accused in the first murder trial was inadmissible in evidence against him, by virtue of provisions of S. 24 of the Indian Evidence Act, 1872:

Held, by *Heaton, A. C. J. and Hayward, J.*, that the statement made by the accused in the first murder trial as a witness, under a tender of pardon, were not inadmissible in evidence in virtue of S. 24 of the Indian Evidence Act, for they were removed from operation of that section in virtue of S. 339 (2) of the Cr. P. Code, 1898.

The statement made by the accused as a witness at the trial of the police officer were not caused by any inducement, threat or promise within the meaning of S. 24 of the Indian Evidence Act and could be admitted in evidence against him on his own trial for murder.

The statements made by the accused as a witness in the first murder trial, which were exactly in accordance with his confession, were the result of improper inducement on the part of the police officer and invited the application of S. 24 of the Indian Evidence Act;

Assuming that those statements were admissible under S. 339 (2) of the Cr. P. Code, yet in view of the fact that they were substantially repetitions of what was stated in the confession and that they contained many falsehoods, no weight should be attached to the statements in question;

The statements made by the accused in the trial of the police officer, were not covered by S. 339 (2) of Cr. Pro Code, inasmuch as they were not made by him as a person to whom any pardon was tendered with reference to the charge that was then under investigation; but the confessional parts of those statements having been the result of the inducement was not admissible in evidence under S. 24 of the Indian Evidence Act.

EVIDENCE ACT, S. 24.

Per Shah, J.—“Though the statements made by an approver may be given in evidence against him under sub-S. 1 of S. 339 of the Cr Pro Code, it cannot be said that the operation of S. 24 of the Indian Evidence Act is altogether excluded. Ordinarily the inducement that would appear on the surface would be inducement of the pardon legally tendered and accepted under the provisions of Cr. P. Code. But if it is shown in any case that there was some other influence simultaneously proceeding from any other authority which would invite the application of S. 24 of the Indian Evidence Act, I do not think that the confessional part of the statements which can be given in evidence against the accused under S. 339 sub-S. (2) of the Cr. Pro. Code can be treated as relevant in spite of the provisions of S. 24 of the Indian Evidence Act.”

S. 24 would apply even if the person who is said to have made the confession was not an accused person at the time that he made the confession. It is sufficient if the person ultimately comes to be an accused person with reference to the charge in respect of which he is said to have made the confession”. (*Heaton, O.C.J. and Shuh, and Hayward, JJ.*) *EMPEROR v. CUNNA*.

22 Bom. L R 1247.

—S 24—Confession retracted—Value of—Corroboration if necessary

A confession by an accused person made after he has been for a considerable time in police and subsequently retracted ought not to be accepted without corroboration. (*Coutts and Adami, JJ.*) *RUSNA TELI v. EMPEROR*.

54 I.C. 881: 21 Cr. L J. 177.

—Ss 24 and 30—Confession—Voluntary—Presence of magistrate—Proof.

Where the magistrate in whose presence the confession was made was called as a witness and sworn that the statements made before him were made freely, that the accused willingly signed the statement when drawn up, that at the time the confession was made no police man was present, that the handcuffs upon the accused were removed and that he told the accused that he was a Magistrate and that only the truth should be stated.

Held, that the confession made by the appellant was not otherwise than voluntary and truthful. (*Rattigan, C. J. and Martineau, JJ.*) *DAULT RAM v. EMPEROR*

2 Lah. L J 653.

—S. 24—Evidence—Admissibility of—Confession of accused—Fear encouraged by police officer—Offer of pardon—Accomplices.

A confession made by an accused person under fear, which was encouraged by a police officer in a subtle way in the hours that elapsed before the accused reached the Magistrate is inadmissible in evidence.

The accused made an incriminating statement before a Magistrate and was sent to jail. An application by the accused for bail

EVIDENCE ACT, S. 27.

was abruptly refused at the instance of the police. Then there came a sudden change and the accused was released on nominal bail and thereafter the accused made himself useful to the police by pointing out various places and in other ways. Subsequently he made a second statement before the Magistrate much more detailed than the first and just the sort of statement that the police like to have from a man, who is to be used as an approver.

Held, that under such circumstances it was difficult to believe that the accused was not given to understand that a pardon was going to be offered to him.

That the second statement by the accused was inadmissible in evidence. A confession made by an accused person on an inducement by a police officer that he would be offered a free pardon, is inadmissible in evidence.

The evidence of an accomplice, if suspicious requires corroboration (*Wainwray and Sham-sil Huia, JJ.*) *EMPEROR v. ANANT KUMAR BANERJI*.

32 C. L J. 204.

—Ss 24 and 30—Statement by a convict implicating another—Admissibility of in evidence.

A person while undergoing a term of imprisonment made a statement before a Magistrate implicating the petitioner in the offence for which he had been convicted. But when he was examined as a witness he denied the implication of the petitioner in the matter. The statement made to the Magistrate was thereupon admitted in evidence and the accused was convicted. *Held*, that the statement was not admissible in evidence (*Tudball, J.*) *Bijji KHAN v. EMPEROR* 18 A. L. J. 87: 54 I.C. 883.

—S 25—Confession to police—Admissibility of, to prove ownership of property.

A confession made to the Police by an accused person is admissible to prove the ownership of property in respect of which he is accused. (*Drake Brockman, J.*) *GANPAT v. BANI* 55 I.C. 62: 21 Cr. L J. 414.

—S 25—Person in authority—Kotwal—Confession to, if admissible.

A kotwal or village watchman in the Central Provinces is not a Police Officer within S. 25 of the Evidence Act. A confession of guilt made to him by an accused person is, admissible in evidence (*Halifax, A. J. C.*) *BHAGWATDIN v. EMPEROR*. 57 I.C. 88: 21 Cr. L J. 568.

—S 27.—Confession—Statement as to burial of dead body by accused.

On a trial for murder a witness stated that the accused offered to point out the place where the dead body was and that on being questioned as to who had buried the body he said that he had done so?

Held, that the accused's statement that he had buried the body was not admissible in evidence. 14 B. 260; 24 P. W. R. 1916, 50

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P. W. R. 1915 Cr., d'st. (*Scott-Smith and Wilberforce, JJ.*) **EMPEROR v. TUREZI.**

55 I. C. 685 : 21 Cr. L. J. 349.

—**Ss. 27, 30 and 114—Information by accused when admissible—Retracted confession—Necessity for corroboration.**

In order to bring an information by accused under S. 27, of the Evidence Act, the information must have had the direct effect of leading to the discovery of the stolen property.

It has been the inviolable rule in the Madras High Court that unless a confession is corroborated in material particulars and by independent testimony it should not be the basis of a conviction (*S:shagiri Aiyar and Moore, JJ.* **RAMASAMI BOYAN, In re.**

11 L. W. 8 : 54 I. C. 479 :
21 Cr. L. J. 79.

—**S. 30—Confession—Recording of—Defect in—Admissibility of.**

A statement by an accused not recorded in compliance with the rules for recording confessions, and without asking any incidental questions to test the voluntariness and genuineness of the confession, only containing matters which could have been easily got from the investigation made by the Police, and uncorroborated and withdrawn at the earliest opportunity, cannot be regarded as a voluntary and genuine confession upon which to base a conviction. (*George Knox and Walsh, JJ.*) **EMPEROR v. AZIM-UD-DIN.** 57 I. C. 462 :
21 Cr. L. J. 638

—**S. 32—Applicability of—Witness dying during trial after examination.**

Where a witness in a suit has been fully examined and cross-examined S. 32 of the Evidence Act has no application and if the witness happens to die before the completion of the suit it is not open to either party to apply for the admission of a statement made by him in a previous suit (*Chapman and Atkinson, JJ.*) **SHAHDEO NARAINDAS v. KUSUM KUMARI.** 5 P. L. J. 164

—**S. 32—Recitals in documents—Admissibility of against strangers.**

A recital in a document is admissible in evidence as against parties who are not parties to the document, only where the conditions laid down in S. 32 of the Evidence Act are fulfilled. (*Das, J.*) **RAM SARUP KAMKAR v. BHAGWAT PRASAD.** 57 I. C. 194.

—**S. 32—Statement made by dead person—Statement in a will shewing a sum due to him by a third person—Memo. of expenses by deceased—Relevancy of.**

In a suit to recover possession of a house the defts. counter-claimed a sum of money spent by their father in building a portion of the house. Reliance was placed on a statement made by the defendant's father in his will as to the amount spent by him on the disputed house and also upon a memo of expenses

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written up by him at the same time. The lower Appellate Court enlarged the counter-claim.

Held, that neither the will nor the memo. was admissible under S. 32 of the Evidence Act, inasmuch as the statements in the will made by the deceased that he had spent a particular sum in effecting the repairs of the house was not a statement made against his pecuniary or proprietary interest, and it could not be held that the memo. was made in the ordinary course of business. (*Macleod C. J. and Heaton, JJ.* **HARI VAIDYA v. AMBABA BALKRISANA** 44 Bom. 192 :
22 Bom. L. R. 57 : 55 I. C. 316.

—**S. 32 (2) and 34—Evidence—Talab baki papers if admissible—Weight due to.**

Under S. 34 of the Evidence Act *talab baki* papers are not sufficient evidence to charge any person with liability.

Talab baki papers may be evidence under S. 32 Cl. (2) of the Act; but before they can be admitted a landlord is to show that the person making the statement is dead and the entries are made by him in the ordinary course of business. (*Chatterjee and Duvat, JJ.*) **UMED ALI v. KHAJEE HABI BULLA** 47 Cal. 266 :
31 C. L. J. 68 : 56 I. C. 38

—**Ss. 32 (3) and 38—Statement by deceased person, as witness to a murder—Omission to give information of commission of an offence—Cr. P. Code. Ss. 44 and 288.**

A woman stated that she had witnessed a murder to her paramour Daolat and to the Police in the course of an investigation ten days after the act. She then died before the inquiry. Daolat deposed to the statement of his mistress before the Committing Magistrate and then disappeared.

Held, that both the statements of the deceased were relevant under S. 32 (3) of the Evidence Act for she having witnessed an offence and not having informed the nearest Police officer or Magistrate exposed herself to a criminal prosecution.

Daolat's statement of what she had told him was also relevant and was admissible under S. 33 of the Evidence Act though not under S. 388 Cr. P. C. which has no application to a witness not produced and examined in the Court of Sessions; but the written record of what the woman told the Police was not admissible though there was nothing to prevent witnesses who had heard the statement depositing to the facts contained in the writing.

The operation of S. 162 Cr. P. C. cannot be evaded by the police choosing to record as the first information a statement obtained after the investigation has commenced. (*Mitra, J. C. J. Mt. Ajodhi v. EMPEROR.*

16 N. L. R. 30 : 56 I. C. 582 :
21 Cr. L. J. 486.

—**S. 32 (5) and (6)—Statements in Horoscope—Admissibility of.**

EVIDENCE ACT, S. 33.

Statements as to age made by deceased persons e. g. in horoscopes in the circumstances mentioned in S. 32 of the Evidence Act, having regard to the illustrations to that section. *21 C L J. 621* (Miller, C. J. and Mullick, J.) *AMAR DAYAL SINGH v. HARA PRASAD SAHU.*

5 Pat L J 605 : 1 P. L. T 511 : 58 I C 72

—**Ss. 33 and 165—D. positions of witness in prior suit—Admissibility by consent**

The consent of the parties to a suit can make admissible the evidence given in a previous judicial proceeding between them even in a case in which the conditions prescribed by S. 33 of the Evidence Act do not exist.

Per *Krishnan, J.*—The provisions of S. 33 are intended for the benefit of a party to a suit and he may waive the benefit at any rate in a Civil suit where no question of public policy is involved. (*Wallis, C. J., Coutts Trottier, and Krishnan, JJ.*) *JAINAB BIBI SAHEB v. HYDER RALLY SAHEB.* *43 Mad 609 : 38 M. L. J. 532. 28 M. L. T 23 : (1920) M. W. N. 360 : 12 L. W. 64.*

56 I C. 957.

—**S. 35—Batwara map at partition proceedings—Admissibility against tenants**

A Batwara map prepared in a partition proceeding between the proprietors of an estate is no evidence against tenants of the estate, if it was prepared after their tenancy was created. But where a Commissioner is appointed to make an inquiry with reference to the map and no objection is taken to its admissibility, it is too late to object after he had made his report. (*Beachcroft, J.*) *BANAMALI PAUL v. SATIS CHANDRA DUTT.* *56 I C 138.*

—**S. 35—Choukidar's register—Entries of births and deaths—Admissibility of.** See (*1919*) *Dig. Col. 528. MAHOMED JAFAR v. EMPEROR.*

54 I C. 166 : 21 Cr. L. J. 22.

—**Ss. 35 and 165—Confidential inquiry—Ex parte proceedings—Report of Judgment on, not propri.**

In deciding a suit for the possession of a holding the Court must record a finding on the evidence adduced before it and is not entitled to base its judgment upon matters which are not properly admissible in evidence. Where a suit was dismissed by the Judge relying upon a confidential inquiry conducted by an Assistant Settlement Officer at the time of the Revised Settlement for the purpose of ascertaining to whom the holding belonged:

Held, that the judgment could not be maintained. The proceeding of the confidential inquiry contained an opinion on an *ex parte* investigation inadmissible in evidence under S. 35 of the Evidence Act. It is the duty of the Judge to record a finding on the evidence adduced before him. (*Das, J.*) *BALDEO SINGH v. SHEORAJ KUENI.* *56 I C. 807*

EVIDENCE ACT, S. 54.

—**S. 35—Handwriting expert—Weight to be attached to, opinion of.**

Experts differ in their opinion when the admitted facts lead to one conclusion and to one conclusion only. It would be in the highest degree unsafe to rely on the testimony of the handwriting expert (*Das and Adam, JJ.*) *SHOBTAHAL SINGH v. AJUN DAS.*

(1920) Pat 155 : 1 Pat L J 136 : 56 I C. 879.

—**S. 35—Record of rights—Entry as to custom—Presumption of correctness.** See B. T. Act, Ss 101, 102, 103. *57 I. C. 126.*

—**S. 35—Survey or thak map—Statement in—Value of**

There is no general inflexible rule of law that the facts stated on the thak or survey map must be presumed to have been in existence at the time of the permanent settlement. The question is essentially one of fact and must be determined on the facts and circumstances of each case. (*Mookerjee and Walmsley, JJ.*) *PRAFULLA NATH TAGORE v. SECY. OF STATE.*

24 C W N. 639 : 31 C. L. J. 320 : 57 I. C. 29.

—**S. 44—Decree—Setting aside—Grounds for—Fraud—What constitutes.** See DECREE, SETTING ASIDE.

1 P. L. T. 119.

—**S. 45—Expert evidence—Cross examination—Absence of—Opinion of expert, challenge of.**

If a finger print expert has not been cross-examined as to the grounds of his opinion and as to the test to which he had put a particular finger print impression submitted for his consideration, the value and weight to be attached to such witness's evidence cannot be diminished by applying to it considerations to which the witness's attention was never directed. (*Mullick and Atkinson, JJ.*) *SARWAR KHAN v. EMPEROR.*

55 I. C. 273 : 21 Cr L J. 257.

—**Ss. 54 and 167—Previous bad character—Relevancy of—Sufficiency of evidence excluding—Evidence objected to—Effect of.**

The fact that the accused had a bad character is not irrelevant under S. 54 of the Evidence Act when the evidence relating to it is not given for the purpose of showing that the accused was a bad character and was therefore likely to commit offences of the kind of which he has been convicted.

Under S. 167 of the Evidence Act the improper admission of evidence is no ground for a new trial if it appears to the court before which such objection is raised that independently of the evidence objected to and admitted there was sufficient evidence to justify the decision. (*Rattigan, C. J. and Martineau, J.*) *DAULAT RAM v. EMPEROR.*

2 Lah. L. J. 653.

EVIDENCE ACT, S. 57.

S. 57 (9)—Public holidays—Judicial notice—Plaint filed after reopening after vacation—Deduction of time—Duty of Court to allow. See C. P. CODE, O 7, R. 6.

56 I.C. 926.

S. 63 illn. (c)—*Copy of a copy—Inadmissible in evidence.*

A Copy of a copy is inadmissible in evidence and when a document is inadmissible in evidence no question of its construction arises and the party relying upon it must fail (*Coutts, J.*) **ABDUL GHANI v. SWED MD. RAZA.** **1 P. L. T 47 : 54 I.C. 941.**

S. 65—*Evidence as to general result of accounts and documents*

Evidence may be given as to the general results of arguments when they consist of numerous documents and accounts, though these are Kanungos entertained to assist the Courts of law in the examination of the Revenue Records. It is an abuse of their functions to require them to give oral evidence of the contents of a document such as record of a muafqi enquiry which ought to be examined in original by the Court itself. (*H. J. Maynard, F. C.*) **GILANI SHAH v. MUSAMMAT HASSAN.** **2 Lah. L. J 714**

S. 68—*Attested document—Mortgage—Proof of—Only one attesting witness called—Effect of.*

In a suit on a mortgage document which on the face of it appeared to be attested by two witnesses the mortgagee called only one witness who spoke to the attestation of the document. The other witness was not called, nor did the witness who was called say that any other attestator was present. Nor was he asked any question by the other side. The Court did not 'require evidence' under C. P. C. O. 3, R. 5, proviso, as regards the attestation by other witnesses.

Held, that the mortgage document had been *prima facie* proved to be a valid mortgage creating a charge on immoveable property as required by S. 68 of the Evidence Act. But this proof could be rebutted by proof on the other side that the apparent attestors of the document were not attestors in the legal sense and have not seen its execution and that the document therefore did not comply with the requirements of S. 59 of the T. P. Act.

It is not necessary that two attesting witnesses should be called when two are alive nor that even assuming that one only need be called, he should at least be made to prove that another attesting witness besides himself saw the execution. (*Sadasiva Aiyar and Spencer, JJ.*) **VENKATA REDDI v. MUTHU PAMBULU NAICK.** **39 M. L. J. 463: (1920) M. W. N. 512:**

28 M. L. T. 213 : 58 I. C. 801.

S. 68—*Attesting witness—Scribe when considered attestor. See T. P. Act, S. 59.*

22 Bom. L. R. 136

EVIDENCE ACT, S. 91.

Ss. 68 and 90—*Document required to be Attested—Proof of signature—Not sufficient—Ancient document—Presumption—Rebuttal.*

Mere proof of admission of the genuineness of the signature of the executant of a document does not dispense with the proof of its proper attestation if the document is one required by law to be attested before it can effectuate a transfer.

The facts that a document is more than 30 years old and is registered and that the genuineness of the signature of its executant if it is admitted may go to raise a presumption as to its genuineness. But such a presumption does not exclude the right of the person against whom the document is set up to rebut that presumption by showing that it was not properly attested and was, therefore, inoperative. (*Stuart, and Kanhaiya Lal, A. J. C.*) **NARAIN SINGH v. DEPUTY COMMISSIONER OF PARTABGARH.**

55 I. C. 501.

S. 90—*Ancient document—Proper attestation—No presumption as to—Rebuttal. See EVIDENCE ACT, Ss. 68 AND 90.*

55 I. C. 501.

S. 90—*Presumption—Copy of a document.*

A certified copy of a receipt purporting to be more than 30 years old, acknowledging possession of certain malik makbuz plots is inadmissible in evidence in the absence of any indication of the record from which it was obtained or of the connection in which the possession was given. No presumption can be made in favour of a copy of a document under S. 90 of the Evidence Act. (*Drake-Brockman, Kt., J. C.*) **NATHURAM v. JAGANNATH.**

16 N. L. R. 106 : 55 I. C. 426.

S. 90—*Presumption—Thirty years Computation of—Document thirty years old at the time of hearing.*

Under S. 90 of the Evidence Act a Court can presume the genuineness of a document which was not thirty years old either on the date of the suit or on the date of its production but was thirty years old on the date when arguments were heard. (*Stuart, J.*) **MAHADEO FRASAD v. MUSAMMAT NASIBAN.**

54 I. C. 368.

S. 91—*Oral loan—Collateral security of hundis—Time for payment—Oral evidence.*

S. 91, Evidence Act refers to cases where the contract has by the intention of the parties been reduced to writing and the document itself constitute a part of the contract of loan but if the hundies were by way of collateral security and the terms had been agreed upon orally then it is the oral terms of the contract which are to be looked at and may be proved and S. 91 is no bar. (*Fawcett, J. C. and*

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Kemp, A. J. C.) LOKUMAL TARACHAND v. THE SIND BANK.

13 S. L. R. 180 : 57 I. C. 394.

—**S. 91**—Promissory note—Unstamped—Inadmissibility in evidence—Suit on the contract of loan—Decree on admissions in pleadings. See STAMP ACT, S. 35.

13 S. L. R. 169.

—**Ss. 91, 92 and 95**—Sale of land—Dispute as to extent sold—Body and schedule different—Oral evidence.

Where in an agreement for the sale of land, it was impossible to reconcile the statement in the body of the agreement with the recital in the schedule as to the extent of the land to be conveyed, extrinsic parol evidence is admissible to explain the facts that led to the execution of the agreement, in order to reconcile the different statements regarding the property sold.

In a contract of sale of land, the presumption is that, in fixing the price, regard was had on both sides to the quantity which both supposed the estate to consist of, though there may be considerations which may rebut to weaken the presumption. *Hill v. Buckley* 17 Ves, 394 Rei. (*Mr Amer Ali*) HUSSAINALLY SULLEMANJI v. MANGALDAS NATHUBHAI.

(1920) M. W. N. 726 (P. C.)

—**S. 91**—Secondary evidence—Deposition in court—Perjury—Record of deposition. See PENAL CODE S. 193. 1 Lah 361

—**S. 92**—Applicability of—Parties ranged on the same side

S. 92 of the Evidence Act merely prevents evidence being given to vary the terms of a document in a proceeding between the parties to the document and their representatives. There is nothing to prevent two persons who are arrayed on the same side, such as joint vendees to give evidence to vary the terms of the written instrument in a contest between themselves (*Mittra, A. J. C.*) RAJIB HUSSAIN v. ZINGRAJI. 54 I. C. 962.

—**S. 92**—Contract—Custom of the trade regarding—Mode of performance of contract—Evidence of custom admissible. See ARBITRATION ACT, S. 19. 58 I. C. 506

—**S. 92**—Document in writing—Conduct of parties—Evidence of if admissible.

Evidence of acts and conduct of parties is not admissible in order to contradict or vary the written terms of an agreement. (*Das, J. Sukhan Rai v. Chakwari Singh*) 56 I. C. 752.

—**S. 92**—Implied contract—Payment of interest—Written contract—Effect of.

The appellants had for many years been allowed to over-draw their account with the respondent Bank. The Bank in fact charged them compound interest with monthly rests and such charge appeared on the face of their pass books. The appellants annually gave the Bank a letter in a printed form in which they

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merely agreed to pay interest on the daily balances.

Hold, that S. 92 of the Indian Evidence Act, did not prevent the Bank from proving an agreement by the appellants to pay compound interest with monthly rests, and that such an agreement could be implied from the appellant's long acquiescence in such a method of calculation. (*Sir John Edge*) HAVIDAS RANCHOR DAS v. MERCANTILE BANK OF INDIA LIMITED. 44 Bom 474 : 38 M. L. J. 387 : 27 M. L. T. 255 : 12 L. W. 356 : (1920) M. W. N. 312 :

18 A. L. J. 359 : 22 Bom. L. R. 545 : 55 I. C. 522 : 47 I. A. 17 (P. C.)

—**S. 92**—Kabuliyat—Stipulation to pay rent in kind or specified money value in the alternative—Landlord it may recover market value—Proof that amount was inserted for registration purposes or to fix stamp duty is inadmissible. See (1919) Dig. Col. 534. GURUDAS v. GOBINDA CHANDRA SINHA.

54 I. C. 914

—**S. 92**—Promissory note payable on demand—Contemporaneous agreement postponing date of payment—Admissibility in evidence. See LM. ACT, ARTS. 69, 73 AND 80.

38 M. L. J. 70.

—**S. 92**—Registered mortgage deed—Oral evidence.

Oral evidence is not admissible to vary the terms of a registered mortgage-deed. (*Mittra, A. J. C.*) JEFIRAM v. SAROO.

58 I. C. 30.

—**S. 92**—Sale deed—Consideration—Proof of non payment of—Oral evidence admissible

In the case of a deed of sale it is open to the vendors to prove that no consideration was actually paid and oral evidence is admissible to prove that fact, though contrary to the recitals in the deed. (*Prideaux, A. J. C.*) MOTIRAM v. RADABAL. 55 I. C. 53.

—**S. 92**—Proviso 1—Mortgage—Redemption suit—Plea that it was fictitious.

It is open to the debt in a redemption suit to plead that the mortgage is a fictitious document intended to cover a previously complete transaction of sale between the parties, and under the first proviso to S. 92 of the Evidence Act to prove any facts which would invalidate the deed (*Lindsay, J. C.*) SAHEB BAKSH SINGH v. MOHAMMAD ALI-MOHAMMAD KHAN. 58 I. C. 115.

—**S. 92 (2)**—Deed—Ambiguity—Oral evidence—Admissibility of.

A mortgage bond contained the following stipulation for interest "I have borrowed from you Rs. 300... I shall pay... for the aforesaid sum every year... calculating interest at ten kalams of paddy every year... on a question arising as to whether 10 kalams were the interest on 100 Rs, or all the 300 Rupees."

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Held, that the document was silent as to the basis on which the calculation was to be made and therefore oral evidence was admissible under proviso 2 of S. 92 of the Evidence Act, to show what the parties really intended (*Old-field and Seshagiri Aiyar, JJ*) *MUTHUSAMI AIYAR v. VARTA VYROVAN*

27 M. L. T 309
(1920) M. W. N. 239 : 11 L. W. 352.
56 I. C. 476

—**S. 92 (2) Unstamped instrument lost—Oral evidence of contents admissibility—Interest rate of—Evidence regarding when document silent.**

Where a promissory note is silent as to interest under S. 92 of Evidence Act of 1872, evidence is not admissible to prove a contemporaneous oral agreement to pay a certain rate of interest at the rate of 6 per cent. under S. 80 of the Negotiable Instruments Act, should be awarded. 12 N. L. R. 9 toll. (*Mittra A. J. C. PENTAYA v. KESHEORAO*,

18 N. L. R. 68 : 56 I. C. 249

—**S. 92 Proviso 4—Mortgagee—Oral evidence showing payment of a lesser sum in full satisfaction of the mortgage amount—Inadmissibility of**

In a suit to recover money due on registered mortgage-deeds, the defendant led oral evidence to show that the mortgagees were discharged by a payment of a lesser sum. A question having arisen whether the evidence was admissible.

Held, that the evidence was inadmissible under S. 92 proviso 4 of the Evidence Act, the defendant's case being that the plaintiff agreed to receive a lesser sum in full satisfaction of the much greater amount which was due on the mortgages. (*Macleod, C. J. and Heater, J.*) *JAGANNATH SHANKAR*. 44 Bom. 55 : 22 Bom. L. R. 39 : 54 I. C. 639.

—**S. 92 Proviso 4—Raiyati holding—Registered lease—Oral surrender—B. T. Act, S. 86**

Even where the original lease is a registered one, a raiyat can orally surrender his holding under S. 86 of the Bengal Tenancy Act if it was not for a fixed period and its possession is given up. 28 Cal. 253; 28 C. L. J. 220, ref 13 C. L. J. 281 dist. (*Chatterjee and Duval, JJ.*) *PORAN MATIA v. INDRA SENI*.

47 Cal. 129.

—**S. 92 Proviso 4—Under raiyati interest of less than Rs. 100 in value—Relinquishment by unregistered instrument.**

Where an under raiyati interest of the value of less than Rs. 100 is created by a registered instrument it will not preclude the admission in evidence of an unregistered instrument to show that the interest has been relinquished. A relinquishment for consideration may be recorded as a conveyance and in the view of a document by which an interest in immoveable property of the value of less than Rs. 100 is

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relinquished does not require registration. (*Turon and Newbold, JJ.*) *SORMAN FAKIR v. MOLLA ABDUL AZIZ*. 57 I. C. 949.

—**S. 92 (5)—Lease—Construction—customary incidents—Evidence of.**

The mere fact that a document is called a dowl kabuliyat does not decide its nature. The document should be looked at as a whole and any evidence designed to show customary incidents of tenure as attaching to the jote must be rejected and so far as it conflicts with what is contained in the dowls themselves.

Evidence of a custom of transferability is thus excluded by an express statement in the dowls that there is no right of sale, gift or transfer without the landlord's consent.

Where the only right secured in the dowls to the tenant was an option to take a renewal at the rate of rent prevalent in the parganah.

Held, that the tenancy is created by the dowls were neither heritable nor transferable and no evidence of custom was admissible on these heads. (*Graves and Newbold, JJ.*) *MAHOMED AYEJUDDIN MEA v. PRODY AT KUMAR TAGORE*. 25 C. W. N. 13.

—**S. 92 Proviso 6—Written document—Evidence to vary terms—Contract and intention—Sale or mortgage.**

Where a document is a perfectly plain straightforward document, no extrinsic evidence is required to show in what manner the language of the documents related to existing facts. There may be cases where such extrinsic evidence is required and it will therefore be admitted. But it can only be in such cases where the terms of the documents themselves require explanation and then evidence can be led within the restrictions laid down by proviso to S. 92 of the Evidence Act.

Where a document has stood more than fifty years it is extremely undesirable to allow evidence to be led to show that the document is not what it appears to be on the face of it. (*Macleod, C. J., and Crump, J.*) *GANPATRAO v. BAPU TUKARAM*. 44 Bom. 710 : 22 Bom. L. R. 831 : 58 I. C. 576.

—**S. 96—Mortgage deed—Provision for payment of revenue by mortgagee—Enhancement of revenue—Liability to pay—Admissibility of evidence to show intention of parties**

Where a usufructuary mortgage deed provides for the payment of revenue by the mortgagee, but fails to indicate whether the parties meant the revenue as assessed at the date of the deed or as it might be re-assessed from time to time evidence may be given under S. 96 of the Evidence Act of facts to show what was meant. Such facts may be the fact of a provision of law that in the absence of a contract to the contrary, the mortgagee will pay the revenue as assessed from time to time and again the fact that the parties must have foreseen the enhancement of revenue within the period

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allowed for redemption. Evidence of this nature will, however, be outweighed by an express declaration of the parties, even two years after the execution of the mortgage deed, as to what they meant when the deed was executed. (*Lyle and Ashworth, A J C*) FARZAND ALI v. KANIZ FATIMA. 22 O C 270. 54 I C 264

S. 108—Burden of Proof—Person not heard of for seven years—Presumption of death.

A man is presumed to be alive until he is dead. A person asserting that a particular man is dead has to prove it. If he could show that a man has not been heard of for seven years, then the Court will presume his death. But the earliest date to which the death can be presumed can only be the date when the suit was filed. It cannot have a further retrospective effect. (*MacLeod, C. J. and Heaton, J.*) JESHANKAR REVASHANKAR v. BAI DIVALI.

22 Bom. L. R. 771 : 57 I. C. 525

S. 108—Presumption of continuance of life.

The presumption is in favour of the continuance of life and the onus of proving the death of a person lies on the party who asserts it. (*Scott Smith and Leslie Jones, JJ.*) TANI v. RIKHARAM. 1 Lah. 554 : 2 Lah. L. J. 481 : 56 I. C. 742.

S. 110—Title—Possession—Presumption of possession with owner where title is recent. See SP. REL. ACT, S. 42 56 I. C. 720

S. 114 III (b) Accomplice—Evidence of—Weight due to corroboration.

An approver's evidence is in itself tainted evidence though in some cases it may be of belief for various reasons. The uncorroborated statement of an approver taken at the end of the trial is of no value whatever.

Statements of witness extorted by the Police under threats of implication in the crime cannot fail to detract from the value of their evidence especially where they had no reason for refraining from depositing against the culprits. (*Shadi Lal, C. J. and Wilberforce, J.*) SUNDAR SINGH v. EMPEROR. 56 I. C. 667 : 21 Cr. L. J. 507.

S. 114 III (d)—Joint Hindu family—Presumption of jointness

If a person is shown at one time to be a member of a joint Hindu family, it must be held under S. 114, illustration (d) of the Evidence Act that he never separated at all unless the contrary is proved. (*Halifax, A. J. C.*) SUKA v. MUSSAMMAT RAKHL. 57 I. C. 339.

S. 114 III (e)—Presumption arising under—Service or notice to quit by means of Post—T. P. Act, S. 106. See (1919) Dig. Col. 539. GIRISH CHANDER GHOSE V. KISHORE MOHAN DAS. 54 I. C. 5.

EVIDENCE ACT, S. 115.

S. 114 III. (e)—Presumption—Cadastral Survey, Khazan—Entries—Presumption as to accuracy of. See BENZ LAND REV. SALES ACT, S. 57. 55 I. C. 645.

S. 114 III. (g)—Presumption—Non production of accounts

Where a party persistently omits to produce his books of account there is a justifiable presumption that they do not support him. (*Drake-Brockman and Findlay, JJ.*) PADAMRAJ v. GOPIKAN. 56 I. C. 129.

S. 114 III. (g)—Suit for profits—Absence of evidence of collections.

Where in a suit for profits of land the recorded collections are suspiciously low, and the debt, neither produces nor gives any evidence to show what was collected the Court would be justified in presuming that the full amount of the rents had been collected and in assessing the profits on the basis of the gross rental. (*Daniels, A. J. C.*) RAGHUNATH SINGH v. HAR DAYAL. 56 I. C. 751.

S. 115—Easement—Right to take water from neighbour's well—Dominant owner rebuilding well with consent of servient owner—Servient owner estopped from disputing right of dominant owner. See EASEMENTS ACT, Ss. 13 AND 47. 22 Bom. L. R. 415.

S. 115—Estoppel by conduct—Building on land by tenants—Silence of landlord—Tenants aware of limited tenure—No estoppel. See CANTONMENT-TENURE. 56 I. C. 813.

S. 115—Estoppel—Pleading and proof—Attestation when imports knowledge—Hindu joint family—Manager—Alienation—Concurrence—Estoppel. See HINDU LAW JOINT FAMILY MANAGER 1 P. L. T. 546.

S. 115—Estoppel—Representation—Conduct must be influenced by—Otherwise no estoppel. See LIM. ACTS, ART. 119 and 141 22 Bom. L. R. 974.

S. 115—Estoppel—Representation—Omission—Change of position—Proof of.

Before advantage can be taken of the doctrine of estoppel, the representation of the party sought to be estopped and the action of the party seeking to estop must be shown to be connected together as cause and effect. There must be proved first of all a declaration, act or omission on the part of the person sought to be estopped, and secondly, that by such a declaration, act or omission the person seeking to estop was led to believe a thing to be true and, thirdly, that by such act or omission the party seeking to estop was not only led to believe a thing to be true which in fact was untrue but to act upon such belief to his prejudice. (*Das, J.*) RAM BARAN PANDEY v. RAM NIHORA SINGH. 57 I. C. 263.

S. 115—Estoppel—Rule of pleading.

The doctrine of estoppel as laid down in the Evidence Act is a rule of pleading based upon a man's conduct who by his representation

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made to a third party has induced the latter to alter his position. Such a person cannot turn round and plead that he is not bound by his own representation. (*Abdul Rahim and Moor, JJ.*) SHANMUGARAVELAYUDHAN CHETTY v KOVAPPAL CHETTIAR. (1920) M. W. N. 679

S. 115—Minor—Conveyance by Vendor aware of real facts—Suit to set aside sale—Equity to refund Consideration—Specific Relief Act, S. 41.

Plif, a minor sold her husband's property to her husband's brother for valuable consideration. She was at the date of the sale a minor. After attaining her majority she sued for a declaration that the sale-deed was not valid and to recover possession of the property.

Held, that the plif was no estopped from contending that she was a minor at the date of the sale inasmuch as the deft. who was her brother-in-law and who must be presumed to know her age was not deceived by what the plif had told him as to her age.

(2) that though the Court had a discretion to direct plif to restore the consideration money under S. 41 of the Sp. Rel. Act, yet it would not do so unless there were very strong circumstances in the case to enable the Court to find that there was an equity in favour of the defendant, and.

(3) that, therefore the sale should be set aside and that the deft. was not entitled to refund of the consideration money in the absence of any such equity in his favour. (*MacLeod, C. J. and Heaton, J.*) GURUSIDDHESWAMI v. PARAWA DUNDAYA NARENDRA. 44 Bom. 175.

22 Bom. L. R. 49: 55 I. C. 271

S. 116—Landlord and tenant—Estoppel—Denial of title—Holding over.

S. 116, of the Evidence Act 1872 rests on the well established principle that a tenant who has been let into possession cannot deny his landlord's title however defective it may be so long as he has not openly restored possession by surrender to his landlord.

17 Bom. L. R. 1006 P. C. Ref.

A tenant who wishes to dispute his landlord's title must not only see that the tenancy has come to an end, but that the possession which was in him as a tenant has been surrendered. A tenant who holds over and remains in possession cannot be allowed to use that possession as a lever to support a case in which he denies the landlord's title. (*MacLeod, C. J. and Hayward, J.*) EKOBA GOVINDSHET VANI v. DAYARAM NARAYAN. 22 Bom. L. R. 82: 55 I. C. 353.

S. 116—Landlord's title—Denial by tenant—Lease of unrecognised sub-division of bhag—Tenant cannot plead the invalidity of lease when sued in ejectment—Bhagdari and Narwdari Act, S. 3

The defendant mortgaged in 1895 an unrecognised sub-division of a Narwa but remained in possession of it under a rent note

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executed in favour of the mortgagees. The mortgagee assigned his rights to the plaintiff. Plif sued the debt in ejectment and the latter pleaded that the mortgage, the lease and the assignment were void.

Held, overruling the contention that the defendant having attorneyed to plif it was not open to him to contend in the ejectment suit that plif had no right to let out the property on rent; and that therefore plif was entitled to succeed. (*MacLeod, C. J. and Heaton, J.*) DEVIDAS DWARKADAS v. SHAMAL GOPAL.

22 Bom. L. R. 149: 58 I. C. 595.

S. 132—Witness compelled to answer—Question by Judge—Defamation.

After the examination of a plif was over he was asked by the Judge why he was suing for his money to which he replied that he did not want to leave it with the deft. who was a *Badmash* and a thief. *Held*, that the witness was compelled to answer the question put to him by the Judge, under S. 132 of the Indian Evidence Act and proceedings for defamation could not be taken against him 16 All. 88 not toll 16 A. L. J. 201 ref. (*Walsh, J.*) GANGA SAMAI v. EMPEROR.

42 All. 257:

18 A. L. J. 112: 54 I. C. 890 21 Cr. L. J. 186.

S. 132—Defamatory Statement—Witness—Liability of—Joint trial—Defamatory Statement by several persons as witness.

An answer given by a witness to a question put to him either by the Court or by counsel on either side would especially when the question is on a point relevant to the case, come under the protection afforded by the proviso to S. 132 of the Evidence Act, notwithstanding that the witness had made no formal protest against the question; a voluntary statement by the witness may stand on a totally different footing.

At a criminal trial the question arose whether L, a prosecution witness had been to a certain house. The question was admittedly one relevant to the case. Five defence witnesses were called to prove, and they stated, that L could have gone there because he had been outcasted by reason of his having contracted a *dharecha* marriage. Thereupon L prosecuted these five persons under a charge of defamation, and they were tried together at the same trial and convicted. *Held*, in revision, that the accused were protected from prosecution by the proviso to S. 132 of the Evidence Act, 3 Mad. 271. 16 All. 88; 16 A. L. J. 201; and 18 A. L. J. 112 not appr. *Scribble*, that a joint trial of the five accused persons was illegal. (*Tudball J.*) CHATUR SINGH v. EMPEROR.

18 A. L. J. 940: 58 I. C. 825

S. 133—Accomplice—Statement of Corroboration, necessity for—What is corroboration.

An approver may be telling the truth and it is quite probable that he himself had a hand

EVIDENCE ACT, S 133.

in the murder but his statement as to who his accomplices were must be corroborated by reliable evidence before it can form the basis of a conviction

The corroboration offered in this case was the statement of two men who apparently knew something about the matter from the very beginning but refused to make any statement until the third day of the police investigation. The delay may be due to their reluctance to implicate the accused after they had promised not to give information, but it was obvious that statements obtained after such a long delay must be regarded with suspicion; and these witnesses may possibly be scheming themselves at the expense of innocent men

Even if these witnesses bear no enmity to the appellants and are related to them, the long delay in making their statements makes their evidence liable to grave suspicion (*Chevris, C.J. and Le Rossignal, J.*) *FATTA v EMPEROR.*

2 Lah. L J. 296

S 133—Accomplice — Who is—Knowledge of crime committed necessary. Sec 31 C. L J 30: 58 I. C 674

S. 133—Retracted statement of approver—Admissibility of

The retracted statement of an approver is evidence against the accused. 15 Mad. 352 and 21 All. 175 foll. 10 Mad. 295 (*Olgers, J.*) *IN RE DAMUR VEERABIDRA.*

12 L. W. 385.

Ss. 154 and 58—Attestor—Cross-examination—Adverse witness.

There is no distinction between an attestor whom a party is obliged to call and another witness he may cite of his own choice; and the Court may in its discretion permit the person who calls a witness to put any question to him which may be put in cross examination by the adverse party. 2 Moo & Rob. 501; 1 P & S. 745; L. R. 1 P. & M. 70, 71 (1866); (1909) P. 157 (150); 24 T. L. R. 839 42 Ch. D. 372 (1889); "Times". 13th Dec. 1907; distinguished.

A witness is considered adverse when in the opinion of the Judge he bears a hostile animus to the party calling him and not merely when his testimony contradicts his proof.

L. R. 1 P. & M. 70, 71 (1866) Referred to.

When a witness is treated as hostile and cross-examined by the party calling him this must be done to discredit the witness altogether and not merely to get rid of part of his testimony.

1 F. & F. 254 (1858).

A theory of improbability in order to prevail against positive evidence must be clear and cogent; must be such as to justify the rejection of the positive evidence as concocted and unreliable.

39 Bom 388; 22 Cal. 519 Ref. (*Mookerjee and Fletcher, J.J.*) *SURENDRA KRISHNA MONDAL v. RANEES DASSI*

24 C. W. N. 860.

EXCESS PRO. DUTY ACT, S. 2.

—S. 157—Test—Identification—Statement made to police—Admissibility of in corroboration.

It owing to the lapse of time between an identification by the Police and the trial a witness, owing to defective and uncertain memory, is unable to say whether the person on his trial is the person whom he identified the statement made by the witness to the Police at the test identification is admissible under S. 157 of the Evidence Act, if the effect of that statement is not to contradict the evidence of the witness given at the trial. (*Mullik and Atkinson, JJ.*) *SARVAR KHAN v. EMPEROR.*

55 I. C. 273 : 21 Cr. L. J. 257.

—S 157—Statements—Proof of.

The evidence of a person who bears a statement as direct proof of that statement being made as the evidence of a person who sees a deed is proof of the deed being done.

Where a statement is admissible under S. 157 of the Evidence Act, it may be proved by any one to whom it was made. (*Chevris, J.*) *C. A. HEYMERDINGUER v. EMPEROR.*

58 I. C. 344 : 21 Cr. L. J. 760.

S. 163—Documents filed under—Evidentiary value of.

Held, that there is no authority for the proposition that evidence which is admitted under the special provisions of S. 163 of the Indian Evidence Act must be deemed to be conclusive evidence against the party who has inspected the documents. There is certainly nothing in the language of the section itself to justify such a conclusion. All that happens is that the documents which the other party has produced become evidence in the case for what they are worth. (*Lindsay, J. C.*) *RAMADHIN v. RAM DAYAL.*

23 O. C. 156:

57 I. C. 973.

S. 167—Decision of Lower Court based partly on irrelevant evidence—Remand—Proportion of. See EVIDENCE ACT, Ss. 5, 32 AND 167.

5 P. L. J. 410.

EXCESS PROFITS DUTY ACT, S. 2—Carrying on business—Meaning—Company owing business and letting tenements—Liability to tax.

The term "business" in S. 2 of the Excess Profits Duty Act has the same meaning which is assigned to it in the Income Tax Act. The former Act does not contemplate an extension of that meaning or justify the introduction of anything which, according to the scheme of the Income Tax Act, is wholly dissimilar.

A person invested his capital in house property and kept a rent office, and a staff of rent collectors, clerks, etc., for the purpose of letting out his houses and collecting the rents. Held, he was not carrying on a business within the meaning of the Excess Profits Duty Act. A Company which holds house property and distributes the rents therefrom in the form of dividends to shareholders is not carrying on a business within the meaning of that Act;

EXECUTING COURT.

Although it is an association for acquiring gain, yet the method of acquiring gain is passive by owning property and not by the active carrying on of business (*Twomey, C. J. and Robinson, JJ.*) KALADAN SURATEE BAZAAR *It. re.*

56 I. C. 914.

EXECUTING COURT—Decree construction of.

It is competent to a court executing a decree to interpret the decree, but when it decides that an interpretation thereof would be premature, it is not competent to that court to interpret the decree and any opinion expressed by it is not an adjudication binding on the parties (*Pridaux and Mittra, A. J. C.*) BALLABADAS v. GULIB INGH.

57 I. C. 177

Decree — Mistake in recitals in—If binding on executing court

Plaintiff sued for rent for two years for 12 bighas odd and for 6 bighas for the third year it being admitted in the plaint that the holding had been reduced by a recognised transfer. An *ex parte* decree was passed reciting that the claim was in respect to an area of 12 bighas odd without mentioning that the claim for the third year was in respect of a reduced area. The decree directed defendant to pay plaintiff the rent claimed. The executing court, held that the sale not being a sale of the whole holding could only be treated as a sale held in execution of a money decree and not as a sale held in execution of a rent decree.

Held, that the execution court was bound by the operative part of the decree but that the question as to what was to be sold under the decree was a question of fact upon which the trial court had made no adjudication for itself whether it was the whole holding or only a part of it which was to be sold.

The decree was executable as a rent decree (*Dawson Miller, C. J. and Mullick, J.*) MAHARAJA SIR RAMESHWAR SINGH BAHADUR v. SUBU LAL JHA. 5 P. L. J. 402.

Decree—Validity of — Not to be questioned.

It is true that an execution court cannot go behind the decree and must execute it as it finds it, and it is also true that ordinarily it is open to the mortgagee (decree-holder) to recover the whole of the money from any part of the mortgaged property he chooses; but if the vesting of part of the equity of redemption in the mortgagee is tantamount to a discharge or satisfaction of a proportionate part of the mortgage debt there is no reason why an execution court should not recognise it and go into the event to which the decree has been satisfied. (*Tudball and Sulaiman, JJ.*) SARJU KUMAR MUKERJEE v. THAKUR PRASAD.

42 All. 544 : 18 A. L. J. 690 :
58 I. C. 743

Decree Validity of—Not to be questioned.**EXECUTING COURT.**

The Court executing a decree has no justification whether the decree should stand or whether it should be set aside on any of the grounds on which a decree can be set aside. The Court cannot for instance say in execution that the award, on which the decree proceeds, is a bogus award and vacate the decree on that ground. The only question which the Court has jurisdiction to deal with is the question whether the Darskhast should proceed. (*Mackod, C. J. and Fawcett, J.*) RAMA CANDRA GOVIND v. JAYANTA RAVI.

22 Bom. L. R. 1409.

Duty to execute decree as it stands—Mortgage suit—Decree in accordance with compromise but not in conformity with O. 34, R. 4, C. P. C.

The Court of execution has to execute the decree as it stands, and it is not open to the parties to impeach the validity or the correctness of the decree.

A decree passed in terms of a compromise directed the judgment-debtor to pay the debt due to the decree-holder by certain specified instalments providing also that in case of default the property mortgaged to the decree-holder would be sold. Default having been made the decree-holder applied for sale of the property.

Held, that the decree having been passed in accordance with a compromise arrived at between the parties was not a preliminary decree within O. 34, R. 4 C. P. C. but was a final one and capable of execution. (*Shadi Lal, J.*) KORA LAL v. PUNJAB NATIONAL BANK, LTD.

55 I. C. 816.

Legality of decree if can be questioned. See (1919) Dig. Col. 511 HAR Gopal v. RAM RICHPAL.

54 I. C. 239.

Power of—Jurisdiction of Court which passed the decree—Not to be questioned in execution. See C. P. CODE, Ss. 24 AND 37.

39 M. L. J. 203. (F. B.)

Power to vary decree—None—Construction of decree.

An executing court has no right to go behind the decree and in any way to add or amend the terms thereof. It has to execute the decree as it is and any amendment thereof can be made either by review or under Ss. 151 and 152 of the C. P. Code

28 Cal. 353; 1 P. L. W. 620; 15 I. C. 719 foll.

But an executing court can give a fuller and more complete description of the property described in the decree, which would be a correct description on paper construction of the decree read with the judgment and the pleadings. (19 W. R. 343 applied). (*Jwala Prasad and Adami, JJ.*) BABU BAIJ NATH SAHAY v. GAJADHAR PRASAD.

1 P. L. T. 471 : 58 I. C. 276.

EXECUTION.

EXECUTION—Application—Removal of, from file—Effect of—Not a valid dismissal of the application treated as one to continue existing one *See LIM ACT, ARTS. 181 AND 182*

11 L.W. 42

Attachment of mortgagee decree and sale—Procedure *See C.P. CODE, O. 21, R. 53.*

22 Bom. L.R. 1304

Decree—Objection to validity of, not to be allowed.

An objection to the sale of certain properties directed by a mortgage decree to be sold in satisfaction of the debt could not be entertained in execution and the decree must be executed as it subsisted (*Teuon and Beachcroft, JJ.*) *HARENDRALAL v. PABNA MODEL CO., LTD.*

55 I.C. 256.

Right to apply for—Person on record as decree-holder entitled to execute—Beneficial owner—Rights of. *See LIM. ACT. ART. 182 (5).*

38 M.L.J. 271.

EXECUTION SALE—Application to set aside—Dismissal for default—Restoration.

An order rejecting an application to set aside an order dismissing for default an application to set aside an auction sale is not appealable *19 C.W.N. 25 foll. (Newbould, J.) AMBICA CHARAN KJASKEL v. ISMAIL.*

56 I.C. 981.

Sale certificate—Evidence of title, A sale certificate does not create title but is merely evidence of title. (*Mookerjee, O.C.J., Fletcher and Richardson, JJ.*) *PROMOTHA NATH PAL CHOWDHURY v. MOHINI MOHAN PAL CHOWDHURY.* 31 C.L.J. 463. 24 C.W.N. 1011 : 58 I.C. 327.

Moveables—Goods not answering description—Sale set aside—Right to recover purchase money. *See C.P. CODE O. 21, R. 78.*

54 I.C. 315.

Occupancy holding—Purchase by mortgagee—Liability to pay rent.

Where a mortgagee purchases a holding at a sale in execution of a mortgage decree he must be taken to have known the nature of the holding on which he had advanced money and the terms of the contract on which that tenancy had been created. Where the holding purchased is that of a raiyat at fixed rates created by a kabuliyat containing stipulations for the payment of rent monthly instalments and for interest at a very high rate on arrears, the purchaser and his successor in interest are bound to pay interest at the rate and pay rent in accordance with the instalment provided for in the kabuliyat. (*Teuon and Chaudhuri, JJ.*) *BHUT NATH NASKER CHATTERJI v. MATHURA MOHAN.* 57 I.C. 1004.

Proclamation—Decree against father—Sale of joint family property—Son's interest does not pass—*See also* *High Court Civil*

EXECUTORS.

Circulars R. 69. *See BOM. HIGH COURT CIVIL CIRCULARS R. 69 (vii).*

22 Bom. L.R. 970.

Purchaser—Rights of—Dispute—Promise—Entry in Government register—Revenue sale.

Where B agreed to pay pension to S and upon the death of B, K got into possession of all the properties left by B and S got a decree in respect of his arrears of pension against K., in respect of B's properties in his possession not duly administered by K and S attached property Z belonging to B as having been purchased by her at an auction sale, and K raised several objections.

(1) Held, that the fact that M daughter of B brought a suit against K in which it was compromised that K should continue in possession, upon the latter paying an annual sum to M and her heirs was immaterial

(2) that the fact that B had not got actual possession of the property X, for which K had to bring a suit, did not change the character of the property.

(3) that an entry in Government Register showing Government revenue payable by K under a settlement did not imply that K had an independent title by virtue of a settlement and

(4) that the purchase by B at the revenue sale was in her own rights, the rights of all the co-sharers including her own as heir of her husband, having been lost. (*Coutts and Sultan Ahmad, JJ.*) *MAHARAJAH KESHO PRASAD SINGH v. SHIVA SARAN LAL.*

1 P.L.T. 602.

Stay of—Application after execution No order for stay or execution can be made after the decree has been executed. (*Abidul Raoof, J.*) *GHULAM MUSTAFA KHAN v. GHULAM NABI.* 58 I.C. 442.

What passes under—Mahomedan law—Co-heirs—Decree against some—Effect of.

Persons who are not parties to a decree are not bound by it. A sale in execution of a decree does not operate to pass the property of any person who is not bound by the decree in ordinary cases. Where a decree was obtained against such only of the heirs of a deceased Mahomedan who were in possession of his property, and it was sought to execute the decree against other heirs who subsequently got their shares from the heirs in possession. Held, that the decree could not be executed against them or against their shares in the inherited property as the decree did not bind them and the heirs in possession against whom the suit was brought did not represent them in that suit. (*Lindsay, J.C.*) *THAKUR JADU NATH SINGH v. MUSSAMMAT AFZAL KHANAM.* 57 I.C. 526.

EXECUTORS—Co-executors—Suit for account by one against representatives of another—Trustee de son tort—Limitation—Lim. Act, S. 10 and Art. 120,

EXECUTORS.

Plaintiff and another person as executors and trustees appointed by the Will of a Hindu lady took out probate but the estate was administered by the latter alone during his life time and on his death in 1900 by his son and by his grandsons the Defendants on the death of his son. In 1915 Plaintiff sued the defendants for accounts.

Held, that the defendants were in the position of a trustee *de son tort* and it was not open to them to deny their liability as such or to contend that they were trespassers and could not therefore be liable to render accounts.

The rule of English law that no liability as executor *de son tort* can arise where there is a personal representative did not apply in this case where plaintiff the rightful executor took no part in the administration when the defendants were intermeddling with the estate.

28 Mad. 351 ref.

The trustee represents the *cestuique* trust and the suit for accounts at the instance of the plaintiff was maintainable against the defendants.

Under the present Limitation Act a suit for accounts in respect of trust property comes under S. 10 and a trustee *de son tort* stands in the same position as an express trustee.

The claim for accounts for six years prior to the institution of the suit would be saved by Art. 120 of the Lim. Act (1877) the obligation of a trustee to account being continuous. (*Chatterjee and Panton, JJ.*) DHANPAT SINGH v. MOHESH NATH TEWARI.

24 C. W. N. 752 : 57 I. C. 805.

EXPLOSIVE SUBSTANCES ACT. S. 7—Consent form of—whether court can convict under a section other than that set out in the order of consent—Cr. P. Code S. 230 See (1919) Dig. Col. 551. AMAR SINGH v. EMPEROR.

1 Lah. L. J. 173 : 55 I. C. 102
21 Cr. L. J. 230.

EXTRADITION—Foreign State—East Indian possessions of France—Treaties of 1814 and 1870—Procedure—Preliminary enquiry—Common Law right. See (1919) Dig. Col. 552. RAHAMAT ALI v. EMPEROR.

47 Cal. 37.

FACTORIES ACT, Ss. 29 and 41—Factory—Employment of labour after prescribed hours—Liability of manager and occupier—Joint and several.

The liability of the occupier and manager of a factory to be sentenced for an offence under S. 41 of the Indian Factories Act is joint and several. Hence where both are tried jointly for an offence under the section they cannot each be sentenced to the maximum penalty provided by the section; but their joint liability to pay fine cannot exceed the maximum. (*Shah and Crump, JJ.*) EMPEROR v. VRIJVALLABHDAS JEKISONDAS.

22 Bom. L. R. 904
58 I. C. 152 : 21 Cr. L. J. 728.

FAMILY SETTLEMENT.

Ss. 29 (1) and 43 (a)—Manager of mill—Liability of—Employment of workmen to work after prescribed time—Separate conviction in respect of each workman. See (1919) Dig. Col. 553. EMPEROR v. JOHNSON.

44 Bom. 88.

FAMILY ARRANGEMENT—Test of—Transaction when liable to be set aside by reversioners.

The true test to be applied to a transaction, challenged by the reversioners as an alienation not binding upon them, but which is alleged to be a family settlement, is whether the alienee derives title from the holder of the limited interest or life-tenant. There may be a family arrangement between heirs or possible claimants by inheritance; but there can be no family arrangement as between legatees or donees to which the reversionary heirs are not parties. (*Kanhaiya Lal, J. C.*) BHUSHAN v. DEO NARAIN.

54 I. C. 82.

FAMILY SETTLEMENT—Binding nature of—Acting of parties.

A family settlement of a disputed claim arrived at without fraud or concealment is binding on the parties and cannot be re-opened, especially when it has been acted upon and carried out. 42 Cal. 801 (P. C.) Referred to. (*Piggott and Kanhaiya Lal, JJ.*) BALDEO SINGH v. UDAI SINGH.

18 A. L. J. 877.

58 I. C. 732.

—Binding nature of—Existence of present or future dispute—Necessity for.

In order to validate a family settlement it is not necessary that there should be an existing dispute. It is sufficient that there should be the possibility of a future dispute which might result in litigation and the evidence of possible litigation and the consequent preservation of the family property is sufficient consideration for a family settlement. (*Lyle and Ashworth, JJ.*) GANDHARP SINGH v. NIRMAL SINGH.

22 O. C. 300 : 54 I. C. 325.

Muhammadan Will—Dispute among heirs—Will—Compromise.

A Muhammadan made a will by which he devised the whole of his property to his eldest son. Subsequently, he executed a deed of gift, by which he gave the whole of his property to his wife in lieu of dower and then died. A dispute arose between his eldest son and his widow as to their respective rights under the will and the deed of gift. The dispute was compromised, and a certain portion of the property was given to the son, the rest being allotted to the widow. The son executed a deed of relinquishment that he and his heirs would have no claim to the property allotted to the widow. The latter executed a similar deed of relinquishment:

Held, that the settlement was conclusive and binding on the parties as to the rights held by each of them in the estate left by the deceased, but it did not refer to any rights which either of the parties might acquire subsequently by

FERRIES ACT, S 6.

inheritance or any other method of devolution. (*Stuart and Pandit Kanhayalal A. J. C.*) MAHOMMED ZAKI ALI KHAN v AHMAD SHAI

58 I C 983

FERRIES ACT, (1 of 1885) SS 6, 11 and 16—Public and subsidiary ferries—Powers of Lieut. Governor and Dist Magistrate.

The legislature has given the District Magistrate power to open as many subsidiary ferries as he likes but such subsidiary ferries must all be within two miles from the public ferry.

A subsidiary ferry established under S. 11 is not a public ferry. It must be regarded as a private ferry and there is no power in the Magistrate to establish a subsidiary ferry within two miles of another subsidiary ferry. (*Das and Adami, JJ.*) PANDIP SINGH v. SECY. OF STATE FOR INDIA.

5 Pat L J. 500 : 1 Pat. L T. 395
(1920) Pat 297 : 57 I C 516

FIXED DEPOSIT — Nomination of payee by depositor after his death—Effect of Rights of nominee and heir at law—Principles governing—Stranger beneficiary—Rights of.

N. a shareholder in a Nidhi or Fund carrying on business in Madras, requested the Fund to receive a payment of Rs. 200 for twelve months on fixed deposit. The application (Ex II in the case) which was made in a printed form provided by the Fund, contained certain particulars to be filled in by the depositor including the following:—"Name of the person entitled to receive the deposit paid by me after me, relationship etc M." Against this N entered the names of his elder brother's son and grandson. N. then received from the Nidhi the fixed deposit receipt in the usual form which provided that interest would cease at the end of the twelve months, when the receipt should be sent for renewal of payment Art. 26 of the Articles of Association of the Nidhi which article was binding on N as a shareholder, provided:—"If any accident should happen to one of the signatories in order to transfer the shares etc. to which he is entitled he must write giving specific details as to the person to be entitled to receive the money after his death or his heirs may receive it. Should any one desire to alter the names of the said persons it can be done on payment of a fee." In a suit brought after N's death by his nominees in Ex. II against the Nidhi and the heirs at law of N for the recovery of the amount of the deposit, held, that the nomination gave the plaintiffs no right to recover the same and that N's heirs at law was entitled to it.

Per Chief Justice and Krishnan, J.—In the absence of a will the next of kin are entitled to succeed and if any one desires that any portion of his estate should go to any one else, he must make a will in the prescribed form. The nomination in the present case cannot be enforced as a will because it is not attested by

FOREST ACT, S 75.

two witnesses and probate has not been obtained as required by the Hindu Wills Act in the case of a will executed in the Presidency Town.

Per Krishnan, J.—*Held* On the facts of the case that it was not a part of the contract of deposit between N and the Nidhi that the latter should repay the money to the plaintiffs in the event of the former's death without having withdrawn it or changed the names of his nominees;

(2) that even if it were a part of the contract between N and the Nidhi that the latter should pay the money to plaintiffs they as strangers to the contract, obtained thereby no right to the money;

(3) that treated as a mandate the nomination was of no effect as it became revoked by N's death (*Wallis, C J and Krishnan, J.*) T NANA TAWKER v. BHAWANI BOLEE

43 Mad 728 : 39 M. L. J. 381.

FOREST ACT (VII of 1878), S 41—Chittagong Hill Tracts—River Rules Removal of forest produce—Offence.

The River Rules of the Chittagong Hill Tracts framed under S. 41 under the Forest Act relates to reserved forests of the Government, and have no application to the case of a person who has obtained a lease of a forest in fee simple. The removal, by such a lessee of bamboos from one portion of the estate to another is not an offence punishable under those rules. (*N. R Chatter and Cumming, JJ.*) SATYARANJAN SEN GUPTRA v. MAHOMED SARFARAJ

57 I C 819 : 21 Cr. L J. 659

S. 75 (c)—Rules under—Rule 2—Sandalwood trees on occupancy land grown after Survey Settlement—Ownership of—Bom. Land Revenue Code, Ss. 40 and 214.

The accused were occupants of a survey number in a village in which the first survey settlement was introduced in 1851, and the revised settlement in 1889. Considerable time after the settlements, sandalwood trees grew on the land. Those trees having been cut and removed by the accused without the permission of Government the accused were convicted of a breach of R. 2 framed by Bombay Government under S. 75 Cl. (c) of the Indian Forest Act and punished under S. 76 of the Act:—

Held, reversing the conviction and sentences, (1) that the trees in question, which were not shown to be in existence at the date of the settlements, belonged to the accused as occupants, and they had committed no offence in cutting their own trees

(2) that under R. 93 framed under S. 214 of the Bombay Land Revenue Code and S. 40 of the Code the right of Government was confined to reserved trees existing at the date of the settlement. (*Shah and Hayearl, JJ.*) EMPEROR v. YELLAPPA RAMANGOWDA

22 Bom L R 884:

58 I. C. 60 : 21 Cr. L J. 716.

FRAUDULENT PREFERENCE.

FRAUDULENT PREFERENCE—Railway employee—Adjudication of as insolvent—Employee drawing his provident fund from his company — Payment to wife, whether offence—Provident Funds Act, S. 4. See PROV INSOL. ACT, S. 43. 22 Bom. L. R. 322.

FRAUDULENT TRANSFER—Mortgage—Fraud—Carried out—Plff. if can allege his own fraud.

Plaintiff sued defendant for a declaration to the effect that a mortgage deed without possession executed by plff. in favour of debt. was null and void and that nothing was due under it. In the plaint it was averred that the plaintiff being heavily involved and being pressed by his creditors was induced by the defendant to mortgage or hypothecate his property including stock-in-trade to debt the consideration being Rs. 1,400, on account of former debts. Rs. 1,100 advanced in cash and an undertaking to finance the plaintiff up to the sum of Rs 10,000 that this transaction was a fraudulent one, intended to defeat the claims of the creditors and for that reason should be declared null and void, none of the considerations having been paid.

Held, that the plaintiff cannot be permitted to allege his own fraud inasmuch as the object with which the fraudulent transaction was entered into has actually been carried out in part.

11 P. R. 1875 foll; 114 P. R. 1879, 38 P. R. 189; 18 M. 578; 85 C. 11 P. C.; 175 P. L. R. 191; 61 P. R. 189; 45 I. C. 333 referred to (*Broadway and Wilberforce, JJ.*) DINA NATH v. DUNI CHAND. 2 Lah. L. J. 439.

GAMBLING ACT (BURMA ACT) (1 of 1899) Ss. 6 and 7—Search warrant—Presumption on instruments being found—Cr. P. Code, Ss. 79 and 101—Endorsement of warrant. See (1919) Dig. Col. 556. PO THWAI v. EMPEROR. 54 I. C. 57. 21 Cr. L. J. 9.

S. 7—Presumption on instruments of gaming being found—Rebuttal of presumption. See (1919) Dig. Col. 556. EMPEROR v. SEIN KEE. 54 I. C. 52: 21 Cr. L. J. 4.

S. 10—Unoccupied hut, whether a place within the meaning of S. 10—Place meaning of. See (1919) Dig. Col. 556. NGA HLWA v. EMPEROR. 54 I. C. 50: 21 Cr. L. J. 2.

GARNISHEE—Debt due to judgment debtor, and others—Not the proper subject of garnishee proceedings. See MAD. HIGH COURT. RULES, ORIGINAL SIDE. 39 M. L. J. 91.

GENERAL CLAUSES ACT, S. 3. (25)—Immoveable property — Tenant-at-will—Rights of.

The term "immoveable property" as defined in the General Clauses Act does not include mere temporary rights of a tenant-at-will to reap the produce to which he is entitled as a

GOVT. OF INDIA ACT, S. 65.

Tenant. (Scott Smith and A. Raoof, JJ.) MAHOMED ISMAIL v. SHAMSUDDIN.

1 Lah. 567 : 2 Lah. L. J. 684: 58 I. C. 321.

GHATWALI — Rent — Arrears due to Ghatwal—Attachment and execution

Arrears of rent, which fell due during the lifetime of the Ghatwal, but were collected after his death, from his personal property and can be realized in execution of a decree against him + W. R. 1 and 23 Cal 874 rel. (Coutts and Adam, JJ.) BRIJ NATH RAM v. MUSSAMAT CHAND NUMARI.

1 P. L. T. 642 : 58 I. C. 17.

GIFT—Construction—Agrahar gift—Condition as to residence in the place merely recommendatory and not enforceable—T. P. Act, Ss. 10 and 11—Restraint on alienation.

Certain lands and a house were given by way of Agrahar gift to a donee and his descendants in order that he should enjoy the produce of the lands and reside in the house and perform the six-fold religious duties. It was further provided that the donee should not abandon the house, nor go to another place and enjoy his Vritti given to him in connection with the Agrahar from that place. If the donee acted in contravention of the above, his act should be considered an act of irreligion and another person should be substituted in his place. After conforming to the above conditions for some years, the donee went to another place to live and eventually sold the lands. A question having arisen whether the sale was valid.

Held, upholding the sale, that the Agrahar gift was private gift to the donee and an absolute gift according to Law; that the further provision as regards residence was only a recommendation and appeal to the religious conscience of the donee and his descendants; and that as condition it was not valid and enforceable in law. (Shah and Hayward, JJ.) RUKMINIBAI KRISHNARAO v. LAXMIBAI NARAIN.

44 Bom 304: 22 Bom L. R. 254: 56 I. C. 361.

GOVT. OF INDIA ACT, 1915, Ss. 65

and 79—Imperial and provincial legislatures—Powers of—Not a legatee of Parliament—Power to enact statutory body with the making of bye-laws. See CAL. MUN. ACT, Ss. 559 AND 561. 24 C. W. N. 196.

Ss. 65 (2) and (3) and 72—Legislative power of the Govt. of India—Limits of.

S. 65 (2) of the Government of India Act does not prevent the Government of India from passing a law which may modify or affect a rule of the constitution or of the common law upon the observance of which some person may conceive or allege that his allegiance depends. It only refers to laws which directly affect the allegiance of the subject, as by a transfer or qualification of allegiance or a

GOVT. OF INDIA ACT, S. 79

modification of the obligation thereby imposed (*Viscount Cave*.) BUGGAE EMPEROR.

39 M.L.J. 1 Lah. 336 :
18 A.L.J. 455 : 24 C.W.N. 650 :
22 Bom. L.R. 609 : 12 L.W. 296 :
47 I.A. 128 : 56 I.C. 440 :
21 Cr. L.J. 456 : (P.C.)

—(1915) S. 79—Local Legislature—Powers of—Power to entrust the making of bye laws to statutory bodies—Bye laws framed *intra vires*. See CAL. MUN. ACT, Ss 559 AND 571. 24 C.W.N. 196.

—S. 107—Conduct of trial—Interference—Revision.

In the special circumstances of this case the High Court in the exercise of its powers of superintendence interfered with the order of the lower court refusing to allow the defendants who opposed the plff's claim, to cross-examine the latter's witnesses after the plffs. had cross-examined them. (*Miller C.J. and Mullick, J.*) MOTIRAM MARWARI v. LALIT MOHAN GHOSH. 5 P.L.J. 545 :

1 Pat. L.T. 676 : 58 I.C. 238.

—S. 107—Cr. P. Code, Ss. 145 and 439—Proceedings under—Difference of opinion among Judges of High Court—Opinion of senior judge prevails. See Cr. P. Code, S. 145.

32 C.L.J. 54.

—S. 107—Dismissal of suit—Reference to commissioner—Dismissal of suit before report of commissioner is received—Revision—Interference. See C. P. CODE, S. 15 AND O. 9, R. 8. 54 I.C. 56.

—S. 107—Interlocutory orders—Revision of.

Interlocutory orders, even where an appeal from the final decree lies, may be dealt with under the Courts's powers of superintendence and revision in order to avoid irreparable injury to the parties. 14 Cal. 761 and 13 C.W.N. 682 rel. 15 C.W.N. 313 ioll. (*Miller, C.J. and Mullick, J.*) KUMAR RAMESHWAR NARAYAN SINGH v. RANI RIKHUNATH KOERI.

5 Pat. L.J. 550 : 1 Pat. L.T. 668 : 58 I.C. 281.

—S. 107—Jurisdiction of High Court—Munsi committing party for contempt—Interference in revision—Statement that an order was "against rules and law" whether amounts to contempt. See (1919) Dig. Col. 558 KADHORI *In re.*

42 All. 26.

—S. 107—Order under S. 145 Cr. P. Code—Revision by High Court—Government of India Act, See Cr. P. Code S. 145.

32 C.L.J. 270.

—S. 107—Powers of superintendence—Scope of.

It is the privilege and prerogative of the High Court once a record is before it which is erroneous and so erroneous as manifestly to amount to an injustice to exercise its powers of

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superintendence to revise such order or to set it aside and direct such further proceedings to be taken as justice may require (*Atkinson and Alami, JJ.*) BRINDABAN CHANDER CHOUBE v. GOUR CHANDRA RAY.

(1920) Pat. 56 : 1 Pat. L.T. 467 : 58 I.C. 155.

GOVERNMENT REGISTER—Value of, entry in. See EXECUTION SALE

1 P.L.T. 602.

GRANT—Construction—Doubtful language—Rule of construction.

The correct rule of interpretation where a deed contains words of doubtful import, is not that it should be construed in favour of the grantor, but is that as between the grantor and the grantees, if the words of the grant or instrument are of doubtful import, that construction shall be placed upon them which is most favourable to the grantees. (*Macnair, A.J.C.*) RAMOO v. SADOO.

58 I.C. 954.

—Construction—Havelli lands sold by E. I. Co.—Samad constituting vendee a zemindar—Peshchush fixed including produce from lankas—Lankas if included in the grant—Subsequent conduct of Govt. servants—Limitation—Adverse possession—Ignorance of real owner—Time—Running of, if suspended—Accretion—Acceleration of, by artificial means—Entry by Govt. for conservancy purposes—Adverse possession—Interruption of.

Certain villages on the bank of the Krishna river and belonging to Govt. were sold by them in 1802 to the predecessor in-title of the zemindar of Vallur and a samad was issued in 1803 fixing peshchush at a certain amount which included also the income from mustard sown on the lankas and keelankas left by the subsiding of the flood of the river and it appeared that both prior and subsequent to the grant so much of the river-bed as was within the *ad medium filum limit* was treated and enjoyed by the owners on either bank with the knowledge and acquiescence of the Government as forming the river-bed Ayakat of the villages abutting on the river the Government having remained quite probably under the erroneous view that the English Law negating the right of the Crown to the bed of a non-tidal river also applied to river-bed adjacent to the village granted.

Held, that under the facts and circumstances and in the absence of a special reservation in favour of the Crown ever giving full weight to the principle that grants by the Crown must be construed strictly in favour of the crown, the grant in question included the river-bed Ayacut area as part of the villages which were expressly mentioned and (2) that even if there were any doubts or ambiguity as to what exactly was included in that grant of 1803 the nature of the subsequent possession by the grantees and the conduct, assertions and declarations of the parties from and after the grant

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and the views entertained by the grantor at the time of the grant can be legitimately referred to as evidence of the nature and extent of the grant. 15 M. 101; (1879) A.C. 670; 1907 A.C. 369; 27 M. 151 P.C. Rei.

Held, also per *Salasiva Aiyar, J.*, (Bur. J. dissenting) that the possession of the Zamindar was adverse to the Government from 1803 the date of the grant or at least from 1848 the Government admitting the title of the riparian owner to half the river-bed directed one of its officers to demarcate the boundaries in the river-beds and lands in order to put an end to the disputes as to mark boundaries between riparian owners on the same as well as on the opposite bank of the river and not merely from 1853 when the Government confirmed and adopted the report of the officer.

Per *Salasiva Aiyar, J.*—If the true owner A having the opportunity to acquaint himself with all the facts and law and not being led into any error by the fraud of the opposite party B sees B enjoying A's land openly claiming it as owner limitation against A cannot cease to run till the ignorance on the part of A which led him into thinking that the land really belonged to B is removed.

Per *Burn, J.*—Though the formation of banks might have been greatly helped and accelerated by the artificial means employed and the operations carried on by the river conservancy staff of the Public Works Department they did not thereby lose their character of accretions belonging to the owners of adjacent lands and the Government having entered upon them under the statutory authority for the purposes of river conservancy only could not claim such accretions as its own property. 22 M. 464; 40 M. 1081; (1915) A.C. 399; 4th Dg. and Jones 5th; 13 M. 369 Rei. (*Salasiva Aiyar and Burn, JJ.*) THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. VENKATANARASIMHA NAIDU.

27 M.L.T. 147: (1920) M.W.N. 209:
11 L.W. 256: 58 I.C. 689

—Construction of—Maintenance grant
—Perpetual or for life.

Where a rich and sonless Zamindar made a *Mashahara bandagi patra* (maintenance grant) in favour of his daughter, the deed recited that the daughter had been receiving a certain sum of money for her maintenance and other expenses and that unless some deed was executed objection might be raised in future to her getting the "settled amount of maintenance" which was, therefore, made "*kain*" (permanent) by the deed. It was further provided by the deed that the daughter would get the same in "*douhi transha*."

Held, that the grant was intended to be perpetual and was not limited to the life of the daughter's sons and that the word "*douhi transha*" was intended to mean "in the line of the daughter's son." (*N. Chatterjee and Pantow, J.*) RAJLAKHMI DEBYA v. SAROLA SUNDARI DEBYA.

58 I.C. 803.

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—Construction—Minerals—Grant right to—Grant by Zamindars of tenure in lands within Zamindari—Grant of rent free tenure—Effect. See (1919) Dig. Col. 559. RAGJUNATH ROY MORWARI v. DURGA PRASAD SINGH.

47 Cal. 95.

—Construction—Putra Poutradikramai warson Kayam recitation—Meaning in Chota Nagpur. S.C. (1919) Dig. Col. 55. BROKISHORE RAM v. JAGAT MOHAN NATH SAHI DEO.

5 P.L.J. 265:
58 I.C. 486.

—Construction—Sankalp under proprietary right—See DEED, CONSTRUCTION.

23 O.C. 30.

—Easement—Long continued user—Right of way.

Uninterrupted enjoyment to raise a presumption of right must have been acquiesced in by the owner of the servient tenement.

Where from continued user the Court is asked to presume a grant of right of way knowledge of such user on the part of the servient owner is an essential condition to the acquisition of an easement. 3 B.L.R. 18 at 25 and 50; 6 B.L.R. 85. 10 Cal 21+ Rei. (*Drake Brockman, J.C.*) RAMCHANDRA RAO v. VENKATRAO.

16 N.L.R. 76:
54 I.C. 936.

—Easement—Right of way—Partly derived from grant and partly by prescription. See EASEMENT.

57 I.C. 852.

—Lost grant—Presumption as to—Question one of fact. See PRESUMPTION.

31 C.L.J. 501.

—Maintenance — Tankhas — Transférability of.

"Tankhas" are heritable allowances in the nature of property and therefore assignable (*Richardson and Huda, JJ.*) LALA MUKTI PROKASH NANDE v. SRIMATI ISWARI DEBI.

24 C.W.N. 938: 57 I.C. 858.

—Minerals—Grant by Zamindar—No presumption of grant of Sub. Soil rights.

A grant, by a Zamindar, of a tenure in lands within his zamindari does not pass the minerals unless it appears clearly from the terms of the grant that the minerals were included in the grant. 47 C. 25 P.C. foll (*Dawson Miller, C.J. and Cotts, J.*) KUMAR PRAMATH NATH MALIA v. MEIK.

5 P.L.J. 273:
(1920) Pat. 146: 1 Pat. L.T. 360:

56 I.C. 184.

—Presumption—Public navigable river—Dry land, appearing on bed through recession—Whether part of Zamindari—Thak and Survey maps Value of.

Rennell's map showing the state of the land between 1764 and 1773 indicated the existence of Kaliganga and Dhulia as large navigable rivers and the map prepared by Alexander Hodges in 1831 indicated that at that time Dhulia was a large navigable river.

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Held, that it lay on the plaintiff who sued for a declaration that lands recently the beds of these rivers but now dry by reason of the rivers receding from their beds were included in their permanently settled estates to prove their allegation that at the date of the permanent settlement of their adjoining zemindaris in 1793 they were narrow channels.

Plaintiff having failed.

Held, that the rivers must be held to have been navigable at the date of the permanent settlement.

The fact that in the thak and survey maps of 1859-60 the beds of the rivers were shown as within the boundaries wholly or in part of plaintiff's permanently settled estate was not sufficient to establish the plaintiff's case that the beds were included in lands charged with assessment permanently fixed in 1793.

The decisions do not lay down any general inflexible rule of law that the facts stated on the thak or survey map must be presumed to have been in existence at the time of the permanent settlement. The question is essentially one of fact and must be determined on the facts and circumstances of each case (*Mookerjee and Walsley, JJ.*) PRAFULLA NATH TAGORE v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL 24 C. W. N. 639 : 31 C. L. J. 320 : 57 I. C. 29.

GUARDIAN—Agent appointed by—Nor not entitled to ask agent for accounts or for particular amounts. See **RIGHT OR SUIT**.

39 M. L. J. 247.

GUARDIAN AND WARD—*Infant*.—Mother leading irregular life—mother, appointment of, as guardian—Conditions.

Guardianship of a minor child was given temporarily to grandmother instead of to mother who was leading a very irregular life at the time of the institution of the proceedings and her conduct was such that it would be wrong to confide a child to her.

The mere fact that the mother is unable to earn more than a small and possibly precarious income is in itself no reason for depriving her of the child.

The fact that the grand-mother is able to keep the child in very suitable physical surroundings has weight in the consideration of the question whether she should be appointed guardian.

The mother by such appointment, does not permanently forfeit all her natural right to the custody of her child. (*Chatterjee and Panton, JJ.*) MRS. WINIFRED v. MRS. WINIFRED CHAPMAN. 31 C. L. J. 365: 57 I. C. 13.

—Mother—Right to custody of infant—parting with child under agreement—Effect of—Restoration when refused.

It is well settled that a mother cannot be deprived of her natural right of absolute control over her own child by any agreement by which she made over the child to another to

GUAR AND WARDS ACT, S. 7.

be brought up as the latter's own even though she might have definitely stipulated never to claim back the child. But there may be circumstances in a particular case which would render it undesirable in the interests of the infant that she would resume her rights when she has once made over the child to another and associations or expectations have been created on the part of the infant.

The mother of a posthumous boy made him over when two or three months old to her sister to be brought up as her own, in order that she might go and have herself trained as a nurse and be thereby in a position to bring up her children of whom there were four others who were placed in various charitable institutions. When the boy whom the aunt was bringing up as her own child and for whom she had much affection was 7½ years old, the mother being now in a position to maintain and bring up the child asked for the custody of the child.

Held, that in the circumstances of the case the child should be restored to the mother. (*Chatterjee and Panton.*) FANNY EMMELINE PETERSON v. EARNEST HENRY SHAVE.

24 C. W. N. 711 : 56 I. C. 242.

—Powers of guardian to make an agreement binding the minor—Limits See MINOR.

1 P. L. T. 65.

—Sale by guardian—Minor not bound by covenants in sale-deed—Guardian's personal liability. See CONTRACT ACT, S. 11.

11 L. W. 248.

GUARDIAN AND WARDS ACT. (VIII of 1890) S. 3—Mandatory order—Jurisdiction to make.

Under the Guardians and Wards Act, a court has no jurisdiction to make a mandatory order directing the father to allow the mother access to her minor children.

Except in the case of Chartered High Courts, the court's powers over minors are confined to those given by the Guardians and Wards Act, 38 M. 820 ; 42 M. 617 foll (*Rigg J.*) HAZARA BIBI v. SULEIMAN HAJI MAHOMED.

13 Bur. L. T. 86.

—Ss. 7 and 17—Order appointing guardian in conflict with the decree of Civil Court—Husband—Custody of wife.

The minor girl concerned in the case was apparently married to two persons K. and L. In a suit which took place regarding her marriage a decree was passed in favour of L with a condition that he should have no right to her person until she became a major. She had not yet attained puberty, when L applied for her guardianship and this was granted. *Held*, that this order was obviously in conflict with the decree of the Civil Court that he should have no right to her person till she was of age and must be set aside. (*Wilberforce, J.*) KHUDA BAKSH v. LAL. 2 Lah. L. J. 509.

GUAR AND WARDS ACT, S. 7.

—Ss. 7 and 47 (a)—Order appointing guardian with direction to furnish security—Security tested and accepted—Issue of final order—Appeal against if competent when preliminary order left unchallenged.

An application for the appointment of a guardian for the properties of a minor was made and the Court passed an order appointing the mother as guardian and directing her to furnish security for Rs. 1,000 within two weeks of the date of the order and after such security was furnished and accepted issued a final order styled a "warrant of appointment." An appeal was preferred against the final order alone. Held, that the first order was only preliminary and conditional upon the furnishing of security and did not take effect till the security was furnished and that the final order was the only order appointing the mother as guardian under S. 7 of the Guardians and Wards Act. An appeal against the latter order was therefore maintainable. (*Spencer and Krishnan, JJ.*) **SANGAYYA TEVAN v. PETHAMMAL**

11 L.W. 377 : 56 I.C. 513.

—Ss. 12, 43 and 47—Minor left in the custody of grandmother pending disposal—Application for guardianship of her person or—Orders against custodian regarding marriage of the girl—Validity of

Pending the disposal of an application for appointment of the guardian of the person of the minor, the minor was allowed to remain in the custody of her grandmother. Subsequently a proposal for the marriage of the girl having been made the Court sanctioned the proposal, but rescinded it later on. Another proposal of marriage was then entered and sanctioned by the Court. Held, that the order passed by the Court as to the custody of the minor was validly made by the Court under S. 12 of the Guardians and Wards Act, 1890, but the orders passed regarding marriage of the minors could not be made either under S. 12 or S. 43, and were made without jurisdiction. (*Shah and Crump, JJ.*) **LAXMINARAYAN SESHGIRI v. PARVATIBAI PARMESHWARI**. **44 Bom. 690.**

22 Bom. L.R. 399 : 57 I.C. 79

—S. 17—Custody of girl—Duty of Court.

In considering the question of the custody of a young girl and the appointment of a guardian, regard should be had to the material and spiritual welfare of the child. Having regard to S. 7 of the Guardians and Wards Act preference should be given to one who will bring her up in the religion of her parents. (*Mears, C.J. and Banerji J.*) **RAM PRASAD RAMJANA v. THE DISTRICT JUDGE OF GORAKHPORE.** **57 I.C. 651.**

—S. 17 (1)—Application for appointment as guardian—Legal right—Vindication of—Welfare of minor.

The respondent made an application to be appointed guardian of his minor grandson aged over 9 or 10, on the ground that his right

GUAR AND WARDS ACT, S. 29.

to such appointment had been denied. It was admitted that the child's mother had always taken care of her children after the death of her husband which happened six years before suit. Held, that it was not for the benefit and welfare of the minor to take him out of the custody of his mother especially when the application for appointment of guardianship was made simply for the vindication of the plaintiff's right. (*Tudball and Ryves, JJ.*) **SUDHILA v. MAKKA.** **18 A.L.J. 71 : 54 I.C. 418.**

—Ss. 20, 27 and 33—Duty of guardian in dealing with ward's money—Investment—Duty to account for profits made—Neglect of duty—Breach of trust. See (1919) **Dig. Col. 565.** **LIBHU RAM v. BAGML**

2 Lah. L.J. 130 : 54 I.C. 926.

—S. 27—Guardian if can ratify unauthorised act of previous guardian.

A guardian appointed under the Guardian and Wards Act cannot ratify the unauthorised acts of a former guardian; this can be done by the minor alone on attaining majority. (*Mittra, A.J.C.*) **SANKAR v. GOVINDA.**

54 I.C. 311.

—Ss. 27, 30 and 31 (2)—Sanction of Court for sale—Necessity not mentioned—Purchaser under void sanction—Position of.

The provisions of S. 31 (2) of the Guardian and Wards Act are mandatory and not merely directory. An order which failed to recite the necessity for or the advantage of the transfers is not a legal order which could be pleaded as sufficient sanction for a sale by the guardian.

When the permission given by the Judge was not a legal permission the sale is voidable under S. 30 of the Guardians and Wards Act and the original purchaser must be deemed to have acquired only a defeasible title and could give no better title than this to the subsequent purchasers.

It is not an act of ordinary prudence on the part of the guardian within S. 27 of the Guardians and Wards Act to admit that his wards were liable for debt which could not be legally recovered owing to the lapse of time. (*Lindsay, J.C.*) **BANKEY LAL v. SWAMI DAYAL.**

23 O.C. 72.

—S. 29—Guardian and Ward—Lease of minor's property to guardian by mortgagee of such property—Liability of minor to pay rent.

S. 29 of the Guardians and Wards Act allows a certified guardian to give a lease of property belonging to the minor for a period of five years. There is nothing to prohibit a lease for a similar period being taken by the same guardian of property belonging to the minor from a person holding the same under a mortgage made for legal necessity. The lease, while it imposes upon the minor the liability to pay rent brings with it a corresponding gain and the transaction is, if beneficial to the minor,

GUAR. AND WARDS ACT, S. 29.

of a nature within the competence of the guardian binding on the ward (*Kanhaiya Lal, J. C.*) **GUR DIN v. DURGA DIN.**

54 I.C. 19

—**Ss. 29 and 30—Restriction on powers of guardian—Transfer of property without sanction of court—Extent of liability of minor—Duty to restore benefit.**

The restrictions on the powers of a guardian appointed under the Guardians and Wards Act can be enforced only to such extent as is laid down by the provisions of that Act. **45 I.A. 73 (P.C.), dist.**

Although a transaction entered into by a certificated guardian on behalf of his ward in respect of the latter's immoveable property without the sanction of the District Judge cannot be enforced against the ward during his minority so as to affect directly his immoveable property yet a simple money decree can be passed against him to the extent to which he is found to have benefited by the transaction. (*Kanhaiya Lal and Lyle, A.J.C.*) **LALA PURSHOTAM DAS v. NAZIR HUSAIN.**

54 I.C. 846.

—**S. 34—Minor—Application for appointment of guardian of properties of minor—Guardian directed to furnish security—Agreement by guardian to pay moneys out of minor's estate to sureties—Legality of. See LEG. PRACTITIONERS ACT, S. 15 (b) AND (f).**

38 M.L.J. 58.

—**Ss. 35 and 36—Guardian—Suit for accounts—Guardian's liability—Liability of legal representatives.**

Property belonging to a minor was at first managed by his maternal grand-father. Subsequently he got himself appointed guardian of the property by the Court, and gave a bond under S. 34 (a) of the Guardians and Wards Act, 1890. He retained management of the property even after the death of the minor, and after sometime, he again got himself re-appointed by the Court as guardian of the property, but without giving any bond. On the death of the guardian, the minor's widow sued his legal representatives for an account of the management.

Held, that the suit was maintainable and that neither S. 35 nor S. 36 of the Guardians and Wards Act, 1890 barred the same; and that the legal representatives were liable to account in case it was established that the property of the minor did go into the hands of the guardian and thence into the hands of his representatives. (*Shah and Crump, JJ.*) **NARAYAN BALAJI NAGARKAR v. KASHIBAI KESHAV.**

44 Bom. 852 : 22 Bom. L.R. 633 : 58 I.C. 213.

—**S. 36—Guardian of minors' property—Suit against guardian—Leave of the Court obtained subsequent to suit.**

A suit brought against the guardian of the property of a minor under the provisions of S.

GUZ. TALUKDAR'S ACT, S. 31.

36 of the Guardians and Wards Act, 1890, is in order even if the leave of the Court is obtained subsequent to the filing of the plaint. (*Mazrood, C.J. and Heaton, J.*) **MAINA HARI TARDE v. SHANKAR MORO TARDE**

44 Bom. 602 : 22 Bom. L.R. 787 : 57 I.C. 540.

—**S. 41—Liability of guardian after minor's death—Court's jurisdiction to deliver up property. See (1979) Dig. Col. 569. CHANDRA BHUKAN SINGH v. SAJAN KUAR.**

42 All. 1.

—**Ss. 47, 48 and 34—Appeal—Competency—Order directing guardian to pay into Court balance due from him.**

No appeal lies against an order calling upon a guardian to pay into Court the balance due from him on settlement of his accounts.

Order under S. 34 of the Guardians and Wards Act are open to revision by the High Court. (*Broadway, J.*) **RAM JAS v. CHANI**

55 I.C. 587.

—**Ss. 47 and 48—Refusal to remove guardian—Appeal.**

An order refusing to remove a guardian is final and is not open to appeal under Ss. 47 and 48 of the Guardians and Wards Act. (*Tudball and Sulaiman, JJ.*) **MUHAMMAD ANWAR ALI KHAN v. DARA SHAH KHAN.**

42 All. 514 : 18 A.L.J. 624 : 56 I.C. 208.

—**S. 47 (a)—Order appointing a person guardian with direction to furnish security—Security furnished accepted—Final order of appointment—Appealability of. See GUARDIAN AND WARDS ACT, Ss. 7 AND 47.**

11 L.W. 377.

GUJARAT TALUKDAR'S ACT (VI OF 1883) S. 31—Jivaidar if Talukdar—Alienation by talukdar's son—Summary eviction by Talukdari Settlement Officer.

A Jivaidar is a Talukdar within the meaning of the Gujarat Talukdars' Act 1888.

A Talukdar and his son mortgaged a portion of Talukdari estate; and after the death of the Talukdar his son sold the property to the mortgagee. The Talukdari Settlement Office having issued a notice under S. 79 A of the Bombay Land Revenue Code, to summarily evict the mortgagee from possession of the property the latter sued for a declaration that he was entitled to remain in possession:—

Held, that the mortgage by the Talukdar ceased to be operative after his death.

That the mortgage by his son was inoperative from the start for he was not a co-sharer with his father in the talukdari estate and not having any interest in the property at the time he was not competent to encumber the interest to which he might succeed on his father's death, that the sale of the property by the son was an invalid alienation under S. 31 (2) of the Gujarat Talukdars, Act 1888; and that the notice of eviction under S. 79-A of the Land Revenue

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Code, 1879, was valid (*Macleod, C. J. and Hatton, J.*) BHAIJI ISHWARDS SHAH v. THE TALUKDARI SETTLEMENT OFFICER.

44 Bom. 832 : 58 I. C. 88.
22 Bom. L. R. 906.

HAT—Right to hold market—Grant—Intimidation of customers of rival Hat holder.

There is in Bengal no such thing as a market franchise or a right to hold a market conferred by grant from the Crown, nor can such right be acquired by prescription.

In Bengal the right to hold a market is treated as an incident to the ownership of land. The proprietor of the old market has no monopoly or privilege which is entitled to protection and no immunity from competition.

Where illegal means in the nature of intimidation and physical compulsion were employed by agents of the defendants acting within the scope of their employment to induce traders who would have gone to plaintiff's old hat to attend defendant's new hat, and as a natural consequence thereof there was diminution of plaintiff's profits from his hat. Held, that the plaintiff was entitled to a civil remedy by way of a suit for damages (*Richardson and Greaves, JJ.*) HEM CHANDRA ROY v. BEPIN BEHARY SAHA SANDAR. **24 C. W. N. 800.** **58 I. C. 879.**

HIGHWAY—Dedication—Proof of—Evidence necessary to prove dedication. See

47 I. A. 25

Dedication—Proof of—Intention to dedicate—User—Permissive acts of licensees—Dedication to section of the public—Punjab Municipal Act, ss. 3 and 171.

In cases where the existence of a public highway is in issue, it is of crucial importance to distinguish between the grant to the public as such of a right of way and the permission which naturally flows from the use of the ground as a passage for visitors to or traders with the tenants whose shops abut upon it.

A person dedicating land to public use may limit the purpose of the dedication as he wishes but the dedication must be to the public as a whole. There cannot in law be a dedication to a limited part of the public. In order to constitute a valid dedication to the public or a highway by the owner of the soil, there must be an intention to dedicate. User by the public is only evidence of such intention (*Lord Shaw*) MUHAMMAD RUSTUM ALI KHAN v. THE MUNICIPAL COMMITTEE OF KARNAL CITY.

**1 Lah. 117 : 38 M. L. J. 455 :
18 A. L. J. 468 : 11 L. W. 579 :**

**22 Bom. L. R. 563 : 13 P. L. R. 1920 :
28 M. L. T. I. 25 C. W. N. 122 : 32 C. L.
J. 471 : 56 I. C. 1 : 47 I. A. 25 (P. C.)**

HINDU LAW—Adoption—Authority to accept—Construction—Power given to widows jointly—Senior if can exercise it.

By a will a Hindu left all his properties to his two widows. Authority to adopt was given by the same will as follows:—"They (the

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widows) may, if necessary adopt a boy of good family according to their necessity." The senior widow adopted the appellant after the death of the junior widow. Held, that the power of adoption given by the will was a joint permissive one; but it required a joint agreement to adopt i. e., a selection of heir and actual adoption by both the widows. The appellant therefore was not an adopted son of the testator. 37 Mad 196, discussed. (*Mears, C. J. and Banerji, J.*) LACHMI PRASAD v. PARBATI. **42 All. 266 : 18 A. L. J. 108 : 54 I. C. 910.**

—Adoption—Authority to adopt—Widow—Bombay School—Direction in husband's will—Effect of.

According to the Bombay School of Law the duty of a Hindu widow to obey her husband's command compels her to act upon any mandatory direction that he may give by will as to the way in which her power of adoption should be exercised.

Held, that the adoption by the widow of a boy different from the one specified in her husband's will was invalid.

A condition in a will imposing duties on the adopted son is one subsequent to the appointment and not a condition precedent to the exercise of the power. (*Lord Buckmaster*) SITA BAI v. BAPU ANNA PATIL.

**39 M. L. J. 106 :
(1920) M. W. N. 556 :
22 Bom. L. R. 1359 : 12 L. W. 386 :
16 N. L. R. 162 : 25 C. W. N. 97.
57 I. C. 1 : 47 I. A. 202 (P. C.)**

—Adoption Authority to adopt—Widow—Maharashtra school—Restriction on power, by father-in-law of widow, invalid. See HINDU LAW, WILL.

22 Bom. L. R. 71.

—Adoption—Capacity to take—Minor widow who has not reached the age of puberty.

Under Hindu law a Hindu widow of the age of twelve who has not reached puberty cannot make a valid adoption.

In view of the importance of the act of adoption it is necessary that the adopting widow must have reached such an age of discretion that she must be able to realise the importance of her act to make up her own mind as to the person she ought to adopt. There may be circumstances which will enable the Court to consider whether a widow has reached the age of discretion. That she has attained to puberty may be one circumstance but in India not necessarily the only one. The actual age of the widow may be another test and probably the most important one. (*Macleod, C. J. and Heaton, J.*) MULGAPPA BASAPPA v. KALAVA GOLOPPA. **44 Bom. 327 : 22 Bom. L. R. 91 : 55 I. C. 361.**

—Adoption—Ceremonies—Jains.

Among Jains a married man can lawfully be adopted, adoption amongst Jains being a purely secular matter.

29 A. 491 ; 30 A. 197 ; 32 A. 247 ; foll.

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No religious ceremonies are essential to the validity of an adoption among Jains, inasmuch as they do not believe in the Hindu doctrine of the spiritual efficacy of sons. But the secular ceremony of giving and taking cannot be dispensed with. (*Drake-Brockman, J. C.*) MUSSAMMAT JAMUNABAI v. JUHARMAL.

56 I. C. 81.

Adoption — Ceremonies — Jains — Authority of widow

Among Sitambari Jains, the only ceremony necessary to the validity of an adoption is the giving and taking of the adopted son. Amongst them, the widow of a sonless Jain can legally adopt to him a son without any express or implied authority from her deceased husband to make an adoption and the adopted son may be at the time of his adoption a grown up and married man (*Sir John Edge*) SHEOKUWAR BAI v. JEORAJ. (1920) M. W. N. 627.

16 N. L. R. 170 (P. C.)

Adoption — Ceremonies — Jains — Giving and taking

In matters of adoption the Jains are governed by Hindu Law to the extent that giving and taking are sufficient to constitute a valid adoption.

In the case of Jains all that is necessary under the law to effect an adoption is that the possession of the child to be given in adoption must be made over to the adoptive parent.

In a grown up man who is adopted, his being placed near his adoptive parent would be sufficient in point of law to constitute a valid delivery of possession. The ceremony of actually placing him in the lap of his adoptive parent is not essential. (*Mitra, A. J. C. and Pridax, A. J. C.*) JIWRAJ v. SHEOKUNWARBAI.

56 I. C. 65

Adoption—Consent of Sapindas—Value of—Reasons of Sapinda—Whose consent essential—Bhandus,

Consent of the sapindas to an adoption by the widow is material as guaranteeing the propriety of the widow's action in making the adoption.

Where such consent has not been shown to have been obtained by fraud, coercion or corruption, it is sufficient authority for the adoption and the court's right to scrutinize the sapindas' reasons extend only to cases in which consent is refused, and not to cases where it is granted.

A daughter's son is not entitled to be consulted regarding an adoption by a widow who has obtained the consent of the nearest sapindas, as he is not a gnat, and Bhinna-gotra sapindas are not included under the term sapindas in the texts which require their consent to an adoption.

An upanayanam is not valid unless performed by the father or in his absence, by another kinsman in the family to which the boy concerned actually belongs. The perform-

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ance of the upanayanam in a family into which the boy is wrongly believed to have entered by invalid adoption, is a nullity and is no bar to his subsequent adoption. (*Olffield and Phillips, JJ.*) VISWASUNDARA ROW v. SUMUSUNDARA ROW. 43 Mad 876.

Adoption—Consent of sapindas—Whose consent required—Rule—Exception—Dravida school—Duty to ask for consent

Under the Matrakshara Law as administered in the Dravida country a Hindu widow, although not authorised by her husband to adopt a son to him, may nevertheless make such an adoption with the consent of his nearest sapindas.

The consent required is that of a substantial majority of those relatives nearest in relationship who are capable of forming an intelligent and honest judgment on the matter.

Save in exceptional cases, e.g., minority and lunacy, the consent of the nearest sapindas must be asked and if it is not asked it is no excuse to say they would certainly have refused, but where a sapindas is clearly proved to have withheld his consent from corrupt or malicious notions his dissent may be disregarded.

The absence of consent on the part of the nearest sapindas cannot be made good by the authorisation of more distant relatives.

(1918) 45 I. A. 225 followed (*Vise-nut Case*) ADUSUMILLI KRISTNAYYA v. ADUSUMILLI LAKSHMIPATHI. 43 Mad 650.

39 M. L. J. 70 · 28 M. L. T. 70 · 18 A. L. J. 601 : (1920) M. W. N. 385 · 24 C. W. N. 905 : 12 L. W. 625 : 46 I. A. 99 : 56 I. C. 391 (P. C.)

Adoption—Custom—Bisi chowrasi gaddiars—Originally non-Hindus—Subsequent adoption of Hinduism—Assimilation of the law of adoption. See HINDU LAW CUSTOM

5 P. L. J. 164.

Adoption—Dancing girls—Prostitution—Validity of adoption—Estoppel

An adoption by a dancing girl for purposes of prostitution does not affect the status of the adoptee.

Such an adoption cannot be validated on the ground of estoppel as an estoppel cannot be relied upon to defeat a prohibition on the ground of public policy. (*Aylng and Contts Trotter, JJ.*) KANDAYA PILAI v. CHUKKAMMAL. 28 M. L. T. 106 : 12 L. W. 7.

Adoption—Evidence of—Admissibility of affidavit filed in interlocutory proceeding—Practice—Procedure—Question put by Judge to person present in Court not cited as witness—Answer not challenged—Matter for comment. See (1919) Dig. Col. 574. GANNA BHATTULA VENKANNA v. GANNA BHATTULA VENKATARATNAMMA.

27. M. L. T. 106.

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Adoption—Existence of idiot natural son—Widow's power

The adoption of a son by a Hindu widow having a congenitally idiot natural born son is valid in law. (*Mitra and Pruleaux, A J C. Raju v. Bhimrao*, 57 I.C. 647)

Adoption—Existence of prior adopted son—Bar.

Under Hindu Law, a widow cannot adopt a son to her husband where there is in existence a son adopted by her husband. (*Macleod, C J*) *BHUJANGONDA v. BABU BALA*

44 B. 627 : 22 Bom. L.R. 817
57 I.C. 573

Adoption—Factum valet.

The doctrine of *factum valet* in Hindu Law only applies to adoptions where matters which do not affect the essence of the adoption have been disregarded. It cannot be applied to validate the adoption of an orphan. (*Prideaux, and Macnair, A.J.C.*) *SONIBAI v. DHANRAJ*

56 I.C. 620

Adoption—Factum valet—Orphan.

The adoption of an orphan is invalid under the Hindu Law and cannot be supported by the application of the doctrine of *factum valet*. 37 Mad. 529 relied on (*Ayling and Odgers, JJ.*) *BANDARU MARAYYA v. BANDARU RAMAKSHMI*

39 M.L.J. 495:

12 L.W. 613 : (1920) M.W.N. 708.

Adoption—Minor—Capacity to take Estoppel—Doctrine of if applicable.

An adoption by a minor widow of the age of 12 years who has not sufficient maturity of understanding to appreciate the nature of the transaction is invalid.

Such an adoption cannot be held valid as against the widow on the basis of a personal estoppel where she has not done anything to prejudice the rights of the adoption.

Sadasiva Aiyar, J.—There can be no estoppel where the other side knew the full facts. (*Sadasiva Iyer and Spencer, JJ.*) *SESHAYYAR v. SARASWATI AMMAL*

12 L.W. 544 : (1920) M.W.N. 721.

Adoption—Proof of—Old adoption evidence of treatment.

On a question arising as to the validity of an adoption to a person who had died in 1822 there was no direct evidence to show that the widow had authority to adopt. It was proved that the alleged adoptee had over a long course of years behaved and had been treated by others including the ancestors of the plaintiffs who now denied the adoption as adopted son. *H.L.*, that it could be inferred from established facts that the widow must have had authority to adopt was known and recognized in the law by (*Piggot and Walsh, JJ.*) *PREM DEVI v. SHAMBHU NATA*

42 All. 382 : 18 A.L.J. 474.

Adoption—Rights of adopted son against father and subsequently born aurasa son—Partition—Shares.

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In a partition between the father, his *aurasa* son and a son adopted before the birth of the *aurasa* son, the adopted son is entitled to one ninth share, the father and the *aurasa* son being each entitled to a four ninths share of the family properties.

The rule of *Vashta* is applicable in all cases of partition of patrimony *inter se* between the members of the joint family, the adopted son taking in such cases only a limited share.

In a case of collateral succession, the share of the adopted son is as extended as that of a natural born son.

Case Law on the subject and the texts of Hindu Law discussed. (*Sishagiri Aiyar and Moore, JJ.*) *VENKAMAMIDI BALAKRISHNAYYA v. VEKAMAMIDI VENKATY TRIAMBAKAM*.

43 Mad. 398 : 38 M.L.J. 86 :
27 M.L.T. 142 : 11 L.W. 379 :
55 I.C. 371.

Adoption—Rights of adopted son—Disposition by husband's will—Provisions of will intended to take effect after adoption.

Where a Hindu testator provided by his will that his senior widow should adopt a boy after his death and that if after such adoption disagreement should arise between his junior widow on the one side and the senior widow and adopted son on the other side the junior widow should be given 15 acres absolutely and both the adoption and disagreement took place accordingly.

Held, in a suit by the junior widow for the recovery of the 15 acres.

(1) that in the absence of any agreement with the natural father at the time of adoption that it was to be subject to a liability to give 15 acres to the junior widow the latter was not entitled to recover ; 27 Mad. 597 distinguished ; and (2) that her right to sue for maintenance and residence however remained unaffected.

A son adopted to a deceased Hindu stands in the same position as if he was his posthumous son.

43 Bom. 778 foll.

A Hindu has no such power of alienation over ancestral properties as would affect the rights of his adopted son unless the alienation was made for necessity and an attempted alienation by will to take effect on a certain contingency expected to occur after an adopted son comes into existence subsequent to the death of the testator is therefore invalid. (*Sadasiva Aiyar and Spencer, JJ.*) *BHYRI APPAMMA v. BHYRI CHINNAMMI*.

12 L.W. 17 : 58 I.C. 511.

Adoption—Right of adopted son—Stepmother—Co-wives of adopter—Relationship of adopted son.

Where a man takes a son in adoption after the death of his first wife, the adopted son becomes a step-brother of a daughter by the first wife. The adopted son becomes the full son, of the wife joining in the adoption and the

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step-son of the other. (*Walmsley and Huda, JJ.*) **SRIMATI GUNAMANI DASSI v. DEVI PROSANNA ROY.** 54 I. C. 897

Adoption—Rights of adopted—Subsequently born natural son—Agreement between adopter and father of adopted—Validity of.

R, a Dayabhaga Hindu, took in adoption a son of N with whom he entered into an agreement whereby it was stipulated that the adopted son would become entitled to all R's properties, moveable and immoveable, and to perform the services of the idols and all rites and ceremonies in connection with paternal and maternal ancestors. The agreement further provided that in case a son should be subsequently born to him both would be equally entitled to all the aforesaid moveable and immoveable properties which might be left by him. A son having been subsequently born:

Held—that by the agreement R intended that the adopted son and the natural born son should inherit both the debutter and the secular properties of R in equal shares. (*Sir John Edge J Asstt. MOHAN GHOSH MOULIK v. NIRODE MOHAN ROY GHOSH MOULIK.*

24 C W N. 794 : (1920) M. W. N. 541 : 12 L. W. 556 : 47 I. A. 140 (P.C.)

Adoption—Rights of on adoption.

Although the adoption of a sister's son's son may amount to a breach of caste custom, it is nevertheless legal and valid. An adopted son succeeds to an occupancy right and he is not liable to ejection as a non-occupancy tenant (*Ferrand M. and Harrison, J.*) **SHEOPUJAN RAI v. MANOJ GIR.** 56 I. C. 562,

Adoption—Who can be adopted—Brother's daughter's son—Validity of—Kshatriyas of South Kanara—Singas.

The adoption of a brother's daughter's son is allowed by custom among the members of the community of Singas, presumably of impure Kshatriya caste, who originally migrated from Rajputana and remained settled in South Kanara for a very long time. 4 Bom. L. R. 160 ; 27 C. L. J. 119 and 36 Bom. 533 ref. (*Sadasica Aiyar and Spencer, JJ.*) **SOORATHA SINGA v. KANAKA SINGA.**

43 Mad. 867 : 12 L. W. 245 : (1920) M. W. N. 528 : 59 I. C. 585.

Adoption—Who can adopt wife of lunatic.

Under Hindu law, the wife of a lunatic cannot make a valid adoption (*Macleod, C. J. and Fawcett, J.*) **RAMKRISHNA v. LAXMI NARAYAN.**

22 Bom. L. R. 1181.

Adoption—Widow—Authority.

A Hindu died in union with his nephew who also died leaving him surviving a widow. Thereupon the former's widow adopted a son.

Held, that the adoption was invalid.

The widow of a deceased co-parcener of a joint Hindu family cannot, in the absence of

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any specific authority make an adoption subsequent to the death of a co-parcener who survived her husband; and more particularly when that latter surviving co-parcener has left a widow (*MacLeod, C. J. and Heaton, J.*) **THAKARANA TEJRANI v. SRUPCHAND**

44 Bom. 483 : 22 Bom. L. R. 209 : 55 I. C. 964

Adoption—Widow—Consent of coparcener—Joint family—Adoption without consent—Rights of adopted son.

Under Hindu law, the widow of a co-parcener cannot adopt unless she has either the express authority of her husband or the consent of her husband's co-parceners. If she otherwise adopts such adopted son cannot claim to be entitled to the self-acquired property of his adoptive father. (*MacLeod, C. J. and Fawcett, J.*) **PANDU KRISHNA JADHAV v. DHONDI KRISHNA PATIL.**

22 Bom. L. R. 1403.

Adoption—Widow—Co-widows—Preferential right—Adoption with consent.

P, a Hindu, had a son who died during his life-time leaving two widows. The junior widow had a son who died before attaining the age of ceremonial competence. P adopted the plaintiff as his son. Later on, the mother of the boy who had died a minor, adopted defendant No. 11 with the consent of her father-in-law, P. The plaintiff having sued to declare that the adoption of defendant No. 11 was invalid:

Held, that the adoption of the defendant No. 11 was valid.

The preferential right of the senior widow to make an adoption exists when the widows inherit the property of their husband, that is, when the husband is a separated member of the family. Even then it is subject to any authority given by the husband to the junior widow to adopt or any express or implied prohibition by the husband against the senior widow.

The doctrine of the preferential right of the senior widow to adopt cannot be extended to a case where the husband dies in union with his father, and where the widow can adopt if at all, with the consent of her father-in-law. (*Shah and Crump, JJ.*) **DNYANU PANDU CHAVAN v. TANU BALARAM CHAVAN.**

44 Bom. 508 : 22 Bom. L. R. 890 : 57 I. C. 113.

Adoption—Widow—Limits of her power—Son dying separate and issueless—Power to adopt.

A Hindu died in union with his brothers leaving a widow and a minor son. The minor son became divided in interest from his uncles and then died unmarried. The widow next adopted plff. A question having arisen whether the adoption was valid:

Held, that the widow was competent to make the adoption even without the consent of her husband's brothers.

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Per Macleod, C. J.—The rights of rever-sioners are not vested so that her adoption of plif. was not derogatory of any vested right. That and the condition that the son's estate has not vested first in some other than herself are the only two conditions which stand in the way of the widow's right to adopt even if her husband died in union. (*Macleod, C. J. and Heaton, J.*) **MALLAPPA BHARMAPPA v. HANMAPPA MARDEPPA.** 44 Bom 297 : 22 Bom. L. R. 203 : 55 I. C. 814.

—*Adoption—Widow's power—Estate vested in surviving co-parcener*

A Hindu widow who has not the family es-tate vested in her and whose husband was not separated at the time of the adoption is com-petent to make an adoption with her huuband's authority and the consent of the senior surviving co-parcener. 41 M 998 foll (*Mitra and Prileaux, A. J. C.*) **RUSTAM RAO v. DINKARO** 55 I. C. 38

—*Adoption—Widow—Right to adopt—Not dependent on her inheriting husband's estate—Adopted son, his rights—Divesting of estate by adoption—Jivai grants—Zamindar's reversion on failure of male heir—May be divested by adoption. See (1919) Dig. Col 576 *PRATAP SINGH SHIVSINGH v. THAKOR SHRI AGAR SINGHJI RAI SINGH JI.**

27 M. L. T. 47.

—*Adoption—Widow—Unchastity if a disqualification—Sudras.*

Under the Hindu Law, in the Presidency of Bombay, among Sudras, a widow though unchaste can make a valid adoption & Beng L. R. 362, (1894) P. J. 22 d'st (*Norman Macleod, C. J. and Fawcett, J.*) **BASWANT v. MALLAPPA.** 22 Bom. L. R. 1400

—*Applicability of—Jains—Adoption.*
The Jains are of Hindu origin. They are Hindu dissenters ; and they have so generally adopted the Hindu law that the Hindu rules of adoption are applied to them, in the absence of contrary usage. (*Sir John Edge*) **SHEOKUAR-BAI v. JEORAJ.** (1920) M. W. N. 627 : 16 N. L. R. 170 : (P. C.)

—*Applicability of—Migrating family—Law applicable to*

The Hindu law must be applied generally to the cases of Jains in the absence of custom varying that law 1 All. 688; 16 Bom. 347 ; 32 All. 247 ; 5 I. A. 87 foll.

As a Hindu carries his personal law with him, the Jains do so also. The ordinary pre-supposition that a Hindu family migrating from one part of the country to another takes with it the laws and customs as to succession pre-vailing in the Province from which it comes, must be applied in the case of Jains also, unless it can be established that after migration the family conformed to the particular doctrines in vogue in its new domicile. (*Drake Brockman, J. C. and Prileaux, A. J. C.*) **MUSSAMMAT ZUNKARI v. BUDHMAL.** 57 I. C. 252.

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—*Applicability of—Migrating family—Law applicable to—Succession—Law at the time of migration*

The law of succession is in any given case to be determined according to the personal law of the individual whose succession is in question. If nothing is known about a man except that he lived in a certain place, it will be assumed that his personal law is the law that prevails in that place. But if it is known that he originally belonged to some place from whence he has migrated to another place, his personal law, which is the law of the place of his original res-dence as it was when he left, must be determined unless it can be shown that he has renounced his original law in favour of the law of the place to which he migrated.

According to the Hindu Law as expounded by the Mayu'dha school in the Bombay Presi-dency the daughter succeeding to her father takes an absolute estate (*Lord Dunedin*) **BAL-WANT RAO v. BAJI RAO.** 39 M. L. J. 166 :

(1920) M. W. N. 483 : 18 A. L. J. 1049 : 28 M. L. T. 157 : 12 L. W. 679 : 22 Bom. L. R. 1070 : 57 I. C. 545 : 47 I. C. 213

—*Applicability of—Migrating family—Presumption as to law applicable to—Proof of adherence to religious and social rites of the place of origin—Effect of—Brahmins and Kayasthas of Bengal—Dayabhaga Law applica-ble*

In the matter of succession, the contest was between the sister's son and the great-great grandfather's great-great grandson, the former alleging that the family was governed by the Dayabhaga School and the latter, that it migrated from Behar and adhered to the Mitakshara Law Prevaling there :-

Held, that it is well settled that a Hindu family residing in a particular province of India is presumed to be governed by the law of the place where it resides, but where a Hindu family is shown to have migrated from one place to another the presumption is that it carried w' th it the laws and customs as to success'on and family relation prevailing in the province from which it came. This pre-sumption however is rebuttable by proof that the family has adopted the law and usages of the place to which it has migrated.

The Brahmins and Kayasthas of Bengal migrated from Kanauj and originally brought with them the Mithila law; it was after their settlement in this province, that the Dayab-haga School of Hindu Law was founded by Jimutavahana about the 14th century and that is the law which now governs the Hindu population of this Presidency even though they have originally migrated from North Behar, and the defendant would have to establish not merely that the family migrated from Behar but that the migration took place after the foundation of the Bengal School of Hindu Law by the author of the Dayabhaga.

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This fundamental fact which if proved would have shifted the burden of proof from the defendant remained unestablished and the burden consequently lay upon the defendant to prove that the family was governed in matters of succession by the Mitakshara law. This burden might be discharged by proof of instances of succession consistent with the Mitakshara and inconsistent with the Dayabhaga law and to that evidence might also be given that the family had conformed to religious and social rites and usages consistent with the Mitakshara and inconsistent with the Dayabhaga law.

A Hindu family which has migrated into Bengal and has retained some of its former religious rites and ceremonies may yet be shown to have acquired a course of devolution of property in accordance with the Dayabhaga law. (*Wockrjee and Panton, JJ.*) PITAMBARA C. IANDRA SINGH v. NISHI KANTA SAH.

24 C. W. N. 215 : 31 C. L. J. 52.
55 I. C. 5.

—Applicability of—*Parbhūs migrating from Bombay—Law applicable.*

The Parbhūs of the Central Provinces who originally immigrated from the Bombay Presidency are governed by the Bombay School of Hindu Law as now known and judicially ascertained and not by that Law as it existed at the date of their immigration. (*Batten, A. J. C.*) MADHO RAO v. KESHO RAO.

55 I. C. 175

—Applicability of—*Tiyars of South Malabar.*

The Tiyars of South Malabar are governed by the Mitakshara Law as expounded by the Southern Commentators in the absence of a proved custom to the contrary. (*Sadasiva Aiyar and Spencer, JJ.*) THAIKKANDHI POKKANCHERI v. ILLIVATHUKKAL ACHUTHEN.

39 M. L. J. 427

—Caste—Right of, to own and acquire property. See C. P. CODE O. 1, R. 8.

24 C. W. N. 206.

—Custom—Proof of—Community—Non-Hindu in origin—Subsequent adoption of Hinduism—Presumption—Extent of adoption—*Basi Chowrasi Gaddidars—Marriage—Adoption—Impartiality.*

In dealing with the custom of an entire community it is of more importance to have regard to the history of the main body than to the history of less important branches.

The *Basi Chowrasi Gaddidars* are a recognised community. Probably the community was non-Hindu in origin; but the members have all now accepted Hinduism to such a degree as to raise a presumption that the community has assimilated the law of adoption and so far as the Lachmipur *Gaddi* is concerned there is no custom in it to the contrary.

It is only in the case of the Tundi, Guadan, Jbaria and Palganj *Gaddis* that the tradition

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exists that the holders of the Kharagdiha *Gaddis* were originally Rajputs. The indication there is that as a group then *gaddidars* were originally indigenous and at some time unknown accepted Hinduism.

The estates of these *gaddidars* are impartible and descend to the eldest son; but this does not show that they are non-Hindus.

The rule against marrying within the same *gotra* is not a universal rule among Hindus but it is recognised by the *Basi Chowrasi Gaddidars* inasmuch as they do not marry within certain groups (*Chapman and Atkinson, JJ.*) SHAHDEO NAKMINDAS v. KUSUM RUMARI.

5 F. L. J. 164.

—Debts—Antecedent debts—Debt antecedent to the transaction—Alienation in respect of—*Propriety of*

Out of the consideration of Rs 1,499 for a deed of mortgage Rs 700 were due to the mortgagee himself and Rs 793 were borrowed to pay off debts due by the mortgagor to others. In a suit to enforce the mortgage against the sons of the mortgagor a question arose whether the debt so created could be treated as antecedent under Hindu law:—

Held, that the object of the alienation by way of mortgage having been to pay off the antecedent debts incurred by the father prior to the mortgage, the whole debt was antecedent under Hindu Law.

There is nothing in the judgment in *Sahu Ravachandra v. Bhup Singh* which supports the contention that the antecedent debt must be due to the mortgagee himself and that the object of the alienation must be to satisfy the antecedent debt due to the alienee. If the money is borrowed on the security of a mortgage to pay off the antecedent debts, it would be an alienation in respect of antecedent debts. (*Shah and Hayward, JJ.*) PANDURANG v. BHAGWANDAS.

44 Bom. 341 : 22 Bom. L. R. 120 : 55 I. C. 544.

—Debts—Antecedent debt—Decree—Payment of, by mortgagee of properties—Liability of sons.

The grandsons of a Hindu sought to impeach a mortgage of family property effected by him, on the ground that no portion of the consideration was taken for family necessity or for the payment of antecedent debts binding on them. It was found that the mortgage was effected to pay off a decree and thus save the family property from sale. *Held*, the arrangement made for paying off the decree was for the benefit of the family and amounted to an antecedent debt which a son would be under a pious obligation to discharge.

Where a Hindu father is alive the pious obligation of his son to discharge his debts may only be contingent but such debt may still be binding on the son in consequence of that contingent obligation. (*Kanhaiya Lal, A. J. C.*) HARIHAR DAT v. MATHURA PRASAD.

57 I. C. 589.

HINDU LAW.**Debts—Antecedent debt—Meaning of.**

Where the earlier deed carried a personal liability to repay the amount borrowed and the amount secured by a subsequent deed was credited towards the payment of the earlier deed, held that since almost the entire amount of the earlier deed was borrowed to repay money debts not secured on joint family property, it was an ancestral debt.

The question of an antecedent debt becomes material only when legal necessity cannot be established and it is incorrect to hold that a party should prove that all the antecedent debts in lieu of which the deed purports to have been executed were taken for legal necessity.

The pious obligation of a son or grandson to pay off his ancestor's debts does not depend on whether the two were joint or separate in estate, because the doctrine is founded on religious considerations to which the question of jointness or separation is entirely irrelevant.

Where there is a debt which a father himself was under a pious obligation to pay, a subsequent debt incurred to repay that debt becomes an antecedent debt binding in turn on his sons.

21 O. C. p. 200 foll. 25 All. 67 and 6 M. I. A. 393 R. (*Daniels and Wazir Hasan, JJ*) RAM SARAN v. MANGAL SINGH.

23 O C 327

Debts—Antecedent debts—What are Son's liability.

A Mitakshara father as the manager of the joint-family has got the power to alienate the joint-family properties for family necessity or payment of antecedent debts. This is an exception to the general rule that no co-parcener of a Mitakshara joint-family, can without the consent of the other co-parceners, sell or mortgage such properties.

An "antecedent debt" is neither a debt which is prior in time to the father's security though not quite independent of it, nor a debt prior in time to the suit in which it was sought to be enforced, but a debt which is not only prior in time but completely apart from the security which is sought to be enforced.

Decisions on the subject reviewed. (*Coutts and Sultan Ahmad, J.*) SUKHDEO JHA v. JHAPAT KAMAT.

5 P. L. J. 120 : 1 P. L. T. 49 : (1920) Pat. 67. 54 I. C. 946

Debts—Decree debts—Liability of joint family property—Necessity, proof of. See 1919 Dig. Gol. 580. GANESH RAI v. DEO SARAN AHIR.

1920 Pat. 100.

Debts of father—Binding nature on sons—Proof of father's immorality by sons—Whether satisfied by showing father had no trade or business and his income was sufficient and that he was leading an immoral life—Appropriation of payments—Whether creditor entitled to appropriate payments without specific direction—Interest up to date and balance for portion of principal. See (1919)

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Dig. Col. 581. DHULIPALLA BUTCHAYYA v. KUPPA VENKATAKRISHNAYYA.

58 I. C. 797.

Debts—Father—Immorality—Onus of proof on sons. See HINDU LAW, JOINT FAMILY, ALIENATION.

1 P. L. T. 6

Debts—Father's personal debts—Liability of sons—Suit on mortgage by father for personal debt—Personal decree against whole ancestral properties including son's share.

In a suit against a Hindu and his sons upon a mortgage bond executed by the former the Court found the mortgagee to be not binding as such upon the sons, passed a decree for sale in respect of the father's share of the mortgaged property and declined to pass a decree under O. 34, R. 6 C. P. C. though the plaintiff had expressly prayed for it. The claims for a decree under O. 34, R. 6 was within time and the mortgage debt *qua* debt was not proved to be illegal or immoral. Held, in second appeal that the plaintiff was entitled to a conditional decree for the recovery from the mortgagor personally and from the ancestral properties of himself and his sons of any balance left in case the net proceeds of the sale of the father's share of the mortgaged property was found to be insufficient to pay the amount due to him.

A conditional decree under O. 34, R. 6 can be passed in the mortgage suit itself without waiting for the mortgaged property to be sold to ascertain if any balance would be left over.

The observations in *Sahu Ram's case* did not alter the law as to the pious obligation of a Hindu son even during his father's lifetime for a debt of the latter which is not immoral or illegal (*Oldfield and Krishnan, JJ*). KANDASAMI GOUDAN v. KUPPA MOOPAN.

43 Mad. 421 : 38 M. L. J. 203 : 11 L. W. 221 : (1920) M. W. N. 181 : 27 M. L. T. 96 : 55 I. C. 320

Debts—Father—Pious obligation—Property gone out of the family—Son's right to recover back.

There is a contingent pious obligation on the son to pay the debts of his father which he cannot repudiate unless he shows that the debt was taken for immoral purposes so that if the property has passed out of the family to pay off such an antecedent debt either under a conveyance executed by the father or under a sale held in execution of a decree for the father's debt, the son cannot recover back the property unless he can show that the obligation arising out of the antecedent debt was of a character which he was not, in any contingency, liable to discharge 20 O. C. 271 ; 21 O. C. 200 and 22 O. C. 84 foll. 43 Bom. 612 Ref. (*Stuart and Kanhaiya Lal, A. J. C.*) BHARATH SINGH v. SARSUTI SINGH.

23 O. C. 244.

Debts—Father—Sons and grandson—Liability to pay debts of father and grandfather—Money promised to bridegroom at the

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time of marriage. See HINDU LAW, MAINTENANCE. 1 P. L. T. 541.

—Debts of father-Son's liability—Execution sale.

A creditor suing a Hindu for his personal debt not tainted by immorality or illegality is entitled to include the sons of the debtor as parties to the suit and to sell the whole ancestral property including the son's share, in execution of the decree. The decision of the Privy Council in 39 A 457 : 33 M. L. J. 14 (P. C.) has not altered the previous law in this respect (*Abdur Rahim and Ayling, JJ.*) *SUBRAMANIA IYER v. SHAW WALLACE & CO.* 38 M. L. J. 402 : 12 L. W. 117 : 28 M. L. T. 107 : 58 I. C. 648

—Debts—Father—Surety debts—Liability of sons and grandsons.

A Hindu son or grandson governed by the Mitakshara Law is liable for the debt of his father or grandfather due on account of a contract of suretyship for the payment of money and which comes within the meaning of *vyaaraharika* i.e., lawful useful or customary unless the transaction is either illegal or immoral. (*Coutts and Adam, JJ.*) *BALAKRISHNA SAHAI v. SHAM SUNDAR SAHAY.* 56 I. C. 962

—Debts—High rate of interest—Necessity, proof of—Onus. See HINDU LAW, JOINT FAMILY, ALIENATION. 1 P. L. T. 6

—Debts—Money borrowed for purchasing other property—Benefit to family—Necessity—Destruction—Creditors duty to enquire.

Where joint family property was mortgaged to obtain a loan on the representation that the money was required for the purpose of purchasing certain Zemindari Property and the purchase was not an unprofitable or improvident transaction but proved beneficial to the family. Held, that the debt was incurred for the benefit of the family and was binding on all the members thereof.

In this case as a matter of fact at the date of the mortgage the purchase money had already been otherwise paid up, and no part of it remained unpaid. Held that if the creditor took reasonable care to ascertain and was satisfied that the sale was being negotiated and about to take place, and the borrowers represented to him that the money was needed for making the purchase it was not necessary for him to ascertain whether the money was actually needed for the purchase, or whether purchase money has already been paid or not. 6 M. I. A. 393 referred to. (*Bancrji and Sulaiman, JJ.*) *TULSI RAM v. TULSHI RAM.* 42 All. 559 : 18 A. L. J. 699

—Debts—Mortgage debt of father—Personal debt—Conditional decree under O. 34, R. 6 C. P. C.—Liability of ancestral property including son's share. See, HINDU LAW, DEBTS. 38 M. L. J. 205.

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—Debts—Mortgage—Necessity—Liability of sons.

A mortgage by a Hindu father of joint family property in lieu of antecedent debts and debts incurred for the benefit of the family is binding on his sons' share of the joint family property.

The payment of a prior mortgage or the consideration for the acquisition of property for the joint family are debts for which the joint family is liable (*Bancrji and Tudball, JJ.*) *ATAR SINGA v. RAGJUNATI SHAH*

55 I. C. 974.

—Debts—Promote by father or manager—Liability of other members.

In the case of a Hindu joint family carrying on agricultural business, where money is borrowed and spent on proper family purposes and promissory notes are executed as security for the loans by the father or a member of the family in managing charge of the business, the other members of the family are liable for such loans but their liability is restricted to the extent of their shares in the joint family property. (*Twoomey, C. J. Robinson, Maung Kin, and Ruileidge, JJ.*) *S. T. S. V. CHETTY v. V. N. VADANVETTY.* 12 Bur. L. T. 255 : 55 I. C. 711. (F. B.)

—Debts—Son's liability—Child *en ventra sa mere*—Rights of.

A son, who is *en ventra sa mere* at the date of an alienation, has a right to challenge the alienation if it is not for legal necessity or is otherwise not binding upon him. 26 I. C. 871 foll.

Under the Mitakshara law, the pious obligation resting upon a son to pay his father's debts cannot, during the father's lifetime, be made a ground for giving effect, as against the son, to a mortgage of joint ancestral family property executed by the father to secure a debt which is neither antecedent nor justified by legal necessity. (*Macnair, A. J. C.*) *PARASRAM v. LAKHMICIAND.* 57 I. C. 578.

—Debts—Son's liability—Unascertained sums.

Under Hindu Law, the son is under pious obligation to discharge the debts incurred by his father upon contracts or quasi contracts though the amount may not be ascertained as a debt at the time of the father's death. Where there is breach of the civil duty even though it might involve some tort or crime the sons are liable under the doctrine of pious obligation to make it good out of the family property (*Spencer and Odgers, JJ.*) *VENKATACHARULU v. MOHANA PANDA.* 39 M. L. J. 586 : (1920) M. W. N. 650 : 12 L. W. 390.

—Debts—Subsequent partition among members inter se—Liability—Form of decree.

Where a debt binding on a joint family is incurred and a suit is brought for the amount, after a partition among the coparceners, the

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creditor is entitled to a decree for the full amount due, against all the co-parceners or the joint family property in their hands and not merely to a decree against each co-parcener for the amount he is liable, as between the co-parceners. 24 Mad. 555 foll.

12 L. W. 408.

—Debts—Trading family—Manager's debts—Liability of minor members. See HINDU LAW, JOINT FAMILY, TRADE.

38 M. L. J. 55.

—Gift—Female donee—Absolute estate—No presumption.

Where a grant is made by a person governed by the Hindu Law in favour of a female there is no necessary presumption that an absolute estate is intended to be granted S. 82, of the Succession Act has no application to such a case. (*Kanhaiya Lal, A. J. C.*) CHAURAS KUNWAR v. JAGANNATH SINGH.

56 I. C. 287

—Gift—Widows—Gift to two—Tenancy in common.

Where property is given to two widows for their maintenance, they enjoy it as tenants-in-common and not as joint tenants. (*Sultan Ahmad, J. J.*) SASIBALA DASI v. CHANDRA MOHAN DUTTA.

56 I. C. 937.

—Guardianship—Minor—Member of joint family—Appointment of guardian of person.

Though a guardian of the ancestral property of a minor member of a joint Hindu family cannot be appointed, a guardian of the person of such minor can be appointed by the Court. 21 I. C. 848; 5 L. W. 374, 41 M. 561; 30 B. 152; 46 I. C. 815 Dist. (*Spencer and Bawell, J. J.*) JAMBAGATHACHI v. RAJAMANNAR SAMI.

11 L. W. 596: 57 I. C. 678.

—Guardianship—Right to—Mother—Re-marriage effect of—Paternal grandfather—Natural guardian when superseded—Right to give minor in marriage. See (1919) Dig. Col. 537. MUSSAMMAT INDU v. GHANIA.

1 Lah. 146: 1 Lah. L. J. 203.

—Hereditary office—Upadhyaya of caste—Vritti, if immoveable property—Injunction.

The plaintiff belonged to the family of the hereditary priests of the caste of the Gujarathi Patidars of Yeola, and officiated as Upadhyaya of the caste till the year 1906. About that time, disputes having arisen between members of the priestly family as to how the emoluments of the office should be distributed, the defendants who were managers of the caste settled the manner in which the emoluments of the office were to be distributed among the members of the priestly family. In 1916, the plaintiff sued for an injunction to restrain the defendants from prohibiting the plaintiff from officiating in his Vritti as Upadhyaya in the caste and from receiving the perquisites of the Vritti:—

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Held, that the hereditary office enjoyed by the plaintiff being immoveable property, he was entitled to an injunction restraining the defendants from interfering with the office; but that as acquiesced in the action of the defendants for nearly ten years, he debarred himself from seeking the protection of the court by way of injunction. (*Macleod, C. J. and Fawcett, J.*) GIRJASHANKAR DAJI BHAT v. MURALIDHAR NARAYAN CHAUDHURI.

22 Bom. L. R. 1202.

—Illegitimate daughter—Succession to mother's estate—Right of, See

22 Bom. L. R. 1306.

—Illegitimate son—No right of collateral succession. See HINDU LAW, SUCCESSION.

22 Bom. L. R. 52.

—Impartible estate—Accretions.

It is open to the owner of an impartible estate if so minded to incorporate his self-acquisitions in the Zemindari. Whether he has done so in any particular case is a question of fact. (*Wallis, C. J. and Krishnan, J.*) GURUSWAMI PANDIAN v. SENDATTI KALAI PANDIA CHINNATHAMBIAR.

39 M. L. J. 529: (1920) M. W. N. 660:

28 M. L. T. 365.

—Impartible estate—Custom—Gaddidars.

The estates of Baisi Chowrasi Gaddidars are impartible and descend to the eldest son. But this does not show that they are non-Hindus now. (*Chapman and Atkinson, J. J.*) SHAH DEO NARAIN DAS v. KUSUM KUMARI.

5 P. L. J. 164.

—Impartible estate—Evidence partibility—Succession—Custom of Primogeniture.

The question whether an estate is impartible and descends by the law of primogeniture or is subject to the ordinary Hindu law of inheritance must be decided on the facts of each case. *Held*, on the evidence in the case that the Zemindari of Munagala was an impartible estate

Per *Chief Justice*.—In the present case, there was even before the permanent settlement an hereditary property in the Zemindary to which the custom of primogeniture could attach and the permanent settlement of 1801 merely recognised and confirmed the proprietary rights of the Zemindar subject to a fixed assessment. 36 C 590 Dist, 13 M. 406 foll.

Per *Sadasiva Iyer, J.*—Whether a zemindari had an ancient origin whether it was in the nature of a military tenure, whether there has been a confiscation and re-grant, whether the Government divided the estate and re-granted it in parcels to junior members of the family or to strangers,—these and similar considerations are relevant to the determination of the question of impartibility. Of greater evidentiary value than these are the course of descent of the property for generations, the inner conviction of the members of the family as shown

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by their conduct and declarations from time to time and the admission by members of the junior branches against their own interest. (*Wallis, C. J. and Sadasiva Iyer, J.*) *Raja Keesara Venkatappaya v. Raj Nayani Venkatarama Rao.* 43 Mad. 288 38 M. L. J. 149

—Inheritance. See HINDU LAW, SUCCESSION.

—Joint family—Accounts—Execution of Joint decree against individual member—Payment by him—Suit for refund, if maintainable.

If in execution of a decree against the members of a joint family, property in the possession of one of them is attached and he deposits the decree amount in Court in order to avert the attachment and applies for its refund.

Held, that he would be entitled to a refund only if he proves that the payment was occasioned by the decree being executed against his own self-acquisition and he had no joint family properties in his hands at the time of attachment. (*Krishnan, J.*) *Muthusami Asari v. Angayakannu Asari.*

11 L. W. 115 : 54 I. C. 807.

—Joint Family—Acquisition by members—Ownership of.

Where property is acquired jointly by the members of a family, the presumption is that the property so acquired is co-parcenary. 20 W. R. 197 ; 25 Mad. 149 foll (*Drake Brockman, J. C. and Prideaux, A. J. C.*) *Mussammat Zunkari v. Budhrmal.* 57 I. C. 252.

—Joint family—Alienation—Antecedent debts—What are—Alienee need not be himself prior creditor. See HINDU LAW, DEBTS.

22 Bom. L. R. 120.

—Joint family—Alienation—Co-parcener's right of.

In the Bombay Presidency a co-parcener can alienate his share in the joint family property for consideration. (*Shah. and Hayward, J. J.*) *Pandurang Narayan v. Bajrang Wandas.* 44 Bom. 341 : 22 Bom. L. R. 120 : 55 I. C. 544

—Joint family—Alienation—Co-parcener's right.

An alienation by a co-parcener whatever it may profess to convey is valid to the extent of the alienor's own interest in the property (1917) I. L. R. 39 All 437 ; (1890) I. L. R. 18 Cal. 157 ; (1873) 12 B. L. R. 90 ; (1901) Appeal Cases 495 at 505 ; (1878) I. L. R. 5 Cal. 148 (P. C.) 3 C. P. L. R. 64 ; (1881) Appeal No 420, dated the 20th August 1881. (*Digest of Civil Rulings 1882, No. 90 Part 8*) referred to. (*Kotval, J. J.*) *Seth Kisanlal v. Nathu.*

16 N. L. R. 131 : 56 I. C. 44.

—Joint family—Alienation—Co-parcener's right—Consent of theirs if necessary.

Joint family property cannot form the subject of a gift, sale or mortgage by one co-

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parcener without the sanction express or implied of all the other co-parceners except during a "season of distress" (*Knox, J.*) *Thakurji v. Nanda Ahir.* 55 I. C. 317.

—Joint family—Alienation of coparcenary—Share of alienor passes to transferee—Decree against father alone—How far binding on son.

In a suit on a mortgage brought against the father in his representative capacity, the father represents the entire joint family and the sons cannot re-open a decree against him except on grounds personal to themselves, e.g., that the debt for which the mortgage was given was not binding on them under the Hindu Law. (*Mittra and Prideaux, A. J. C.*) *Motiram v. Ramgopal.* 16 N. L. R. 64.

—Joint family—Alienation—Debts of father—Son's suit to set aside.

Where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father, in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debts, held that his sons cannot recover that property unless they can show that the debts were contracted for immoral purposes and that the purchasers had notice that they were so contracted.

The rule laid down by the Privy Council in *Rani Sartajkuari's case* is not limited to cases where the joint family property has passed out of the hands of the family and gone into the hands of persons who were neither previous creditors when the sale is by private alienation nor judgment creditors when the sale is by public auction, and that the said rule has been affirmed in 39 A. 437 P. C. (*Wazir Hasan, J.*) *Basdeo Lal v. Maqabir.* 23 O. C. 344.

—Joint Family—Alienation by father—Duty of alienee—Enquiry—Extent of.

If an alienee from the father of a joint Hindu family makes enquiries as to the necessities of the loan and if he satisfies himself that the necessities represented exist, he is sufficiently protected.

If the necessity for the loan cannot be established by direct evidence, it may be assumed if it can be shown that reasonable care was taken to ascertain that such circumstances existed and that the transferee acted in good faith. 40 A. 171 (P.C.) foll. (*Stuart and Pandit Kanhaiya Lal, J. C.*) *Jai Narain v. Bajrang Bahadur Singh.* 56 I. C. 826.

—Joint family—Alienation by father—Suit by sons to set aside—Onus of proof—Suit to enforce security by creditor—Difference.

There is a clear distinction between a case where the sons bring a suit for setting aside alienations made by the father and recovery of possession of property which has passed into the hands of the alienee and that brought by

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the mortgagee to enforce his bond against the joint family in the former case, the sons must show the grounds on which they seek to set aside the alienation in the latter if it is the mortgagee who has to show how he claims repayment of the debt of the father. 9 All 493; 31 All 176 F. B. ref. (*Coutts and Sultan Ahmad, JJ.*) *SUKHDEO JHA v. JHAPAT KAMAT*.

5 P L J. 120 : 1 P L T 49 : (1920) Pat 67 : 54 I C 946.

—Joint Family—Alienation—Manager—Necessity—Non existence of—Alienation void and not enforceable even aganst alienor—Purchase of other property with proceeds of sale—Enjorment of profits—Estoppel. See **HINDU LAW, JOINT FAMILY, MANAGER.**

1 P L T. 533.

—Joint family—Alienation—Mortgage by father—Necessity—High rate of interest—Immorality—Onus of proof—Mortgage not for necessity—Liability of share of mortgagor

Under the Hindu law the burden of proof lies upon the sons challenging mortgages effected by their father on the ground of immorality to prove that the debts were borrowed for immoral purposes. The onus however of proving legal necessity not only for the loan but also for the high rate of interest stipulated for, lies upon the plaintiff mortgagee in the absence of proof or which the rate cannot stand. 23 C. W. N. 700, 50 I. C. 434 foll.

Where the mortgagee fails to prove justifying necessity no decree can be passed even against the share of the karta executant the transaction being void altogether. 39 All 500 foll. (*Lord Phillimore*) *MANNA LAL v. KARU SINGH*.

1 P. L. T. 6 : 56 I C. 766. (P.C.)

—Joint family—Alienation—Necessity—Subsequent consent—Effect of See (1919) *Dig. Col. 593. PREM SUKJ DAS v. RAM BHUJHAWAN MAHTO.*

1 P. L. T. 34.

—Joint family—Alienation—Specific lands by coparcener—Vendee selling the lands—Suit for partition equity.

The first defendant brought certain specific lands from a Hindu co-parcener. In a suit for partition by the other co-parceners, other lands were allotted to the 1st defendant's vendor and during the suit for partition, 1st defendant sold the specific items conveyed to him by the plaintiff. In a suit by the plaintiff against the 1st defendant to have some other lands of the 1st defendant substituted for the items originally sold.

Held, that the plaintiff could only obtain damages for defect of title and that the principle of 38 Mad. 309 did not apply. 45 Mad. 309: referred to: (*Abilur Rahim and Okfield, JJ.*) *DHADA SAIB v. MUHAMMAD SULTAN SAHIB.*

39 M. L J 706 : 12 L. W. 603 : (1920) M. W. N. 710.

—Joint family—Ancestral property—Bequest by father in favour of son—Property answerable in son's hands. See (1919) *Dig.*

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Col. 594 INDOJI JITTAJI v. KOTHAPALLI RAMACHARLU.

**54 I C 146 ;
27 M. L T 245.**

—Joint family—Ancestral property—Inheritance from collateral—Liability for debts of father

Under the Hindu Law property acquired by inheritance from a collateral relation is not ancestral property.

Joint family property may be sold or charged by the father in order to discharge an antecedent debt i. e., a debt incurred not only prior to the date of the sale or charge but incurred wholly apart from the ownership of the Joint estate or the security afforded or supposed to be afforded by it. Where joint family property is thus sold or mortgaged, no question arises as to whether the antecedent debt was incurred for legal necessity or for other purposes binding upon the sons or as to whether the transaction entered into by the father is enforceable against the sons during his lifetime. 39 A. 437 (P. C.) Ref (*Lindsay, J. C.*) *PUDAI RAM v. BAIJNATH LAL*

23 O. C. 264 : 56 I. C. 745.

—Joint family—Co-parcener—Execution sale of Co-parcener's share in specific items of the joint family property—Allotment of some other properties to Co-parcener at a family partition—Rights of auction purchaser against substituted properties. See (1919) *Dig. Col. 595. SABAPATHI PILLAI v. THANDAVA RAYAODAYAR.*

43 Mad 309 : 11 L. W. 108 : 54 I. C 515.

—Joint family—Co-parceners—Rights of—Exclusion—Cultivable holding.

The rights of a tenant under the Central Provinces Tenancy Act are joint family property. Where a holding is joint family property, the interest in it of a member of the family will continue to exist unless it is extinguished by his ceasing to be a co-parcener in the joint family. The mere fact of his taking no part in the cultivation or payment of rent or receipt of profits of holding for more than 12 years will not terminate it. (*Halifax, A. J. C.*) *SUKA v. MUSSAMMAT RAKHI.*

57 I. C. 339.

—Joint Family—Family trade liability of minor members—Extent of.

There is no presumption that a Hindu family has any joint property or that a business carried on by a co-parcener is a family business. 33 A. 677 ; foll. If a plaintiff seeks to impose a minor in a joint family any liability as a member of a family partnership it is for him to show how the minor's liability arises. 27 B. 157 ; 4 Bom. fol.

A minor member of a joint family upon whom an ancestral trade had descended is bound by all acts of the manager or the adult members acting as managers which are necessarily incidental to and flowing out of the carrying on of that trade. But where a business is

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not ancestral, a minor member is not necessarily interested in a business carried on by the major members of the joint family to which he belongs.

A minor member of a joint family cannot become a partner in an ancestral business unless on attaining full age he takes active steps to be recognised as such.

26 C. 340 ; 29 A. 176 ; 37 B. 340 ; foll

A minor member of a joint family firm can only be liable to the extent of the assets of the business *i. e.*, the property which has been used by the family for the purpose or which has been acquired therefrom. (*Drake Brockman and Findlay, A. J. C.*) *PADAMRAJ v. GOPIKISAN.*

56 I. C. 129.

—Joint family—Father—Compromise by—Binding on sons.

A compromise, which is entered into by a Hindu father with regard to ancestral property for the purpose of avoiding an existing or even possible litigation and which is in the nature of a family settlement is in the absence of fraud, collusion, undue influence or other like reason binding on his sons (*Lyle and Ashworth A. J. C.*) *GANDHARPSINGH v. NIRMAL SINGH.*

22 O. C. 300 : 54 I. C. 325.

—Joint family—Father Decree against Execution sale of entire family property

The decision of the Privy Council in *Sahu Ram Chandra's case* 44 I. A. 126 P. C. has not overruled the long line of cases according to which a creditor who has obtained a personal decree for money against a Mitakshara father is entitled to levy execution against the entirety of the joint family property.

"Antecedent debt" does not mean a debt incurred by the father before the birth of a son (*Richardson and Shamsul Huda, JJ.*) *MADHUSUDAN DAS MOHANT v. ISWARI DAYI DEBI.*

24 C. W. N. 949.

—Joint family—Father—Power to appoint testamentary guardian.

A Hindu father has, under the Hindu law, power to appoint by will a guardian of the property of his minor son, (*Mcars, C. J. and Sulaiman, J.*) *DEBA NAND v. ANANDMANI.*

18 A. L. J. 1127.

—Joint family—Father—Sale by father including son's share—Legal necessity—Sons not entitled to pre-empt. See PRE-EMPTION.

18 A. L. J. 116

—Joint family—Father—Suit for specific performance against—Death of father—Liability of sons to convey See SP REL. ACT. S 27 ILLN (2).

22 Bom. L. R. 997.

—Joint Family—Father—Will—Arrangement for maintenance.

A will made by a Hindu father who is joint with his infant son, bequeathing certain family properties to his widow for her maintenance is invalid and inoperative as against the son, although it would have been a proper provision if made by the father during his lifetime. 40

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Mad 1122 d'st. (*Wallis, C. J. and Krishnan, J.*) *SUBBAKAMI REDDI v. RAMAMMA.*

43 Mad 824

—Joint family—Inheritance—Unchastity of mother before death of son whether precludes her from inheriting son's estate—Dayabhaga Law See (1919) *Dig. Col.* 590. *TRAILOKYA NATA NATH v. RADHASUNDARI DEBI.*

55 I. C. 704.

—Joint family—Manager—Alienation—Necessity—Minors how far bound—Mortgage without necessity—Enforceability of—Suit beyond six years—Personal decree barred—Estoppel—Enjoyment of proceeds.

Actual compelling necessity is not the sole test of the validity of a conveyance or mortgage of the family estate by the karta or manager, acting without the express consent of the other members. If without necessity in the ordinary sense of the term, it can be shown that the transaction was one, which was clearly beneficial to the interest of the family as a whole, the transaction will be upheld. In either case, however, the onus is upon the alienee or mortgagee to prove that the transaction was for the interest of the family as being either necessary or beneficial.

All transactions of a purely speculative nature would not be beneficial. But each case must be examined in the light of the facts proved and the surrounding circumstances. The mere fact that money is borrowed to enable the manager to purchase immovable property on behalf of the family does not in itself create any presumption that the transaction was beneficial to the family. Some necessity for the transaction or some benefit resulting to the family therefrom must in all such cases be clearly shown.

6 M. I. A. 303 ; 44 I. C. 605 ; 42 I. C. 670 foll.

The mere fact that the sum borrowed was spent in acquiring property and that the members of the joint family enjoyed the produce of that property cannot be considered to establish benefit to the family and the members are not estopped from contesting the validity of the mortgage. Where it is open to both parties to produce evidence concerning the existence or non-existence of a particular fact, the party upon whom the burden of proving the fact lies, does not discharge that burden by showing that the other side could equally well have proved the contrary.

21 C. W. N. 761 dist.

A mortgage of the joint family property by its karta unless necessity or an antecedent debt is proved is void and not enforceable against the share of the mortgagor. 1 P. L. T. 511 : 39 All. 500 ; 40 All. 171 ; 1 P. L. T. 6 followed.

•S. 65 of the Contract Act is not applicable to a mortgage, which becomes unenforceable because it is proved to be without legal necessity and not beneficial to the family and the suit having been filed beyond 6 years, a money decree against the mortgagor has become

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barred (*Dawson Miller, C. J. and Mullick, J.*)
RAM BILAS SINGH v. RAMYAD SINGH.

1 P. L. T. 285 : 55 I. C. 24

—Joint family—Manager—Administration—Power to sell—Third party, whether can question the authority of manager to sell. See (1919) *Dig. Col.* 599. *DURGA PRASAD v. BHAJAN.*

58 I. C. 487.

—Joint family — Manager—Debts—Liability of ancestral property—Property devised to sons—liability—Creditor—Bona fide enquiry.

B, a Hindu governed by the Mitakshara law, devised his properties which were self-acquired by a Will whereby he provided that each of his sons was to live in joint mess with his brothers up to the age of twenty-five when the share of each would fully belong to him in title after vesting absolutely "in his sons and grandsons, etc." During the minority of his brothers, J, the eldest son of B, borrowed from his brothers represented by guardian a sum of money with the permission of the District Judge for purchasing a residential house. Subsequently a decree was obtained against J for the money and in order to get a stay of the execution of the decree in terms of the order of the High Court J executed a security bond charging his properties including his share of Tankhas granted by the Maharaja of Burdwan:

Held, per *Richardson, J., and Shamsul Huda, J.*, *dubitante*, that the money was lent and borrowed for a legitimate family purpose and the decree could be executed against the entire co-parcenary interest in the property.

If the order of the District Judge was not conclusive to show that the money was required for a legitimate family purpose, it at least entitled the lenders to the consideration due to bona fide creditors. They were not affected directly or indirectly by the antecedent or subsequent mismanagement of his estate by J.

When the creditor lends his money on a representation made by the father that the course which he proposes to take, a course not unreasonable or irrational in itself, is calculated in the circumstances to promote the interests of his family, the creditor ought not to suffer because owing to the subsequent misconduct of the father things in fact turn out badly.

The decision of the Judicial Committee in *Sahu Ram Chandra's case* L. R. 44 I. A. 126 does not prevent a creditor levying execution on the family property to satisfy a decree for money against the father personally.

The decree against, J, being for an antecedent debt not incurred for an illegal or immoral purpose, there was nothing to prevent the security bond from being enforced against the whole co-parcenary interest.

It is open to a Mitakshara father to devise self-acquired property to a son so that it will be ancestral in the hands of the son.

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The testator intended each of his sons to take his share as ancestral property and the properties in the present case must be regarded as ancestral properties in the hands of J.

Tankhas are heritable allowances in the nature of property and therefore assignable. (*Richardson and Shamsul Huda, JJ.*) *LALA MUKTI PROKASH NANDE v. SRIMATI ISWARI DEI DEBI.*

24 C. W. N. 938:
57 I. C. 858.

—Joint family — Manager — Gift — Testamentary gift.

Whatever power the Karta of a joint Hindu family may have of making a gift *inter vivos*, he has no power to make a bequest of any portion of the joint family property to take effect, after his death. 8 M. H. C. R 6; 5 Cal. 148; 16 Mad. 333; 5 Bom. 48. Ref; and foll (*Mears, C. J. Banerji, and Piggot, JJ.*) *LALTA PRASAD v. SRI MAHADEOJI BIRAJMAN TEMPLE*

42 All. 461. 18 A. L. J. 503 :
58 I. C. 667.

—Joint family—Manager—Money borrowed by manager of joint family at high rate of interest—Legal necessity—Necessity for exceptional terms—Burden of proof. See (1919) *Dig. Col.* 601. *NAWAB NAZIR BEGAM v. RAO RAGHUNATH SINGH.*

11 L. W. 188.

—Joint family—Manager—Mortgage by manager—No necessity.

A mortgage by one member of a joint Hindu family of property belonging to the family is not void altogether but is voidable at the instance of the persons whose rights are invaded by it. (*Lindsay, J. C.*) *SHAMBHU v. NAND KUMAR.*

23 O. C. 284 : 58 I. C. 963.

—Joint Family—Manager—Partnership with strangers—Rights of other members of the family.

Where the managing member of a joint Hindu family enters into partnership transactions with a firm, and it is not established by evidence that he did so in a representative capacity or held himself out to the firm as being the head of a joint family, the joint family as a whole does not become a partner; and the partnership comes to an end with his death. 41 Mad. 454; 30 M. L. J. 241; and 31 I. C. 45 Ref. (*Piggot and Ryves, JJ.*) *KHARIDAR KAPRA COMPANY LTD. v. DAYA KISHEN.*

18 A. L. J. 937 : 58 I. C. 765.

—Joint family—Manager—Power of Test of the binding character of a transaction—Liability of other members.

The manager of a joint family has an implied authority to do whatever is best for all concerned and the test in each case is was it a transaction into which a prudent owner would enter in order to benefit the estate.

The manager of a joint Hindu family may embark in money lending business in the ordinary course of management and for that purpose sell a property which brings no income.

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to the family. But the shebait of an idol may not do so, such an act unless empowered by the terms of the endowment cannot be said to be in the ordinary course of management of the debutter property, and must therefore amount to a breach of trust 39 All. 437; 40 Mad. 709; 43 Cal. 707; Ref.

The manager of a joint family has no authority whatever to affect or dispose of any portion of joint family property in order to enable him to embark on speculative transactions, but the mortgagee is not bound to satisfy the Court in each case that the transaction was bound to benefit the joint family. There is a certain element of risk in every business transaction and if it be held when the business has succeeded and the entire family has benefited by it that the mortgage should not be upheld unless the mortgagee satisfies the Court that the business was bound to succeed and that benefit was bound to accrue to the family, the managers of joint Hindu families would be handicapped and a limitation would be put on their powers which would have the effect of stopping all business transactions in every Mitakshara family.

There is no ground for holding that, under Hindu law a son is not bound to pay the commercial debts of his father. 39 C. 862 Ref.

Where a mortgage was executed by the manager of a joint Hindu family in order to pay for the premium of a lease of 3,000 bighas of Khudkasht land and there was every probability that the transaction would be a profitable one for the joint family, it was held that the transaction was binding on the joint family. (*Das and Adami, JJ.*) *SHEOTAHAL SINGH v. ARJUN DAS.* 1920 Pat. 155 : 1 P. L. T. 136 : 56 I. C. 879

Joint family—Manager—Property standing in the name of manager—Presumption—Entry in record of rights—Effect of—Enquiry by purchaser—Extent of estoppel—Plea of—Evidence Act, S. 115—T.P. Act, S. 41.

The presumption of Hindu Law that the properties are joint family properties cannot be rebutted by the mere fact the name of only the karta is entered in the survey records and the rent receipts or a mere assertion of separation the properties remaining joint. The right, title and interest of the members of a Hindu joint family cannot be extinguished except by a partition or by adverse possession.

A plea of estoppel must be precise and indefinite allegations are immaterial.

In order to bind a person who is alleged to have been present at the time of the execution of a mortgage which includes his property also it must be proved that the document was read over to him and that he understood that his share was also going to be disposed of or that he in any way led the mortgagee to believe that the executant was the sole owner of the properties mortgaged and not he,

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The mere attestation of a deed is not sufficient to estop the attesting person from claiming his title unless it is satisfactorily established that he had full apprehension and knowledge of the contents and terms of the document which he attested and that in some way or other it was signed with a view to affect his interest in the properties in suit. 44 Cal. 186; 42 Cal. 876; 3 C. W. N. 207 followed.

S. 115 of the Evidence Act does not apply where there is no act, declaration or omission on the part of any person, on the faith of which another person advanced money to the former's uncle believing him to be the sole owner of the properties mortgaged to him.

S. 41 of the T. P. Act also does not apply when the name of P's uncle K, who was the karta of the joint family was recorded in the survey papers particularly when the mortgagee was a neighbour and had previous transactions with the family of K.

23 All. 442 Referred to.

The first condition of S. 41 is that the transfer must be by the ostensible owner with the consent of the person interested in it.

Dealing with a Hindu family governed by the Mitakshara Law, a creditor cannot content himself with entries in the Collectorate registers or in the survey papers. He must enquire as to whether and how far the other members are interested in it, and *prima facie* the presumption will be that they are so interested. This fact in itself put a creditor on inquiry as to the title of the person so recorded with respect to the properties he is dealing with.

12 I. C. 858 Ref.

A mortgagee who is a neighbour and has previous dealings with the family is charged not with inquiry only but with notice and knowledge of the title of the other members in the properties in suit.

18 W. R. 165 P. C. Ref.

The possession of title deeds is evidence of title under S. 114 Evidence Act.

26 All. 490. 23 All. 442 explained.

S. 41 T. P. Act is an exception to the general rule that a person cannot convey a better title than he himself has in the property. The conditions set forth in that section must therefore be strictly complied with. Under the proviso to S. 41 a transferee must show that after taking reasonable care to ascertain that the transferor had power to make the transfer he acted in good faith.

The care required to be taken under this proviso is one that is expected of an ordinary prudent man of business. It is a question of fact and depends upon the circumstances of each case—a refusal to inquire into the possession of title deeds and to rest content with the entry in the record of rights gives no protection to the transferee.

(1894) 1 Ch. 26 ; (1854) 4 De : G. M. and G 490 ; Re

(1871) 7 Ch. Ap. 75 diss.

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The record of rights is not a document of title. It is simply found upon possession and the entries in such documents do not prove exclusive title or the person recorded.

(1916) 2 P. L. J. 124; (1918) 3 P. L. J. 561; (1906) 21 C. W. N. 18 relied upon (*Dawson Miller, C. J. and Mullick, J.*) *KANHU LAL MARWARI v. PAUL SAHU*. 5 P. L. J. 521: 1 P. L. T. 546: (1920) Pat. 305: 57 I. C. 353.

Joint family—Mortgage by one member for private purposes—No family necessity—Mortgagee—Rights of—Charge against mortgagor's share.

A mortgage of the whole or a share of the joint family property or a Mitakshara family, unless justified by legal necessity or by an antecedent debt, or assented to by the other members of the family is void and inoperative as against the property hypothecated and gives the mortgagee no rights even against the mortgagor's undivided share.

Where, however, the mortgagor's share has been separated from that of the other members of the family an actual partition by metes and bounds not being essential for this purpose or where the share has by legal process been attached or sold at the instance of the creditor, it may become available as security for the mortgage-debt.

In special circumstances where the property has already passed into the hands of the mortgagee the Court is satisfied that the equities of the case require it may in its discretion set aside the alienation upon the terms that the property when restored shall be held separate, the share of the mortgagor being subject to a lien for the mortgage-debt and interest (*Dawson Miller and Mullick, J.J.*) *AMAR DAYAL SINGH v. HARA PRASAD SAHU*.

5 Pat. L. J. 605: 1 P. L. T. 511: 58 I. C. 72.

Joint family—Partition—Unilateral declaration—Communication necessary—Meie demand, if effects severance. See (1919) Dig. Col. 603. INDOJI JITHAJI v. KATHAPALLI RAMA CHARLU. 27 M. L. T. 245: 54 I. C. 146

Joint family property—Forfeiture on non-payment of assessment—Sale by Government. Purchase by a coparcener on his account—Self-acquisition.

Where land forming part of joint family property is sold by the revenue authorities on account of arrears of revenue and purchased by a member of the family out of his self acquisitions, the land does not revert to the joint family, but becomes the private property of the purchaser. (*MacLeod, C. J. and Fawcett, J.*) *CHOKHU v. TATYA*. 22 Bom. L. R. 1287.

Joint family—Reference to arbitration by two members—Family if bound.

Two out of 3 members of a Hindu Joint family cannot bind the family property by referring to arbitration a claim made by a third

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party against the joint family properties. (*Abdur Rahim and Oldfield, J.J.*) *BHUMIREDDI SURANNA v. BHUMIREDDI APPADU*

12 L. W. 668.

Joint family—Self-acquisition.

Property acquired under a grant from government's self-acquired unless it is merely the restoration of a confiscated grant intended for the benefit of the family (*Sultan Ahmed, J.J.*) *SASIBALA DASI v. CHANDRA MOHAN DUTTA*

56 I. C. 937.

Joint family—Trade—Debts of manager—Liability of minor members—Extent of.

In the case of trading families like Komati-Chetties, if moneys are borrowed for the purpose of an ancestral business carried on by the members of the joint family, all the members of the family, including minors are liable for the repayment of such sums, to the extent of their share in whole family property including the assets of the business. 6 L. W. 417 and 3 L. W. 341; 34 Mad. 692; 21 M. L. J. 508 *d.s.t.* (*Abdur Rahim, O. C. J. and Odgers, J.*) *THAMANNA CHINNA LAKSHMI NARASIMHAN v. AKARAPU VENKANNI CHINNAH*.

38 M. L. J. 55: 11 L. W. 55: 27 M. L. T. 83: (1920) M. W. N. 112: 55 I. C. 64

Joint family—Trade—Members of family if members of firm—Presumption.

There is no presumption that a business carried on by a member of a joint Hindu family is a joint family business.

The burden of proving that a certain member of a joint Hindu family joined a firm not in his individual capacity but as a representative of the whole family, is on the party who alleges it. 18 Ind. Cas. 740; 18 Ind. Cas. 701; (*Scott-Smith and Abdul Raoof J.J.*) *SANT RAM v. KIDAR NATH*.

56 I. C. 469

Joint family—Will—Subsequent birth of son.

Where the head of a Hindu family governed by the Mitakshara Law makes a will, the subsequent birth of a son, who thereupon becomes a co-parcener in the family estate, has the effect of rendering the will inoperative and absolutely void and not merely voidable. (*Mitra and Prideaux, A. J. C.*) *GULABDAS v. DHARMIN BAL*.

55 I. C. 996.

Maintenance—Agreement to maintain son-in-law—Enforceability against sons and grandsons.

Where G. agreed to pay certain allowance for the maintenance of R, who married the daughter of G. and G., having died, his ancestral properties came into possession of his sons and grandsons as heirs and survivors and R obtained decrees against G's sons and realized certain sums, and the grandsons of G. brought the present suit for declaration that the agreement and the decrees were not binding upon them.

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Held, that the agreement made by G. was in no sense a marriage brokerage contract and it is not contrary to Hindu Law to make a grant to a bridegroom on the occasion of his marriage. 22 Mad. 113; 15 C. W. N. 201 applied.

The debt incurred by G being not immoral, his sons and grandsons were liable to discharge it out of the ancestral property which devolved upon them. 22 All. 326 dist.

The liability of the grandsons is co-extensive with that of the sons, and a decree having been passed against G's sons, the grandsons incurred a fresh liability as Hindu sons. (*Dawson, Miller, C. J. and Mullick, J.*) MADHUSUDAN PRASAD SINGH v. RAMJI DAS.

5 P. L. J. 516: 1 P. L. T. 541: 57 I. C. 341

—Maintenance—Daughter—Right of—Sale in execution of decree against father—Rights of purchaser.

The rule of Hindu Law that in the administration of a Hindu's estate binding debts would take precedence over mere claims for maintenance or residence on the part of the female members of family is limited in its application only so long as the two obligations are both not made charges on the property. If either of them assumes that shape, then it would take precedence over the other. (*Oldfield and Sesagiri Iyer, J.J.*) SOMASUNDARAM CHETTI v. UNNAMALAI ANMAL. (1920) M. W. N. 458.

—Maintenance—Grant for—Government revenue—Covenant to pay—Charge.

In 1864, B, the Talukdar of certain villages granted to L a junior member of the family, certain specific villages in lieu of maintenance and it was agreed between the grantor and the grantee that the Talukdar should pay the whole revenue, the grantee enjoying the villages given to him revenue free. In 1910 by an arbitration award the then Talukdar K was directed to give to his two uncles S and R certain villages for exclusive enjoyment subject to the liability of each paying a certain specified share towards the payment of the Government revenue by K. The descendants of L, thereupon apprehending that these and other alienations by the Talukdar may affect the latter's ability to pay the revenue due on account of the villages granted to L, sued K, S and R praying that the revenue payable on account of the villages granted to L be declared a charge upon the rest of the Taluka:

Held, that under the arrangement of 1864, B undertook a personal liability to pay the revenue of the villages granted to L and it was not intended to charge the remainder of the taluk with such obligation.

In the absence of any allegation in the plaint that K had not ample property to carry out his undertaking there was no cause of action for the suit.

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Any transferee from the Talukdar took subject to the rights created by him. (*Mr. Ameer Ali, Sunderlal v. Ramjilal.*)

24 C. W. N. 929: 16 N. L. R. 114: (1920) M. W. N. 447: 28 M. L. T. 319: 47 I. A. 149. (P. C.)

—Maintenance—Married daughter—Right to sell property of father.

Quaere: Whether a married daughter is entitled to dispose of the inheritance derived from her father's estate for the purpose of her own maintenance. (*Abdur Rahim and Moore, J.J.*) SHANMUGHA VELAYUDHAN CHETTI v. KOYAPPAN CHETTIAR. (1920) M. W. N. 879.

—Maintenance—Nature of widow's right—Decree or arrangement creating charge—Liability of heirs for maintenance.

A claim for maintenance by a female member of a joint family is a personal claim against members of the family. It can only be made a charge on the family property by an order of the Court or by a properly executed document.

The transferee of joint property from the properly authorised member of a Joint family takes that property free of any claims to maintenance by family.

When a person who is personally bound as heir to maintain a widow is allowed by the Court to recover property from the widow he must in equity secure the widow's right to maintenance. (*Macleod, C. J.*) PARVATI DEVANNA v. SHRINIVAS. (1920) M. W. N. 458.

22 Bom. L. R. 110: 55 I. C. 581.

—Maintenance, right to—Impartible estate—Junior members of the family of holder—Whether they have a right to be maintained out of the estate—Custom—Burden of proof. See (1919) Dig. Col. 608 VIKRAMA DEO v. VIKRAMA DEO.

24 C. W. N. 226.

—Maintenance—Right to—Varies according to circumstances.

A right to maintenance is a recurring right, accruing from day to day. It may be extinguished or modified by a change of circumstances. (*Mookerjee and Panton, J.J.*) RATNAMALA DASI v. KAMAKSHYA NATH SEN.

31 C. L. J. 351: 57 I. C. 9.

—Maintenance—Sisters unmarricd—Right of residence in family house.

The unmarried sisters of a Hindu are entitled to residence in the family dwelling house until they are married and if the house be sold in execution of a decree for debts incurred by him or his legal representatives they can resist the auction-purchaser from ousting them out of the portions in their actual occupations. 12 W. R. 55; 6 Mad. 130; 12 Mad. 260; 27 Mad. 45 Ref. (*Wallis, C. J. and Sadasiva Aiyar, J.*) SURYA NARAYANA RAO NAIDU v. BALASUBRAMANIA MUDALLI. 43 Mad. 635: 38 M. L. J. 433:

11 L. W. 409: 56 I. C. 524.

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—Maintenance—Widow's right—*Bona fide purchaser for value*—Right to follow property

The right of a Hindu widow to maintenance is not a charge upon the estate of her deceased husband, unless and until it is fixed and charged upon the estate by a decree or by agreement, and if such estate has been alienated and is in the hands of a *bona fide* transferee, the widow cannot follow the property even though the transferee had notice of the widow's claim for maintenance. 4 A. 296; 22 A. 326; 24 A. 160; foll. (*Scott Smith, J.*) DAULAT RAM v CHAMPA.

55 I C 28.

—Maintenance—Widow—Right of residence in husband's house—Purchaser for value—Creditors, claim of.

Ordinarily, a Hindu widow has a right of residence in the family house and she may not be ousted except to satisfy claims which are paramount to her right of residence, which is a part of her right to maintenance.

The widow of an undivided member of a Hindu family can set up her right of residence against a purchaser for value unless the alienation was for a family purpose, but the widow of a divided member is bound to liquidate any debt which was binding on her husband unless it was incurred in fraud of her right.

When however, the husband loses the property in his lifetime, there is nothing to which his widow can succeed as his heir or from which she can derive maintenance. (*Le Rossignal, J.*) ASA DEBI v. BASHI RAM.

56 I. C. 198

—Marriage—Asura form—Consideration.

The "Asura" form of marriage is not illegal or immoral, and money paid to the parents of the bride does not constitute unlawful consideration. (*Lindsay, J. C.*) SHAMBHU v. NADA KUMAR.

23 O. C. 284;

58 I. C. 963

—Marriage—Breach of contract—Retraction of marriage for good cause permissible. See DAMAGES.

22 Bom. L. R. 143.

—Marriage—Eligibility for—*Sugotras*—*Baisi Chowrasi Gaddidars*.

The rule against marrying in the same gotra is not a universal rule among Hindus but it is recognised by the *Baisi*—Chowrasi Gaddidars who though originally Non-Hindus have adopted Hinduism. (*Chapman and Atkinson, JJ.*) SHAH DEO NARAIN DAS v. KUSUM KUMARI.

5 P. L. J 164

—Marriage—Form of—Presumption as to Brahma form—Payment of parisam to bride's parents—Effect of. See (1979) *Dig. Col. 608.* REVEREND GABRIELNATHA SWAMI v. VALLIAMMAI AMMAL.

(1920) **M. W. N. 158.**

—Marriage—Sub-Caste—*Shudras*—*Ahirs*—Marriage of different sects of, valid.

Ahirs whether of the Nadvars or any other sub-castes, are Sudras and the Dauwa Ahirs

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are a lower caste than the pure Ahirs and the *ehuri* form of marriage is in vogue among them.

There is nothing in Hindu Law prohibiting marriages between persons belonging to different sections or sub-divisions of the Sudra caste 15 C. 708, foll. (*Mittra, A. J. C.*) DOMARSINGH v. HIRONDIBAI.

54 I. C. 294.

—Marriage—Validity of — Marriage with wife's sister's daughter.

The marriage of a Hindu with his wife's sister's daughter is not illegal. The custom of allowing a Brahman to marry his wife's sister's daughter has been recognised by judicial decisions that custom applies especially in the case of Sudras, such as Telugu Velamas who generally follow the Brahman custom.

The rule in *Grihya Parishta* prohibiting such a marriage among the twice-born classes is merely directory and not mandatory, and the marriage though an undesirable one, is not an illegal one. (*Wallis, C. J. and Krishnan, J.J.*) RAMAKRISHNA RAO v. SUBBANNA RAO GARU.

38 M. L. J. 183 : 43 Mad. 830 :
(1920) **M. W. N. 474 : 12 L. W. 155.**

—Marriage—Validity of — Vaishnabs—*Kanti* form of marriage.

The petitioner, a Vaishnab, applied for letters of administration to the estate of the deceased who was after the death of her husband married to him in kanti form.

Held, that marriage by Kantibadal (exchange of garlands) among Vaishnabs is valid and the petitioner was entitled to letters of administration. (*Ghose, J.*) BENODE BEHARY AUDHIKARY v. SHASHI BHUSSAN BHUR.

24 C. W. N. 958.

—Migrating family—Law applicable to—Presumption proof of adherence to religious and social ceremonies of place of origin—Effect of. See HINDU LAW, APPLICABILITY.

24 C. W. N. 215.

—Partition—Disqualification for—Co-parcener becoming insane after birth—Right to partition. See HINDU LAW, SUCCESSION.

38 M. L. J. 291.

—Partition—Division in status—Profits divided in specific shares—Suit by one member for joint possession to the extent of his specific share—Relief.

The plaintiff sued for joint possession with the defts., of certain cultivating land to the extent of a one-third share. The land had been owned by a Joint Hindu family of which the plaintiff represented one branch, and the defendants the two other branches. The plaintiff alleged that the family had been in joint possession of that land until seven years ago, when a separation of the family took place; but the land remained joint, meaning that there was no division by metes and bounds. The plaintiff had lately been excluded from it

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by the defendants. The findings of the lower Courts were that the plaintiff's share was one third, that there had been a separation of the family, although not a division by metes and bounds, and that the profits of the land used to be divided among the different branches of the family in defined shares. Held, that in view of the findings the suit as brought was maintainable and that the plaintiff was entitled to a decree sought by him. (*Banerji, Piggott and Walsh, JJ v. Sheodan v. Balkaran.*)

18 A. L. J. 1033.

—*Partition—Division in status—Provision against division by metes and bounds—Arbitration—Award.*

After the disintegration of a joint Hindu family the members thereof referred matters in dispute to arbitration and an award was made whereby each of the parties was precluded, during his life time, from claiming separate possession by means of a partition by metes and bounds over any of the property of which he and the other members were joint owners. Held, such award was binding on the members of the family and a suit by one member for separate possession of his share is not maintainable. (*Knox, A. C. J. and Piggot, J. v. Rup Singh v. Bhabutti Singh.*)

42 All 30 : 58 I. C. 632.

—*Partition—Division in status—Unilateral declaration—Onus on person asserting.*

In a Hindu joint family a disruption of the status of jointness may take place by agreement without division of the estate by metes and bounds. Even an unambiguous expression of an intention by one member of the joint family to separate and hold his share separately will suffice. But the question is one of fact and the onus is on the party alleging separation of interest or the intention to separate to affirmatively establish it. (*Mr. Amer Ali, Giridhar Das v. Sri Krishna Datt Dube.*)

39 M. L. J. 18 : 22 Bom. L. R. 1348 : 12 L. W. 759 : 56 I. C. 293 (P. C.)

—*Partition—Evidence of—Entries in village and revenue records—Settlement Court proceedings in.*

A definition of shares in revenue and village papers by itself affords a very slight indication of an actual separation in a Hindu family and is insufficient to prove contrary to the presumption of Law, that the family to which the entries refer had separated.

A decree of a settlement Court in Oudh made in 1869 in favour of the widows of two deceased Hindus, for superior proprietary rights in property lineally descended to the husbands, the decree being "subject to the rights of the other share-holder" does not affirm that a separation had taken place but on the contrary, preserves all rights inherent in

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the property as joint family property. (*Lord Shaw Nageshwar Baksh Singh v. Ganesh.*)

42 All 368 : 38 M. L. J. 521 : 18 A. L. J. 532 : 23 O. C. J. 47 I. A. 57 : 22 Bom. L. R. 596 : 28 M. L. T. 5 : 56 I. C. 306. (P. C.)

—*Partition—Father represents his sons.*

Where the sons of one brother sued for partition of joint family property—a partition having already taken place among all the brothers, to which the sons were not parties—held, that in a partition among the members of a joint family each member is presumed to represent not only himself but also his sons and the sons take their share through their father, the share included in the share allotted to him.

This rule is not limited to minors unless any fraud has been practised (11 Bom. L. R. P. 396 ; 38 Bom. p. 499 foll. (*Davids and Wazir Hasan, J. C.*) RAM BAHADUR SINGH v. NIRBHAI SINGH. **23 O. C. 339.**)

—*Partition—Institution of suit by minor—Effect of.*

The institution of a suit for partition by a minor has not by itself the effect in law of creating an alteration of the status of the family from that of jointness to that of separation. The rule laid down by the Privy Council in the case of *Girja Bai v. Sadashiv Dhunidiraj* 43 Cal. 1031, to the effect that the institution of suit for partition of joint family property has the effect of creating a separation of the joint family cannot be applicable to a suit on behalf of a minor which has not matured into a decree. 43 Cal. 1031 P. C. distinguished. 41 Mad. 442 approved. (*Mears, C. J., Banerji, and Piggot, J. v. Lalta Prasad v. Sri Mahadeoji Birajman Temple.*)

42 All 461 : 18 A. L. J. 503 : 58 I. C. 667.

—*Partition—Intention to sever—Unilateral declaration—Expression of intention to sue for partition in an application for withdrawal of suit—Effect on strangers.*

If plaintiff had sued the 1st defendant who was his adoptive father for a declaration that the mortgage executed by the latter in favour of one Pitchayya Chetty was not binding on him on the ground that the mortgaged property had fallen to the plaintiff in an alleged partition of 1903 or 1904. In that suit he filed a petition to amend the plaint asking to be allowed to establish his right to a partition in case the Court should be of opinion that there had been no partition till then. He subsequently withdrew the petition for amendment stating that he did not press the question of the division of the family properties. The plaintiff afterwards applied for leave to withdraw the suit with liberty to file a fresh suit for partition which petition was allowed.

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Held, that the above conduct of the plaintiff did not constitute such an unambiguous expression of intention as to effect a severance of status between him and his father the 1st defendant.

If a person is a *bona fide* purchaser from the father of a Hindu family for value having no notice of the unilateral declaration by the son of an intention to divide from his father he would be entitled to treat the father as having the power to sell the family property for the antecedent debts of the father and other lawful purposes so as to bind the son. (*Sadasiva Aiyar and Spencer, JJ.*) *VEMI REDDE v. NALLAPPA REDDI.* 11 L. W. 611 : 57 I. C. 800

—Partition—Manager's liability to keep accounts—Marriage expenses incurred after filing of suit but before actual partition to be debited to the joint estate. *See* (1919) *Dig. Col. 611.* *RAMNATHA CHOTTURAN v. GOTURAM RADHA KISHAN.*

44 Bom 179 : 54 I. C. 115.

—Partition—Mother—Right to—Maintenance.

Under the Mitakshara Law a mother is entitled only to maintenance until partition and she can never herself demand a partition. But if a partition takes place by the act of others not being strangers she will be entitled to receive a share if the effect of that partition is to break up or diminish the estate out of which she would otherwise be maintained. The co-sharers in a joint estate having applied for partition, the widow of the last male owner sued for a declaration of her title to a share in the estate:

Held, that she had a right to claim a share equal to that of the other co-sharers: 60 P. R. 1892 foll.

As the widow was residing in the family house the declaratory suit was maintainable. (*Shadi Lal and Broadway, JJ.*) *MUSSAMAT GANESH DEVI v. DARSHAN SINGH.*

2 Lah. L. J. 377 : 56 I. C. 478.

—Partition—Mother's share—Sudras—Legitimate and illegitimate sons—Lewa kulinis of changdev in kandesh *See* (1919) *Dig. Col. 614.* *MANCHARAN BHIKU PATIL v. DATTA BHITU.* 44 Bom. 186 : 54 I. C. 110

—Partition—Partial partition—Presumption—Onus.

When a partial partition of the property of a joint Hindu family is admitted the presumption is that there was a complete partition and the onus is on the party alleging that it was not a complete one to prove it 7 Bom. H. C. R. 155 ; 121 P. R. 1918 rel. (*Scott Smith and Abdul Racof, JJ.*) *KISHAN CHAND v. BEHARI LAL.* 2 Lah. L. J. 570

—Partition—Re-opening of—Error of law, if a ground for.

Where the Lower Court found that the plaintiffs and defendants, who were originally members

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of a joint Hindu family, had partitioned their properties about 50 years ago, but the defendants got one half share instead of one-third which was their legal share, the division taking place *per stripes* through the 2 wives of the common ancestor and not *per capita* among the several sons and the Dist. Judge on appeal ordered the re-opening of partition on equitable grounds.

Held, that the original partition could not be re-opened. (*Coutts and Sultan Ahmad, JJ.*) *DAL BHANJAN SINGH v. KARMAN SINGH.*

1 P. L. T. 465 : 57 I. C. 413.

—Partition—Right to—Purchaser from Hindu co-parcener of share in family property.

The purchaser from a Hindu co-parcener of his undivided joint family property is entitled to recover the share by partition; but he is not entitled to recover past profits before the date of the suit. (*MacLeod, C. J.*) *TRIMBAK GANESH KARMARKAR v. PANDURANG GHAROJEE.*

44 Bom. 621 :

22 Bom. L. R. 812 : 57 I. C. 582.

—Partition—Separation of one member—Status of others—Presumption.

Where one member of a joint Hindu family separates, the presumption of jointness as regards the remaining members is destroyed and an agreement amongst the remaining members of the family to remain united or to re-unite must be proved like any other fact. 30 C. 725 Ref (*Lindsay, J. C.*) *MAHABIR SINGH v. SANT BAKHSH.* 55 I. C. 495.

—Partition—Severance in Status—Intention—Separation.

Held, that in view of the circumstances that there was a quarrel between the brothers and the plaintiff resented the reckless conduct of his step-brother which brought the family almost to ruin, what the plaintiff did in going away from the family was clearly with the intention of separating himself from his brother.

Where the plaintiff made an application for the purpose of having his name recorded in the khewat in respect of an 8 anna share in a certain village by correction of revenue papers and the corrections were made, *held*, that the above entry in the khewat coupled with antecedent circumstances and strong probabilities make it absolutely impossible to hold that the mutation was anything other than a step towards realisation of an intention to separate previously expressed by the plaintiff.

Held also, that such a condition of things would be quite consistent with tenancy-in-common which would have been effected between the two brothers by an expression of intention to separate in an unambiguous language on the part of either of them 3 Cal. 312 ; 29 All 184 ; re. (*Wazir Hasan, J.*) *SHOB DAYAL v. LALITA PRASAD.* 23 O. C. 184 : 58 I. C. 608.

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—Partition — Shares — Adopted son — Share of in competition with father and subsequently born aurasa son — One-ninth share. See HINDU LAW, ADOPTION. 38 M. L. J. 86.

—Partition — Shares of — Jyeshtha-bhagam.

The old practice of giving the elder brother and manager of a joint Hindu family an extra share as Jyeshtabhagam on partition has become obsolete and cannot be legally enforced (Wallis, C. J. and Krishnan, J.) RAJANGAM AIYAR v. RAJANGAM AIYAR.

39 M. L. J. 382 :
12 L. W. 435 : 57 I. C. 18.

—Partition—Suit for — Acquisitions Division of Status.

In a suit for de facto division and not for the division of the title which had already taken place about nine years ago the plaintiff could not, rely on the ordinary presumption of jointness. The appellant not being a member of the family but an utter stranger to it and being in possession of the property in dispute, the plaintiff must establish his title independently of any presumptions before he could hope to succeed in ejecting appellant. The property in dispute having been acquired by defendant No. 1 after the division between him and the plaintiff it was his separate property and the plaintiff had no title to it. (Wazir Hasan, A. J. C.) SHEO DAYAL v. LALITA PRASAD. 23 O. C. 184 : 58 I. C. 608.

—Partition—Suit for—Omission of small item—Effect of—Amendment.

In a suit for partition of the whole family property the plaintiff is not bound to file with the plaint such a complete and exhaustive list of all the properties as not to exclude any item howsoever small. If any defendant wishes to raise the plea that any part of the joint family property has been excluded it is for him to specify such properties and show that they belong to the family and have been wrongly excluded. A suit should not be dismissed on such a technical ground but leave to amend should be given. (Mears, C. J. and Sitalman, J.) AMIR CHAND v. LAKHMI CHAND. 18 A. L. J. 869 : 58 I. C. 275.

—Partition—What constitutes—Preliminary decree in partition suit—Division of status.

A decree in a partition suit completely effects a severance of the joint status and the death of a party after the date of such decree does not entitle persons who were joint before to any increment to their share as the widow of the deceased person is his preferential heir. 35 M. 239 foll. (Mittra and Prideaux, A. J. C.) RUSTAM RAU v. DINKAR RAO.

55 I. C. 38.

—Religious endowment—Alienation by Hindu widow—Gift of a Bunga. See (1919) Dig. Col. 615. GAHL SINGH v. SURJAN SINGH. 54 I. C. 955 : 2 Lah. L. J. 13.

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—Religious endowment — Asthan—Head of—Rights of—Offerings—Proprietorship in—Private property—Onus of proof.

Held, that the head of an Asthan has no property, and his income consists in the profits of that property and the offerings made to him in the character of the trustee of the institution.

Held also, the law of the land does not disable him from owning property of his own but those who allege the separate and personal character of any property found in the possession of a head of an Asthan of Sanyasis and which has descended to him in an unbroken course of succession of Mahants, for a long time must have the onus laid upon them of proving their allegations.

The source of income of a reigning Mahant being limited to profits of endowed properties and the fresh offerings received by him in his character as such, it follows that the subsequent acquisitions must equally be presumed to have been made with the aid of such incomes and consequently will follow the same character as the nucleus.

Offerings made at an Asthan, being made to the priest of the Sanyasi order who possesses no wealth of his own, bear a more marked stamp of trust property than offerings to an idol at an ordinary shrine.

An Asthan as much as an idol is a juristic person capable of holding property and consequently offerings made to the priest of the Asthan presumably at least belong to the Asthan.

The parties to a compromise cannot resile from the conditions given it. Held, further that considering the context and the surrounding circumstances the word "owner" used in the compromise did not imply absolute ownership. (Daniels and Wazir Hasan, JJ.) RAM PAT v. DURGA BHARATI MAHANT. 23 O. C. 303.

—Religious endowment—Debutter property—Purchase of by shebait benami at court sale in execution of a decree against debutter estate validity—Terms on which sale to be set aside—Removal of trustee—Grounds for.

In respect of a debutter in this country the founder of his heir may invoke the assistance of a judicial tribunal for the proper administration thereof on the allegation that the trusts are not properly performed and the case is strengthened when the management would, under the terms of the trust vest in the plaintiff as the founder's heir on a vacancy caused by the removal of the actual incumbent for misconduct.

Where a decree has been obtained against a shebait a representative of the debutter estate he is not competent without the leave of the Court to purchase the debutter property in his personal capacity.

When debutter property was brought to sale in execution of a decree which was liable to be

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satisfied partly from the debutter estate and partly from the shebaits himself and was purchased by the shebaits son with funds entirely supplied by the shebaits:

Held. That the purchase being by the shebaits, the sale should be set aside irrespective of any question as to whether or not terms of the sale were fair or the debutter estate suffered any pecuniary loss thereby.

The mischief which may result from the purchase by a shebaits of debutter property of which he is the custodian and which he is charged with the duty of preserving for the benefit of the endowment may be of a more aggravated character than that which eminent Judges have apprehended in the case of purchase of trust properties by trustees for sale: and such a purchase should be set aside without enquiry as to the fairness of the terms of the purchase: and no difference should be made in the application of this principle, be reason of the fact that the purchase is made at a sale publicly held or held at the instance of a Court in execution of a decree against the debutter estate.

A purchase of property by a person in a fiduciary relation covertly and without the leave of the Court is liable to be set aside even where the purchaser has acted with the completest faithfulness and fairness.

In setting aside the sale, the High Court ordered that the execution creditors should retain the portion of the sale proceeds paid over to them, the shebaits being deemed to have satisfied the decree obtained by them, upon which basis the shebaits would be entitled to be reimbursed out of the debutter estate, he being also entitled to a refund of the surplus sale proceeds.

What constitutes a sufficient reason for removing a trustee is a matter peculiarly within the sound discretion of the Court which in such a case is guided by consideration of the welfare of the beneficiaries of the trust estate, and there must be a clear necessity for interference to save trust property. (*Mookerjee and Panton, JJ.*) MONOHAR MOOKERJEE v RAJA PEARY MOHAN MOOKERJEE.

24 C. W. N. 478 : 54 I. C. 6.

—Religious Endowment—Temple—Dedication to temple—Public and private temple—Test. *Sce REL. ENDOWMENT, TEMPLE.*

54 I. C. 117.

—Religious — Endowment—Trustee—Mortgage—Necessity—Proof of.

Where the Mahant of a Hindu shrine alienated the trust properties and the creditor established both the existence of a valid necessity and that before advancing the money he satisfied himself by enquiry from the debtor as to the nature of the necessity which existed, *held*, that he had sufficiently complied with the law. The defendant was not bound to show either that the money was actually applied for the purpose for which it was borrowed or that

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the lender made enquiries from third parties as to the existence of the necessity.

14 All. 420 toll. (*Daniels and Wazir Hasan, A. J. C.*) DURGA BHARATHI MAHANT v. NAGESHWAR NATH.

23 O. C. 320.

—Reversioner—Rights of—Estoppel—Right to sue for possession when accrues.

Under the Limitation Act the right of suit for possession by a Hindu reversioner accrues to him on the date of the death of a Hindu female.

The mere fact that the presumptive reversioner has no vested interest in the estate which he can effectively deal with, does not prevent the application of the rule of estoppel. (*Abdur Rahim and Moor, JJ.*) SHANMUGA VELAYUDHAN CHETTY v. KOYAPPA CHETTIAR.

(1920) N. W. N. 679.

—Reversioner—Right of—Minor—Guardian—Alienation challenged by reversioner—Suit by some reversioner—Decision if binding on all.

A Hindu reversioner has no right or interest in *pracshti* in the property which a female owner holds for her life. Until it vests in him on her death, should he serve her, he has nothing to assign or to relinquish, or even to transmit to his heirs. His right becomes complete only on her demise; until then it is mere *spes successionis*. His guardian, if he happens to be minor, cannot bargain with it, on his behalf or bind him by any contractual engagement in respect thereto.

Where a transaction is challenged by reversioners as an alienation not binding on them, the true test is whether the alienee derives title from the holder of the limited interest or life tenant. If the title is derived from a person who holds only a limited interest, the title must be such as the holder of the limited interest is capable of conferring. If the title is derived from a person who is only an expectant heir or a person possessed of the contingent reversionary right he cannot assign or relinquish what he does not own so as to confer on another larger rights than those which that other would otherwise have possessed to the prejudice of persons who would be entitled to those rights on the death of the intermediate holder.

Where a suit is filed by some reversioners in the interests of the whole body of reversioners and some of the plaintiffs withdraw from the suit and the suit is decided with regard to the remaining plaintiffs, the decision is binding on the entire reversionary heirs. (*Stuart and Kanhaiya Lal, A. J. C.*) BISRAM SINGH v. SANWAL SINGH. 23 O. C. 238 : 57 I. C. 541.

—Schools of Law—Applicability of—Presumption—Migrating family—Law of place of origin, how far applicable. *Sce HINDU LAW APPLICABILITY OF.* 24 C. W. N. 215.

—Stridhanam—Succession—Husband's brother and step-brother—Preference between,

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The claim of a husband's brother to succeed in preference to the deceased woman's step brother in respect of her separate property is recognised in text books of Hindu Law and has also received judicial confirmation. (*Walmsey and Huda, JJ.*) **SRIMATI GUNAMANI DASSI v. DEVI PROSANNO ROY CHAUDHURI**

54 I. C. 897

—*Stridhanam—Succession—Sapinda—Bandhus*

The word *sapinda* in Chapter 2, *placitum* 11 of the Mitakshara is not confined to *gotraja sapindas* but is used in the generic sense of relationship by blood.

Under the Mitkshara Law, the sister's son of a woman married in the orthodox form who dies leaving no issue cannot claim the stri-dhanam property in preference to the husband's son's son. The persons entitled to succeed are those who would succeed to the property in the property belonged to the husband 36 M 116; 37 M. 293; 36 M. 115, Rel. (*Abdur Rahim and Moore, JJ.*) **MATHOSRI RAMA BOI AMMANNI v. KANDASAMI ASARI**.

12 L. W. 171 : (1920) M. W. N. 501.

—*Succession—After born son—Divesting of widow's estate—Period when divesting takes effect.*

The rights of a son under Hindu Law in the estate left by his father commence at birth and not before, and the widow is consequently competent to alienate the property for necessity before the birth of the son. (*Scott-Smith and Martinicau, JJ.*) **HIRA v. BUTA.**

**1 Lah 128 : 1 Lah. L. J. 36.
56 I. C. 256**

—*Succession—Ascetics—Mundit chela—Adoption of.*

There is no custom which authorizes the succession of a *mundit chela* to the estate of the person making him a *chela*.

The fact that a person is made a *mundit chela* does not constitute that person an adopted son, and the mere fact that his father was present at the ceremony of his initiation as a *chela* does not convert the ceremony into one of adoption. (*Mitra and Pridcaux, A. J. C.*) **GULABDAS v. DHARMIN BAI.**

56 I. C. 996

—*Succession—Bhandhus Father's sister's son.*

In places where the Mitakhara system of Hindu Law prevails the father's sister's sons are heirs; and plaintiffs as such are heirs and therefore entitled to the land in preference to the defendants proprietors in the village.

Where after the death of the last male owner the land was held by his mother on the usual woman's life estate and the plaintiffs who were entitled to possession on her death instituted the suit on the 5th May 1914 and the female was said to have died in the month of May 1902, but there was nothing to show on what date in May 1902 she died.

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Held:—that the plaintiffs had 12 years from the date of her death within which to bring the present suit. That the onus of proving that the female died before the 5th of May 1902 lies upon the defendants who assert it and that there being no proof of the exact date of death the suit is within time.

When the Lower Appellate Court has held that the parties to a case were governed by Hindu Law it is not open to the appellants to urge in second appeal without a certificate that they are governed by custom.

Appellants being high caste Hindus living in Ambala there is no initial presumption that they are governed by agricultural custom. (*Scott Smith and Leslie Jones, JJ.*) **TANI v. RIKHI RAM.**

1 Lah. 554 : 2 Lah. L. J. 481 : 56 I. C. 742.

—*Succession—Bhandus—Female and male bhandus—Priority.*

Under the Mitakshara, the Mother's sister's son is entitled to succeed in priority to brother's daughter. For purposes of succession the female bandhus are excluded by the nine classes of bandhus in the Mitakshara. (*Macleod, C. J. and Fawcett, J.*) **BALKRISHNA BHIMAJI v. RAMKRISHNA GANGADHAR.**

22 Bom. L. R. 1442.

—*Succession—Bhandus—Grandfather's daughter's son's, son if an heir.*

Somble: Under the Dayabhaga law the grandfather's daughter's son's sons is an heir. (*Chatterjee and Newbould, JJ.*) **RADHA RAMAN CHOWDHURY v. GOPAL CHANDRA CHUCKERBUTTY.**

24 C. W. N. 316 : 31 C. L. J. 81 : 56 I. C. 122.

—*Succession—Bhandus—Paternal grandfather's mother's brother's son.*

Held: the plaintiff whose paternal grandfather's mother's brother's grandson was the last male owner was not a bandhu to the last male owner. 6 Cal. 119 and 37 All. 604 ref.

Per *Napier, J.*—The decision in *Buddha Singh v. Laltu Singh* 37 All. 604 did not lay down a law of succession among cognates different from that adopted hitherto. The extended meaning given therein to the word *putra* as including the descendants also up to the fixed limit is confined to succession among agnates and is inapplicable to cases of succession among Bandhus. (*Sailasiva Aiyar and Napier, JJ.*) **VEERA RAGHAVA AIYANGAR v. PADMANABHA AIYANGAR.**

39 M. L. J. 417 : 28 M. L. T. 303 : (1920) M. W. N. 609 : 12 L. W. 397.

—*Succession—Bandhus—Son's daughter's son a bandhu.*

A son's daughter's son is a bandhu and succeeds as heir. (*Macleod C. J. and Heaton J.*) **NATVARLAL GIRDHARLAL v. RANCHHOD BHAGWANDAS.**

22 Bom. L. R. 71 : 55 I. C. 313.

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—Succession—Daughters—Enjoyment of property by one adversely to the other—Survivorship.

On the death of a Hindu, his property descended on his widow and on her death to their four daughters, and one or them S. excluded and held adversely to her sisters. S. alienated many items during her life time and died leaving a son who took charge of the estate. After the expiration of the statutory period 12 years the surviving one of the excluded sisters brought this suit to recover this estate by right of survivorship from S.'s alieneness and her son. Held, she has no such right.

The right of survivorship is incidental to the right of joint possession and enjoyment of the estate with the others who are jointly entitled, and cannot exist separately when the right of joint possession and enjoyment has been lost (*Wallis, C. J. and Seshagiri Iyer, J. C.*) **GELLAGULLA NAGIAH v. IVATURY ATCHAMMA.**

(1920) M. W. N. 761.

—Succession—Daughter—Nature of estate—Bombay Presidency.

In those parts of the Bombay Presidency where the Mayukha Law is paramount as well as in those parts governed by the Mitakshara daughters succeed to an absolute estate. (*Batten, A. J. C.*) **MADHORAO v. KESHORAO.**

56 I. C. 175.

—Succession—Dayabhaga—Principle of spiritual benefit.

It is now settled that the principle of spiritual benefit is the test of heirship under Dayabaga whatever view might have been taken of the matter had it been *res integræ* (*Chaiterjea and Newbold, JJ.*) **RADHA RAMAN CHOWDHURY v. GOPAL CHANDRA CHUCKER-BUTTY.**

24 C. W. N. 316 : 31 C. L. J. 81 :
56 I. C. 122.

—Succession—Exclusion from—Grounds—Insanity—Effect of—Joint family—Insane member—Right to take family property by survivorship

In a joint Hindu family consisting of a father and his son the father became insane after his son attained majority, survived his son and died without recovering sanity. In a competition between the father's and the son's heirs held, that the father did not lose his right in the family property by becoming insane and took the whole property by survivorship on the death of his son and that the father's heirs were entitled to the same in preference to those of the son.

Insanity to be a ground of exclusion from inheritance need not be congenital. The rule in Ch. II S. 10 placitum 6 of the Mitakshara that a person is excluded if he is disqualified at the time of partition, is not a pronouncement that the right ripens and is capable of enforcement only then but a principle indicating who all should be allotted shares at the division. The right of a member of a joint Hindu family

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to share in family property comes into existence at birth and subsists all through although it is incapable of enforcement at the time of partition because of the disqualification then existing. (*Seshagiri Aiyar and Moore, JJ.*) **MUTHUSAMI GURUKKAL v. MEENAMMAL.**

43 Mad. 464 :
38 M. L. J. 291 : 55 I. C. 576.

—Succession—Exclusion from—I idiocy.

Under the Hindu Law, congenital idiocy is a bar to inheritance. The adoption of a son by a widow having a congenitally idiot natural born son is, therefore, valid in law. (*Mitter and Prideaux, A. J. C.*) **RAJI v. BHIMRAO**

57 I. C. 647.

*—Succession—Family custom inconsistent with ordinary Hindu Law—Mere acceptance of sanad inconsistent with family custom—Effect—Maxim *cessatio lex applicability*—Impartible estates—How they originate. See (1919) Dig. Col. 589 RAO KISHORE SINGH v. MT. GAHENABAI.*

24 C. W. N. 601 :
22 Bom. L. R. 507.

12 L. W. 730.

—Succession—Illegitimate daughter—Mother's estate.

Under Hindu Law amongst Sudras an illegitimate daughter succeeds as heir to her mother in default of any nearer heir (*Macleod, C. J. and Fawcett, J.*) **DUNDAPPA v. BHIMAWA.**

22 Bom. L. R. 1306.

—Succession—Illegitimate daughter—Right of—Extent of.

Under the Hindu law an illegitimate daughter even among twice born classes inherits the property of her mother as heir.

A share in the property of a Hindu was held by his mistress, and mutation was effected in her favour some 40 years ago. Although she was entitled to maintenance there was nothing to show that her possession was in lieu of maintenance. Held, that she had acquired title by adverse possession and on her death her share devolved on her daughter. (*Macnair, A. J. C.*) **MUSSAMMAT KASTURI v. LOTE MAJOR.**

56 I. C. 952.

—Succession— Illegitimate son — No right of collateral succession.

Under Hindu law, the illegitimate son of a Sudra cannot inherit the separate property of his father's legitimate son as a brother. (*Shah and Hayward, JJ.*) **DHARMA LAKSHMAN v. SAKHARAM.**

44 Bom. 185 :
22 Bom. L. R. 52 :
55 I. C. 306.

—Succession — Illegitimate son — Rights of—Dasiputra—Meaning of.

Under the Bengal School of Hindu Law correctly interpreted an illegitimate son of a sudra is entitled as a Dasiputra to a share of the inheritance, provided that his mother was in the continuous and exclusive keeping of his father, and he was not the fruit of an adulterous

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or an incestuous intercourse. This right is not subject either to the condition that his mother was a slave woman in the technical sense of the term or to the condition that a marriage could have taken place between his father and his mother.

1 Cal 1; 23 W. R. 334; 19 Cal. 91; Overruled on this point.

The decision of the question of heritability must be based upon the true construction of the text of Dayabhaga Chapter IX para 29 as given in the edition of Bharat Chandra Siromani.

The term "Dasi" is not exclusively applicable to a female slave, but includes a sudra woman kept as a concubine. According to para 29 of Chapter IX of the Dayabhaga, the term "Dasyadi Sudraputra" includes the son of a Dasi or the like Sudra woman. It is not restricted only to the son of a Dasi or the Dasi (Slave woman or wife) of a "Dasa."

To establish that a particular rule of inheritance has been superseded by the growth of a contrary custom in a specified locality, family or section of the community, evidence must be adduced to show that in numerous instances successions has taken place to the estate of deceased persons in contravention of the prescribed rule of inheritance. The rule cannot be said to be obsolete merely because there is no occasion for its application. The existence of a custom must be established by clear and unambiguous evidence.

Per curiam: The term "Aparinita" means, not "a maiden," but "not married (to the Sudra to whom she bears a son)"

Per N. R. Chatterjee, J.—Having regard to the fact that for more than a century the right of an illegitimate son of a Sudra by a kept woman has not been recognised in Bengal and having regard to the opinions of writers on Hindu Law in Bengal, the heritable right of an illegitimate son of a Sudra by a kept woman should not be revived as it is opposed to the usage and sentiments of the people of Bengal. (Mookerjee, A. C. J., Fletcher, Chatterjee, Teunon and Richardson, J.J.) RAJANI NATH DAS v. NITI CHANDRA DE.

32 C. L. J. 333

Succession — Impartible estates—Rival claimants of the same degree of relationship—Preference—Test of.

In the absence of a special custom the rule of succession in the case of impartible estates must be taken to be that of the ordinary Hindu Law by which the parties are governed, with such modifications only as flow from the impartible character of the estate. In determining the line of succession, the test is whether the last owner who left no male issue was or was not separated from the other members of the family. 42 Cal. 1179 foll.

If the Zemindar was undivided from the other branches of the family, then for purposes of succession, the estate must be treated as if it had been partible and it would pass like

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ordinary joint family property by the rule of survivorship; and if there are more persons than one coming within the rule, it will pass to the nearest co-parcener of the senior line and not to the co-parcener nearest in blood to the propositus.

If on the other hand, the Zemindar was divided, the Zemindaries to be taken as his separate property and the Mitakshara rule of succession to separate or sell acquired property will apply; and the rule that the nearest in blood excludes the more remote will be applied. If there are more persons than one in the same degree of relationship the representative of the senior branch will be entitled to succeed as the preferential heirs 20 Cal. 649 foll (Wallis, C. J. and Krishnan, J.) GURUSAMI PANDYAM v. SENATTI KALLAI PANDIA CHINNATHAMBI

39 M. L. J. 529 : (1920) M. W. N. 660: 28 M. L. T. 365.

Succession—Paternal uncle's grandson—Sister's son—Priority between.

Under Hindu Law, the paternal uncle's grandson is entitled to succeed in preference to the sister's son. (Macleod, C. J. and Heaton, J.) ANNAYA MADVAYALA v. SIDAYA MURUGAYYA.

22 Bom. L. R. 1092.

Succession—Primogeniture—Impartible estate—Proof of custom of primogeniture. See HINDU LAW IMPARTIBLE ESTATE.

38 M. L. J. 149.

Succession—Stirpital and capital rules first cousins.

Under Hindu law, on the death of a person his first cousins succeed to his property per capita and not per stirpes. (Shah and Crump, J.J.) NARSAPPA NINGAPPA MALI v. BHARMAPPA RAYAPPA MALI.

22 Bom. L. R. 1196.

Succession—Unchastity of daughter before succession opened out—If debars her right to inherit—Dayabhaga—Application to Assam Koches. See (1919) Dig. Col. 620. ATI KOCHUNI v. AIDEW KOCHUNI.

54 I. C. 695.

Succession — Uncle's daughter-gotra sapinda.

Under the Mitakshara school of Hindu law a paternal uncle's daughter is not a gotraga sapinda. (Heaton A. C. J. and Crump, J.) KRISHNABAI v. KESHAV.

22 Bom. L. R. 1162.

Succession—Widow — Remarriage—Effect of—Custom—Childless widowed daughter of childbearing age—Rights of—Competition with daughter having son.

A childless Hindu widowed daughter of child bearing age and belonging to a caste in which widow remarriage is permitted by custom is not entitled to succeed to her father along with a married daughter having a son where there is no proof of custom entitling the widow's daughter to succeed equally with the married daughter.

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The fact that widow remarriage is a custom in the case does not by itself, predicate the further custom that the widowed daughter, because it is open to her to remarry, is entitled to succeed equally with the married daughter. (*Tcunor and Chaudhuri, JJ.*) SRIKATI BENODINI HAZRANI v. SUSTHU HAZRANI

57 I.C. 740

Temple-Manager—Removal of image to a new building on the ground that old temple was out of repair.

The manager of a public temple has no right under Hindu Law to remove the image from the dilapidated temple and instal it in another new building especially when the removal is objected to by a majority of the worshippers. (*Shah and Crump, JJ.*) HARI RAGHUNATH v. ANTAJI BHIKAJI. 44 Bom. 466 : 22 Bom. L.R. 334 : 56 I.C. 459

Trading family—Debts of manager—Liability of minor members—Extent of. See HINDU LAW, JOINT FAMILY, TRADE.

38 M.L.J. 55.

Widow—Accumulations—What form part of the estate.

Moneys belonging to a deceased Hindu were invested by his relations on Thavana, with a direction to pay the widow or the deceased a sum of Rs. 50 a year for her maintenance. The money together with the accumulated interest was intended to go to the boy to be adopted by the widow. The widow made no adoption nor did she object to the deposit and lay any claim to the money or to the whole of the interest payable each year.

Held, that the accumulated interest formed part of the estate of the deceased and that the principal together with the interest passed on the widow's death to the reversioners of her deceased husband. (*Wallis, C.J. and Krishnan, J.*) NARAYANAN CHETTI v. SUBBIAH CHETTI. 43 Mad. 629 : 38 M.L.J. 437 : 11 L.W. 418 : 58 I.C. 639.

Widow—Interest—Acquisition out of income—Savings from income of properties granted for maintenance.

Profits made out of a business carried on by a Hindu widow do not form part of the estate of her deceased husband. Nor can it be regarded as an accretion to it, and she is competent to transfer the amount of the profit in any way she pleases.

Where a Hindu widow in possession in lieu of maintenance saves a portion of the profits which she could have spent on her maintenance the savings are her personal property. In the absence of a clear indication that she intended that such profits should be deemed to be a part of the property of her husband of which she was in possession, the amount would go to her legal representatives. The mere fact that money might have come out of the estate of her

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husband would not make it part of the estate. (*Banerji and Sulaiman, JJ.*) JWALA PRASAD v. SUKHDEO. 57 I.C. 59.

Widow—Acquisition—Presumption as to—Onus.

There is no presumption that property in the possession of a Hindu widow acquired after her husband's death is either her absolute property or that she has only a widow's interest in it. It rests on the person who alleges that she has an absolute interest to prove it. (*Prideaux, A.J.C.*) KALIRAM v. GANESH PRASAD.

58 I.C. 32.

Widow—Acquisition with income of estate—Power of disposal over.

A Hindu widow is the absolute owner of the surplus income of the estate in her hands: there is no presumption that the properties purchased by her out of such income are accretions to the estate. She has absolute powers of disposition over such property. (*Rahim, O.C.J. and Odgers, J.*) RAMAKRISHNA PRABHU v. RUKMIVATHI BAI. 11 L.W. 112.

Widow—Adoption—Unchastity, not a disqualification among Sudras. See HINDU LAW, ADOPTION.

22 Bom. L.R. 1400

Widow Alienation—Alienation not valid but only voidable—Reversioner only person who can dispute such alienation—Alienation of equity of redemption by a widow cannot be disputed by mortgagee.

An alienation by a Hindu widow is perfectly valid until it is set aside; in other words, it is only voidable and not void.

The only person who can contest the validity of an alienation by a Hindu widow is a reversioner. A mortgagor has no *locus standi* to resist the claim of an alienee of the equity of redemption from a Hindu widow. (*Macleod C.J. and Heaton, J.*) SITARAM v. KHANDV

22 Bom. L.R. 1155.

Widow—Alienation—Compromise—Gift.

Plaintiff sued the widow and daughter of a deceased Hindu, defts. 1 and 2 for possession of the estate on the ground of waste. The parties entered into a compromise whereby the widow was to remain in possession for her life and after her death half the estate would go to her daughter half to the plaintiff. Subsequent to the compromise defendants Nos. 1 and 2 (widow and daughter) made a gift of the entire estate to defendant No. 3 the son of defendant No. 2. Thereupon plaintiff brought the present suit to avoid the gift on the ground that owing to the compromise no valid transfer could be made. *Held* that as in the suit in which the compromise was arrived at there was no attack on the estate by persons claiming by virtue of antecedent title which the compromise recognised, and the compromise was an attempt to settle succession for the future in the guise of a claim for possession on the

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ground of waste against the holder of the life estate it was of no effect against defendant No 3 the donee :

The gift amounted to an acceleration of the estate in favour of the next reversioner and therefore, the plaintiff who was a remote reversioner was not entitled to maintain a suit for declaration of his rights. (*Ryves and Goluk Prasad, JJ*) **SITA RAI v. RAMDEO SINGH**
57 I. C. 711.

—Widow — Alienation — Consent of reversioner.

Where a reversioner personally consents to an alienation by a Hindu widow, and acts for the vendee in acquiring a portion of the property sold, he, personally, is estopped from subsequently asserting that there was not legal necessity for the transfer. The consent of the nearest reversioner to such an alienation is strong presumptive evidence of the fact that there was legal necessity. (*Piggott and Walsh, JJ.*) **MATA PRASAD SHUKUL v. DEVIL SHUKLAIN.**
58 I. C. 576.

—Widow — Alienation — Consent of reversioner — Burden of proof of necessity

In the case of an alienation by a Hindu widow as soon as the alienee on whom first the onus to show that alienation was for legal necessity proves that the reversioners have consented the onus shifts to the person impeaching the alienation to show that there was no legal necessity.

21 Bom. L. R. 650 (P. C.) Ref.

Where an alienation by a Hindu widow is attacked on the ground that she has sold more than what was justified by legal necessity the burden of proof lies on the plaintiff to show that so much of the land as was required as the plaintiff says would suffice for the legal necessity could have been sold. Otherwise one is entitled to presume that the widow could not have sold less than she did in order to realise what was required. (*Macleod, C J and Heaton, J.J.*) **MADHAV KRISHNA DESHPANDE v. SHIDDAYA DANAPPAYA.**

22 Bom. L. R. 79 : 55 I. C. 332

—Widow — Alienation — Consent of reversioner — Effect of.

A Hindu widow with an infant daughter is competent, with the consent of the nearest male reversioner, to effect a valid alienation, and such an alienation cannot, on her death, be challenged by a remote reversioner, who at the time of the alienation, was a minor (*Drake Brockman, J. C.*) **NATHURAM v. SAKHAWATALLI.**

57 I. C. 633.

—Widow — Alienation — Consent of reversioner — Proof of.

The consent of the immediate reversioner to an alienation by a Hindu widow is presumptive proof of legal necessity and obviates further enquiry into legal necessity. The consenting reversioner cannot himself say that there was

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no legal necessity (*Das and Adami, JJ.*) **ADHIKARI KUER v. LOKANATH RAI.**

56 I. C. 426.

—Widow — Alienation — Consent of reversioner — Reversioner joining in conveyance — Effect of.

A Hindu widow and one of her daughters passed a deed of gift conveying a portion of the family property to the sons of the other daughter who had died. After the death of the widow, the daughter having sued to set aside the gift:

Hold, that the deed of gift was good only for the life of the widow, and was bad as regards the transfer of a chance which the daughter had at the time to succeed to the reversion. (Macleod, C. J. and Heaton, J.) **BAI PARVATI v. DAYABHAI MANCHHARAM.**

44 Bom. 488 : 22 Bom. L. R. 704 : 58 I. C. 266.

—Widow — Alienation — Legal necessity — Test of — Widow conducting business of husband.

It is a general rule of Hindu Law that a widow, in possession of her husband's estate, cannot alienate moveable or immoveable property inherited from him except for legal necessity. But in course of management of her husband's business she can transfer only if the prudent conduct of the business requires it, the prudent conduct of business amounting to necessity.

The profit or loss on a transfer made by a widow is not a test of necessity. (*Stuart and Ryves, JJ.*) **PAHALWAN SINGH v. JIWAN DAS.**

42 All 109 : 18 A. L. J. 41.

—Widow — Alienation — Necessity — Alienation not void but only voidable.

A conveyance by a Hindu widow, when it is not for legal necessity, is not void but voidable that is, capable of being avoided. Such a conveyance cannot be avoided at the instance of a person having no interest in the matter but only by her reversionary heirs. (*Fletcher and Durval, JJ.*) **JAGAT CHANDRA CHOWDHURY v. BISWA-MEHR ROY.**

55 I. C. 743.

—Widow — Alienation — Necessity — Proof — Debt paid to third person.

Under the Hindu Law a widow cannot alienate immoveable property inherited by her from her husband except for special purposes. For religious and charitable purposes or for those which are supposed to conduce to the spiritual welfare of her husband she has a larger power of disposition than that which she possesses for purely worldly purposes and to support such an alienation she must show necessity.

The payment of a debt contracted by the widow from a third person does not of itself justify an alienation by her of immoveable property. (*Shadi Lal and Martincau, JJ.*) **GOWARDHAN DAS v. VIRU MAL,**

1 Lah. 48 : 55 I. C. 847.

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—Widow—Alienation—Necessity—
Proof of—Lapse of time—Effect of, on evidence requisite—Presumption.

An alienation by a Hindu widow is challengeable on the ground that it was made without legal necessity (within the limits of the ordinary law of limitation) however long a time has elapsed. But when the transaction took place long ago, such full and detailed evidence as to the state of things which gave rise to the sale cannot be expected as in the case of alienations made at more or less recent dates. In such circumstances presumptions are permissible to fill in the details which have been obliterated by time (*Lord Shaw*) CHINTAMANIBHATLA VENKATA REDDI v. RANI OF WADHWAN. 43 Mad. 541.

38 M. L. J. 393 : (1920) M. W. N. 315 : 18 A. L. J. 367 : 22 Bom. L. R. 541 : 55 I. C. 538 : 47 I. A. 6 (P. C.)

—Widow—Alienation—Necessity—Reversioner joining in the transaction—Presumption.

A mortgage executed by a Hindu widow and the reversioners jointly, detailing the property mortgaged by each shows that the reversioners had assented to the transaction and such assent is presumptive evidence of legal necessity, unless rebutted. 17 All. L. J. 536 followed. (*Khanaiya Lal, J. C.*) BHAGWANA v. RAMESHWAR. 22 O. C. 266.

—Widow—Alienation—Necessity—Reversioner's suit to set aside.

An alienation by a Hindu widow for a sum in excess of the amount which the law authorises her to raise for legal necessity can be avoided by the reversioners on their paying the amount which the widow actually required for legal necessity.

The test in such cases is whether the sale itself is justified by legal necessity. If it is, and the amount it is necessary and legal to raise constitutes practically the whole of the consideration, the reversioners should not be allowed to be questioned (*Prideaux, A. J. C.*) PADUM SINGH v. BADRABAI. 57 I. C. 675.

—Widow—Alienation—Setting aside—Reversioners—Rights of—Claim to reimbursement.

If a Hindu widow transfers part of her estate which by law she is not entitled to do, the reversionary heirs can keep their remedy for the recovery of the estate, but they could not claim to be reimbursed for anything which might have been done by her in violation of the right which she possessed. (*Banerji and Sulaiman JJ*) JWALA PRASAD v. SUKHDIL. 57 I. C. 59

—Widow—Authority to adopt—Jains.

The permission of the husband is not necessary in the case of a Jain widow adopting a son. (*Mittra and Prideaux, A. J. C.*) JIWRAI v. SHEQKVWARBAI. 56 I. C. 65.

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—Widow—Compromise decree against when binding on reversioner—Tests of validity—Guardian of minor widow—Powers of alienation Sec (1919) Dig. Col. 625. SKINIVASA AIYAR v. THIRUVENGADA MAISTRY.

55 I. C. 588

—Widow—Compromise of disputed litigation with reversioner—Surrender—Partial—Moveables

A Hindu died leaving widow four daughters and a son who also died shortly after. The daughters applied for letters of administration with the will of their dead father annexed under which they took the property. Letters were granted in spite of the opposition of the nearest reversioner, who subsequently brought a suit to declare the will inoperative and that the mother took a widow's estate after her son's death. This suit was compromised the widow surrendering all right over the immoveable property, half of it being given to the daughters who were to abandon their rights under the will the other half going to the reversioner, the widow getting absolutely all the moveable property and small portions of land for maintenance. After the death of that reversioner who was a party to the compromise the other reversioners instituted a suit to have the compromise declared invalid and ineffectual on the ground that the surrender by the widow was a partial one and a device to divide the estate w/ the reversioners.

Held, that the arrangements were not a device to divide the estate as they were in pursuance of a bona fide compromise in respect of rights sought to be litigated in the prior suit and that the surrender merely recognising the widow's absolute right over moveables conferred on her by the Mithila law, was not bad as being a partial one. (*Lord Dunedin*) CHOWDHURY SURESHWAR MISSER v. MUSAMMAT MAHESHKRANI MISRAIN. 39 M. L. J. 161 : 18 A. L. J. 1069 : 12 L. W. 461 : 28 M. L. T. 154 : 1920 M. W. N. 472.

57 I. C. 325 : 47 I. A. 233. (P. C.)

—Widow—Compromise of litigation—How far binding on daughter.

A Hindu widow, who had a daughter, sued to recover her husband's share in the joint family property, by actual partition from her husband's brother's son. The suit was eventually compromised the defendant getting the whole of the property and the widow getting maintenance at the rate of Rs. 115 a year for her life, and her daughter receiving it after her death at the rate of Rs. 30 a year for her life. A decree was passed in terms of the compromise. The daughter, who was not a party to the suit or compromise, sued for a declaration that she was not bound either by the compromise or the decree.—

Held, that the decree based on the compromise was void and inoperative after the widow's death and that it was not binding on the daughter.

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ter or her heirs. (*Macleod, C. J., and Heaton, J.*) **NATVARLAL MANEKLAL v. BAI CHANCHAL**
22 Bom. L. R. 768 : 57 I. C. 443.

—Widow—Co-widows—Suit by one for recovery of possession—Decree—Form of.

In a suit by a widow on behalf of herself and her co-widow (who is impleaded as 2nd defendant) for recovery of possession of her husband's properties a decree could be passed as regards the whole property and not merely the plaintiff's half share. If the co-widow defendant is willing to be made a co-plaintiff.

The fact that the co-widow said in her written statement that a separate suit will have to be brought as regards her half share does not prevent the Court from passing such a decree with her consent. (*Sadasiva Aiyar and Spencer, JJ.*) **SESHAYYAR v. SARASWATI AMMAL.**

(1920) **M. W. N. 721 : 12 L. W. 544**

—Widow—Debts—Mortgage—Necessity—High rate of interest—Burden of proof.

The principle that it is incumbent on those who support a mortgage made by the manager of a joint Hindu family to show not only that there was a necessity to borrow but that it was not unreasonable to borrow at a higher rate of interest applied to the case of a mortgage by a Hindu widow.

6 C. L. J. 462; 41 A. 571; 41 A. 581; (1919) Pat 451 Rel.

In the absence however of a specific plea in the written statement that there was no necessity to borrow at a high rate of interest the burden of establishing that necessity does not lie on the mortgagee. 6 *Res. M. I. A. 393*, 18. Cal 311; 1 P. L. W. 6. (*Adaimi and Das, JJ.*) **JAG SAHU v. RAI RADHA KISHUN.**

5 P. L. J. 287 : 1 P. L. T. 209 :
(1920) Pat 211 : 56 I. C. 867.

—Widow—Decree for or against—Binding on co-widow.

An adjudication in favour of a Hindu widow claiming to represent the estate of her husband against an alleged adopted son enures for the benefit of her co-widow even if the latter disclaims all interest in the estate and supports the adoption in that litigation in her capacity of guardian of the adopted son. (*Mittra, A. J. C.*) **SUKHDEO v. BHULAI.**

16 N. L. R. 91.

—Widow—Maintenance, arrears—Delay in suing—Whether demand necessary. See (1919) *Dig. Col. 628*. **MUSSAMMAT BHOLI BAI v. MUSSAMMAT CHIMNI BAI**

2 Lah. L. J. 60 : 55 I. C. 2.

—Widow—Maintenance—Claim for, not a charge unless one created by deed or decree. See **HINDU LAW, MAINTENANCE**

22 Bom. L. R. 110.

—Widow—Maintenance—Unchastity—Decree or agreement for maintenance—Starving maintenance.

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A Hindu widow's right to claim maintenance is forfeited upon her unchastity. 5 Cal. 776 at 785; 17 Cal 674 Rel.

Where in a suit for maintenance there is no claim by the widow quite separate and distinct from her claim for maintenance allowance and a compromise is arrived at fixing a maintenance allowance and a decree is passed in the terms of the compromise, the allowance is liable to resumption or forfeiture on proof of subsequent unchastity on her part. 15 All 382; 26 All, 321; 17 Mad 342; 34 Mad. 658, 9 Bom. 108 foll.

An unchaste widow is entitled at least to a starving maintenance. 34 Bom. 278 Ref. (*Drake Brockman, J. C.*) **MUSSAMMAT LAXMI BAI v. PANDIT VISHWANATHRAO.**

16 N. L. R. 140 : 58 I. C. 860.

—Widow—Minor, adoption—Capacity to take—Minor aged 12 and *impubes*—Not competent to adopt. See **HINDU LAW, ADOPTION**.

22 Bom. L. R. 91.

—Widow—Right of residence in family house—Sale of the house by husband.

Under Hindu law a widow cannot enforce her right of residence in a house which has been sold by her husband. (*Shah and Crump, JJ.*) **GANGABAI v. JANKIBAI**

22 Bom. L. R. 1309.

—Widow—Surrender—Consideration—Reservation of small benefit by widow—Effect of.

A Hindu widow made a gift of her husband's property in favour of her only daughter on condition that the widow was to be maintained by her daughter till her death.

Held, that there was no valid acceleration of the widow's estate by the gift, inasmuch as she had not disposed of her entire life estate by the gift.

In order that an acceleration by a Hindu widow of her life estate can be valid it is essentially necessary that the widow must withdraw her own life estate so that the whole can get vested at once in the grantees. The necessity of the removal of the obstacle of the life estate is a practical check on the frequency of such conveyances. 19 I. A. 30, 32, Rel.

Where there is any consideration for the gift by a Hindu widow of her life-estate that will prevent its taking effect as an acceleration, and turn the transaction into an alienation. (*Macleod, C. J., and Heaton, J.*) **ADIVEPPA NAGAPPA v. TOUTAPPA.**

44 Bom. 255 :

22 Bom. L. R. 94 : 55 I. C. 369.

—Widow—Surrender in favour of next reversioner—Self effacement—How effected—Total renunciation of right. See (1919) *Dig. Col. 631*. **MUSSAMMAT BHAGWAT KOER v. DHANUKDHARI PRASAD SINGH.**

47 Cal. 466 : 12 L. W. 105 : 24

C. W. N. 274 : 1 P. L. T. 1 :

22 Bom. L. R. 477 (P. C.)

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—Widow—Surrender—Occupancy Right—*Surrender to daughter—Effect of.*

A widow of an occupancy tenant transferred her right of occupancy to her daughter and got her recorded as the tenant. *Held* that such transfer had the effect of determining absolutely her life-estate as a widow and she cannot on the death of the daughter, resume that right. (*Hopkins, S. M., and Harrison, J. M.*) DEWAN SINGH v. MUSSAMAT KUAR.

58 I.C. 441.

—Widow—Waste—Gift by limited owner.

The fact that, a life tenant is anxious to transfer the estate to a third person might not amount to waste, but might constitute a danger to the interests of the reversioner which might justify a Court to protect those interests by the appointment of a receiver.

A gift of a portion of the property of which the donor is a life tenant constitutes waste, unless some necessity can be set up by the person making the alienation. (*Macleod, C. J., and Heaton, J.*) AHMAD ASMAL MUSE v. BAI BIBI.

44 Bom. 727 : 22 Bom. L.R. 826 : 57 I.C. 553.

—Widow—Waste—Gift of portion of estate—Receiver—Appointment of. See. RECEIVER.

22 Bom. L.R. 826.

—Will—Construction—Accumulation—Provision for if obnoxious to Hindu law.

R. in his will gave and devised the residue of his property to B, his widow and executrix for life, thereafter to his five sons in equal shares with a direction to make certain payments and for accumulation of the surplus income during the lifetime of the widow for the benefit of the sons:—

Held, that the provisions for accumulation of the surplus income is not invalid.

A direction to accumulate with a gift of the accumulation is not fundamentally bad; it fails only if it offends some independent rule of Hindu Law. (*Greaves, J.*) RAM LAL SEN v. BIDHUMUKHI DASI

47 Cal. 76 : 56 I.C. 373.

—Will—Construction—Authority to adopt given to two widows—Adoption by senior widow—Invalidity. See HINDU LAW. ADOPTION.

18 A.L.J. 108.

—Will—Construction—Bequest to mother and sister—Right to "enjoy will all proprietary rights"—Gift over to dayordes as a contingency—Estate taken by legatee. See (1919) Dig. Col. 632 CHIDAMBARANATHA GOUNDAN v. THEVARAYA REDDI.

27 M.L.T. 37 : 54 I.C. 524

—Will—Construction—Contingent and vested interest—Power of adoption given to daughter-in-law—Contingent interest given to son's daughter to succeed if daughter-in-law

HINDU LAW.

died without adopting—Prohibition of adoption if son's daughter had a son—Effect of.

A Hindu died in 1875 leaving him surviving a widow I and a daughter B of his predeceased son, and also his brother's sons and grandsons. He made a will whereby he left all his property to I for life but permitted her to adopt a son. The boy if adopted was to be the owner of the property. If B had a son I was prohibited from taking a boy in adoption. If I died without taking a boy in adoption, B and the sons that might be born to her were to be owners of the property. B gave birth to a son (plaintiff) in 1891, in 1896 I adopted defendant No. 1. B. died in 1897 and was followed by I in three weeks' time. Plff. having sued to recover possession of the property.

Held, that whatever powers of adoption I had under Hindu law the testator had no power to control them by his will but he could leave his property to I's adopted son as a *persona designata* provided the adopted son was born in his lifetime.

(2) that in as much as defendant No I was adopted after B had a son he could not take a *persona designata* under the will.

(3) that accordingly on I's death there was an intestacy.

(4) that inasmuch as there was on the death of the testator no direct gift of the remainder to B but a gift contingent on the happening of an uncertain event viz., the dying of I without having taken a boy in adoption the contingency could not be regarded as having occurred in view of the fact that I did adopt.

(5) that the plaintiff could succeed only as a *bandhu* but was excluded by other nearer heirs to the testator.

To enable a remainder to be vested there must be a direct gift. (*Macleod, C. J., and Heaton, J.*) NATVARLAL GIRDHARLAL v. RANCHHOD BHAGWANDAS

22 Bom. L.R. 71 : 55 I.C. 318.

—Will—Construction—Limited or absolute estate—Female donee.

A Hindu executed a will bequeathing his moveable and immoveable property in equal shares to his mother and widow using the terms "*Kulli ikhtiyar wa milkia*" in the document. After his death his mother made a gift of her share to her daughter and daughter's son.

Held, that a will by a Hindu in favour of a female must be interpreted in the same way as if it was in favour of a male and that the word *milkia* implies an absolute estate unless there is something in the context to qualify it.

30 All. 84 P.C. 61 P.R. 1911 ; 214 P.L.R. 1908 : 32 I.C. 605 : 30 Cal. L.J. 51 ; 53 I.C. 195 foll. 35 Bom. 279 6 I.C. 141 dist. 27 P.R. 1898 diss. (*Chevins and Dundas, JJ.*) MUSSAMAT WAZIR DEV v. RAM CHAND.

1 Lah. 415 : 58 I.C. 988.

HINDU LAW.

—Will—Joint family property—Father making a dicise to his wife for maintenance—Validity of.

A Hindu father under a will devised in favour of his wife certain joint family properties belonging to him and his minor son. It was found that the provision made by the testator would have been a proper provision for him to make during his lifetime and that such a disposition of joint family properties during his lifetime would have been good:

Held, that the disposition in the will is inoperative as against the minor son and cannot prevail against the right of survivorship which takes effect the moment the testator dies. 8 M. H. C. R. 6 foll; 40 Mad. 1122 dist. (*Wallis, C. J. and Krishnan, J.*) PANDIPATI SUBBARAMI REDDI v. PANDIPATI QAMANNA.

12 L. W. 249 : (1920) M. W. N. 529

HINDU WIDOWS' REMARRIAGE ACT, S. 1—Remarriage—Custom.

A widow of a caste which by custom permits remarriage independently of the Hindu Widows Remarriage Act is not by remarriage deprived of her life interest in her husband's estate. (*Hopkins S. M. and Porter, J. M.*) BHAROOA v. RUP SINGH. 57 I. C. 429.

HINDU WILLS ACT (XXI of 1870)—Applicability of—Khojas—Will—Document of title.

The Hindu Wills Act, 1870, is not applicable to the will of a Khoja Mahomedan. S. 187 of the Succession Act is not applicable to such a will and title under the will can be established without probate, and the will stands on the same footing as any other document of title, (*Crump, J.*) ABDUL KARIM v. KARMALI.

22 Bom. L. R. 708 : 58 I. C. 270.

HIRE-PURCHASE AGREEMENT—Transfer of ownership of goods—Default in payment of instalments—Compensation—Detention.

The transfer of ownership in goods obtained on the hire-purchase system does not pass till payment of the last instalment agreed upon.

Where a hire-purchase agreement contains no provision for forfeiture of previous payment in the case of default in paying an instalment the parties are restored to their original position, but the owner however on receiving back the goods is entitled to reasonable compensation subject to the liability to refund the balance of the amount he has received, (*Oldfield and Seshaigiri Aiyar, JJ.*) SRINIVASA AIYANGAR v. DOUGLAS. 57 I. C. 62

—Will—joint family—Father—No Power to make provision for maintenance by will for his widow. See. HINDU LAW JOINT FAMILY. 43 Mad. 824.

HUSBAND AND WIFE—Restitution of conjugal rights—Decree—Injunction against parents not to bar—Propriety. *See.* 22 Bom. L. R. 214.

INAM.

IMMOVEABLE PROPERTY—Whether decree relating to immoveable property. *See.* 16 N. L. R. 72.

IMPARTIBLE ESTATE—*See also HINDU LAW, IMPARTIBLE ESTATE.*

—No co-parcenary rights in
An impartible Zemindari is the creature of custom and there is no co-parcenary right in the junior members. 30 C. 828 ; 45 I. A. 145 Ref. (*Viscount Cave*) RAJKUMAR BABU BISHUN v. MAHARANI JANKIKUER.

24 C. W. N. 857 : 28 M. L. T. 105 : 12 L. W. 349. (P. C.)

INAM—Agraharam—Jodi—Liability for—Transferee of portion of agraharam if liable for whole Jodi—If a charge on the agraharam or rent within S. 3 (II) of the Madras Land Act—Interest on arrears of Jodi.

Agraharams are ordinarily held on a single and indivisible tenure and agraharamdars are jointly and severally liable to the Zamindar for the Jodi due on the entire agraharam in the absence of any contract to which the Zamindar is a party apportioning the Jodi on the various sub-divisions of the agraharam made by the agraharamdars. 3 M. H. C. R. 59 ; 2 Mad. 234 ; 13 Mad. 25 ; 16 Mad. 34 Ref.

The position of mere transferees of portions of the agraharam would however be different and their occupation of land within the Zamindari would not create a liability out of proportion to the quantum of their estates. 38 Mad. 86 ; 102 Eng Rep. 490 Ref.

In order however to escape from the liability for the whole of Jodi on the ground that the defendants are only transferees or assignees of portions of the agraharam from the original agraharamdars it is necessary that such a special case should be set up at the trial.

- In the absence of a contract or custom to that effect Jodi is not a charge upon shrotriya or an inam except where the grant is by Government and 'Jodi' due upon an inam or agraharam situated within a Zamindari estate is not rent of ryoti land and does not become a charge on the holding. 3 L. W. 273. ref.

- Jodi is not rent as defined in S. 3 (II) of the Madras Estates Land Act I of 1908 and interest thereon cannot be claimed under S. 61 of the Act.

Though in cases where neither the Interest Act nor the Rent Law applies and where there is no contract express or implied to pay interest Courts of Equity may award interest by way of damages it will not do so in a case where the plaintiff has allowed the jodi due to him to fall into arrears without making any demand for payment. (*Spencer and Krishnan, JJ.*) SINGARAZU VANKATASUBRAMANIYAM v. RAJAH OF VENKATAGALI, 11 L. W. 523 ; 56 I. C. 552,

INAM.

—Desai Vatan—Grant of the soil or revenue—Distinction between Vatan and Inams and Saranjans.

In the Bombay Presidency in the case of Inams and Saranjans the ordinary presumption in the absence of any indication to the contrary, is in favour of the grant being limited to the royal share of the revenue; and clear words are necessary to indicate a grant of the soil. The words ordinarily used to indicate a grant of the soil are "water, grass, wood (trees) stones, mines and hidden treasures" but the absence of these words cannot be treated as necessarily establishing that the grant is of the royal share of the revenue only.

In the year 1734 A.D. the then Maratha Ruler granted a whole village in Inam "Koolbab and Koolkanoo (*i.e.*, all taxes and assessments) but exclusive of the (Haks) of Ha'dars and Inam-dars" to provide for the maintenance of the donee by way of return for services. The village was continued to the descendants of the grantees in 1858 by the Inam Commissioner, on the same terms. In 1864, the Inamdar accepted a settlement which was on the lines of the Gordon settlement agreeing to pay to Government a fixed annual payment in lieu of service. A question having arisen whether the grant was of the royal share of the revenue only or of the soil also:—

Held, that the grant in question was a grant of the soil and not merely of the Royal share of revenue. (*Shah and Hayward, JJ.*) AMRIT VAMAN INAMDAR v. HARI GOVIND KULKARNI.

44 Bom. 237 : 22 Bom. L. R. 275.
56 I. C. 411.

—Enfranchisement—Effect of—Holder, of the office—Claim by divided members to Share in the enfranchised lands—onus—Exclusive enjoyment.

The enfranchisement of service inam lands in the name of the office holder does not *per se* deprive a divided member of the office holder claiming a share in the enfranchised lands.

Where the divided member sues for a share in the lands enfranchised the onus lies on him to prove (1) that he is a member of the original service holder's family and (2) that any partition which has taken place among the members of the family the inam lands were kept out of partition as undivided property in which all the members retained joint rights.

The sole possession of the inam lands by the office-holder is not *per se* adverse to the other members of the family divided or undivided so as to deprive them of any interests they might possess. The decision of the Privy Council in 46 Cal. 362 has not overruled the decisions in 30 Mad. 434 and 26 Mad. 330. The opinion of Spencer, J. in 8 L. W. 614 *dist.* (*Ayling and Odgers, JJ.*) DEVULAPALLI VENKATA SUBBA RAO v. SATYANARAYANA-MURTHI.

12 L. W. 642;
(1920) M. W. N. 754.

INAM.

—Kazi imam—Functions of Kazi

The grant of an inam for the performance of functions of a Kazi in a particular locality entitles the grantee to enjoy the inam and in return to render such services as are included in the grant. Although, he is bound to comply when asked to perform such services, he cannot insist on being so employed (*Macnair, A. J. C.*) SAYED WAJIR UD-DIN v. SHAHAB-UD-DIN.

57 I. C. 618

—Presumption—Melvaram and Kudavaram—Resumption of inam—Issue of ryotwari patta—Occupancy rights of Subordinate holders—Payment of thirwu—Charity lands—Grant of occupancy rights by trustee.

In an inam there is no presumption that prima facie the grant is only of the melvaram. The determining factors are the terms of the particular grant and the whole circumstances connected therewith. 41 Mad. 1012 (P.C.) 43 Mad., 166; (P.C.) followed.

Where a grant by the Maharaja of Mysore who was then the ruling power over the territories in which the lands comprised by the grant were situate, described the grantor as the Lord of the Earth, and granted the lands with Ashtabhogam (8 kind of enjoyments) and Dasaswamayam (10 kinds of rights) and the lands granted were referred to in subsequent Jamabandi accounts as Nilamanibham.

Held, that the grant was of both varams and not merely to the melvaram in the lands.

Pcr Sadasiva Aiyar, J.—Where a land is at the absolute disposal of the Government and they grant it to the plaintiff, the fact that some relationship as landlord and tenant had previously existed between the grantee from the Government and a third person cannot avail to deprive the grantee of his rights under the grant and the third person who had no rights against the paramount title of the Government cannot set up his prior rights, destroyed by the action of the Government against the grantee from the Government, even though the prior rights were those of a landlord. (3) 2 Mad., 226, (4) 12 Mad. 422. Followed.

Where an Inam grant was resumed by the Government and a Ryotwari patta on full assessment was issued to the Inamdar himself and it did not appear that the tenants on the land had at the time of resumption acquired permanent rights of occupancy either by grant, by contract or by prescription:

Held, (1) (*per curiam*) that the Inamdar was entitled to eject the tenants

(2) *Pcr Sadasiva Aiyar, J.*—That even assuming that the tenants had obtained occupancy rights by prescription or grant from the Inamdar, the resumption by the Government put an end to the Inam grant and the subordinate titles of the tenants under the Inamdar and the new title acquired by the Inamdar by the grant to him Ryotwari patta by the Government after resumption could not

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be affected by those subordinate rights available against him only if his old title as Inamdar continued.

Per Spencer, J.—Teerva means rent and the payment of it does not indicate that those who paid it had occupancy rights.

Per Sadasiva Aiyar, J.—The grant of occupancy rights to tenants of charity lands by the trustees would ordinarily be a breach of trust 10 L. W. 427, 40 Mad., 709 (P. C.) Followed (*Sadasiva Aiyar and Spencer, JJ.*)
SUBRAMANIA AIYAR v. ONNAPPA KOUNDAN

39 M. L. J. 629: 28 M. L. T 389:
12 L. W. 576

INCOME-TAX ACT (II of 1886) S. 14—Assessment for income-tax—Fresh assessment, when income found to be in excess—Power of Collector.

The Collector has power under S. 14 of the Income-Tax Act of 1886 to proceed to make fresh assessment for income-tax when he finds that first assessment made by him is low. (*Macleod, C. J. and Heaton, J.*) REVANSID-DAPPA v. THE SECRETARY OF STATE FOR INDIA.

44 Bom. 234:
22 Bom. L. R. 88: 55 I. C. 334.

—Ss 2 (1) and 51 Agricultural income—Salami paid to landlord for waste lands and recognition of transfer of holding—Abwai—Reference to High Court—Jurisdiction—Practice.

Premium paid for the settlement of waste lands or abandoned holding is "rent or revenue" derived from land within the meaning of expression as used in the definition of "agricultural income" in S. 2 (1) (a) and is exempt from assessment, but that paid for recognition of the transfer of a holding from one tenant to another is liable to be taxed.

Income derived from illegal abwabs such as *uttarayan* is not agricultural income and is not exempt from assessment but must be taxed as "income from whatever source derived" within the meaning of S. 3 (1).

The High Court exercises not an Original but an Appellate jurisdiction when it entertains a reference under S. 51 of the Indian Income Tax Act, and in a reference made in connection with assessment on a person who resides beyond the limits of the Ordinary Original Jurisdiction of the court the procedure should be that applicable to appeal from the courts in the Province under Cl. 16 of the Letters Patent. Consequently on such a reference Vakils are entitled to be heard and counsel can be properly instructed only by a Vakil and not by an Attorney. In such a reference made in connection with an assessment on a person who resides within the limits of Ordinary Original jurisdiction of the Court the Procedure should be assimilated with that applicable to appeals from the original s de.

The nature of proceeding is a matter of substance and not of form and is not affected by accidental circumstances such as the place

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from or the channel through which the reference may be made by the Chief Revenue authority. (*Mookerjee, C. J. Fletcher and Walmsley, JJ.*) MAHARAJA BIENDRAKISHORE MANIKYA BAHADUR v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

25 C. W. N. 81: 32 C. L. J. 433.

—S. 3 Sub. S (1) (2)—Agricultural income—Tea—"Fit for market"—Reference under Income-tax Act—Right to begin.

The process employed by the applicant company for the cultivation of tea bushes and manufacture of tea as a commercial commodity was as follows: "After the tea bush has been planted and has arrived at a proper state of maturity, the young green leaf is selected and plucked by hand from the bush. It is then dried or withered and rolled, dried and stoned. The actual dried and rolled leaf, the produce of the tea bush, is then sent to the market. In the very early days of tea cultivation, the green leaf was dried or withered in the sun and was then rolled by hand. This primitive method was replaced by machinery."

Held, that the process employed by the applicant company for the cultivation of tea bushes and manufacture of tea as a commercial commodity could not in its entirety be appropriately described as "agriculture" within the meaning of S. 3 sub-S. (1) of the Indian Income Tax Act. The earlier part of the operation, when the tea bush was planted and the young green leaf was selected and plucked was "agriculture." But the latter part of the process was manufacture of tea and could not be described as "agriculture." The manufacture of tea as marketable commodity from the green leaves was not a performance by cultivator of a process ordinarily employed by a cultivator to render the produce raised by him fit to be taken to market.

The crown seeking to recover the income-tax, must bring the subject within the letter of the law, otherwise the subject is free, however much within the spirit of the law the case might appear to be. There can be no equitable construction admissible in a fiscal statute; the benefit of the doubt is the right of the subject: (1869) L. R. 4 H. L. 100 (122), and other cases.

An interpretation of statute which has long been acted on, should not be disregarded by a court of Law: (1889) 14 App. Cas. 417 (429), and other cases ret.

The objector who questions the assessment of tax by the Crown is entitled to begin at the hearing of the Reference in the High Court. (*Mukerjee, A. C. J., Fletcher and Chaudhuri, JJ.*) KILLING AND VALLEY TEA COMPANY, LIMITED v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

32 C. L. J. 421.

—Ss. 3 (1) 5 and 9—Money lending business—Interest not received in the year of account—Liability to tax.

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Interest becoming due to a money lending firm in the year of account but not realized in cash or by adjustment in the accounts is not liable to tax under Act VII of 1918.

Per Sudasira Aiyar, J.—Interest which became due to a Natukottai Chetty Firm in British India which was not realized in cash or by adjustment of accounts would be such income as would be liable to be taxed under the Income-tax Act VII of 1918 if such interest-money had become due to the assessee in the manner and in the sense that it was so completely under his control that by an act of his will he could receive it in cash without greater trouble than is involved in drawing money from his bankers. (*Sir John Wallis, C. J., Ayling, Sudasira Aiyar, Napier and Krishnan, JJ.*) THE SECRETARY TO THE BOARD OF KEVENGE INCOME-TAX, MADRAS v. ARUNACHELLAM CHETTIAR.

39 M. L. J. 649 :
(1920) M. W. N. 789 :
29 M. L. T. 16 (F. B.)

—Ss. 3 (1), 9 and 51—Reference to High Court on the motion of assessee—Right of assessee to begin—Profits of business carried on outside British India on behalf of resident—Profits, not remitted to British India—Liability to tax. See (1919) *Dig. Col.* 638. SECRETARY TO THE COMMISSIONER OF SALT, ABKANI AND SEPARATE REVENUE, BOARD OF REVENUE, MADRAS v. RAMANADHAN CHETTY. 43 Mad. 75.

—Ss. 8, 9 and 11—Allowance in respect of annual value of business premises—Liability to assessment—House-property—Business premises.

Held, (per Piggot, J. dubitante) that where an assessee is carrying on business in premises owned by himself, the allowance on account of the value of the business premises, which is made in his favour by S. 9 (2) of the Income-tax Act of 1918, is not liable to assessment under S. 8 or S. 11 or any other provision of that Act.

Per Piggot, J.—The annual value of the business premises would not be assessable under S. 11 but would be assessable, to the extent of five-sixths thereof, under S. 8. (*Knox, Piggot and Gokul Prasad, JJ.*) IN THE MATTER OF A JOHN AND COMPANY.

18 A. L. J. 1017 :
58 I. C. 836 : (F. B.)

—Ss. 24 Proviso (2) 36 and 40—Scope and applicability—Penal assessment—Order for subsequent prosecution under S. 39 (d)—Maintainability—S. 24 proviso (2)—Effect.

Held, that the prosecution of an assessee under S. 39 (d) of the Act for failure to produce his account books in obedience to a notice issued to that effect was not barred by proviso 2 to S. 24 of the Act by reason of prior order

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for penal assessment made against him by the collector under S. 24 of the Act on the ground that he had made a false return, even though in making the order under S. 24 the Collector treated the non-production of account books by the assessee as evidence of the falsity of his return.

The proviso to S. 24 is intended to bar a prosecution under S. 40 of the Act not one under S. 39.

The only ground on which the Collector can direct a penal assessment under S. 24 of the Act is that the assessee has made a false return, the Collector cannot do so on the ground of non-production of account books by the assessee. (*Ayling and Coutts Trotter, JJ.*) EMPEROR v. HUSSAIN ALLY & CO.

43 Mad. 498 :
38 M. L. J. 333 : 11 L. W. 425 :
55 I. C. 1003 : 21 Cr. L. J. 395.

—S. 39 (d)—Prosecution under maintainability—Prior order for penal assessment. See INCOME-TAX ACT, S. 24 (2).

38 M. L. J. 333.

—S. 51—Reference under—Nature of—Appellate or original jurisdiction—Vakils—Right of audience. See INCOME TAX ACT, Ss. 2 (1) AND 51.

25 C. W. N. 81.

INHERENT POWER—Appellate Court—Power to rectify order of trial judge made under a mistake of fact. See C. P. Code S. 151.

31 C. L. J. 130.

—Doctrine of—Criminal case—Applicability to. See Cr. P. Code S. 145.

32 C. L. J. 270.

—Erroneous order—Rescission of, so as decide case finally. See C. P. Code S. 151.

31 C. L. J. 48.

See also under S 151 C. P. Code.

INJUNCTION — Arbitration—Award—Proceedings of arbitrators when to be restrained. See ARBITRATION, AWARD. 31 C. L. J. 167.

—Co-owners — Members of a joint Hindu family—One member when entitled to restrain another from taking possession.

Plffs. and defts were members of a joint hindu family. In a former suit for partition by the present plffs. there was a decree on arbitration and award that the plaintiffs should have possession of all the family properties for 6 years from July 1904 and that at the end of the period defendants should be entitled to recover their half share either amicably or through court. On plaintiff's failure to give possession at the end of the period fixed defendants attempted to take possess on. There was a possession case and the plaintiffs afterwards brought the present suit for an injunction to restrain defts. from interfering with their possession.

Held, that plffs. were not entitled to the injunction asked for. 18 Cal. 10. (P. C.) Rep.

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(*Oldfield and Seshagiri Aiyar, J.*) SRINIVASA AIYANGAR v. NARAYANA AIYANGAR.

11 L. W. 606 : (1920) M. W. N. 364 : 56 I. C. 608

—Co-sharers—Building on common land
—Right of other sharers to restrain. See *Abadi*
1 Lah 249 : 57 I. C. 207.

—Easement—Infringement of—Right to discharge rain water—Form of decree.

Where a person had enjoyed a right of easement as to the flow of rain water from his house for 40 years and the opposite side failed to show that anything had happened to deprive him of this right or to diminish it.

Held that he was entitled to an injunction restraining the opposite side from interfering with the exercise of the right.

In granting relief to the holder of easement the Courts ought not to place galling restrictions on the opposite side, provided the holder gets what he wants. (*Stuart, J. C.*) RAM LAL v. MAKHAN LAL. 55 I. C. 710

—Easement—Light and air—Substantial injury—Damages.

Any act by deft. which controls or obstructs the light and air to which plff. is entitled is *prima facie* an injury of a serious character.

Where defendant commenced to erect certain buildings which threatened to obliterate the window in a room in the second storey of the house belonging to the plaintiff and both the courts below inspected the property and came to the conclusion that the room would become practically uninhabitable if the window in dispute was entirely blocked.

Held, that the proposed erection of the building by the defendant is a very serious menace to the plaintiffs' property and he is entitled to an injunction. 2 P. R. 1893 foll 8 P. R. 1909; 14 C 839 ; 29 I. C. 249 ; 23 I. C. 785, Ref.

Held, also, that it having been proved that the plaintiff has acquired an easement whereby he is entitled to have free access of light and air through the window in dispute he is *prima facie* entitled to be maintained in his enjoyment of the said easement and he is not legally bound to meet the defendant by opening another window on the opposite wall or one of the other walls.

Held, further, that compensation would not meet the situation. 9 I. C. 417, foll. (*Broadway, J.*) THAKAR DAS v. S. ABDUL HAMID.

2 Lah. L. J. 701.

—Easement—Tree overhanging—Tree growing partly on plaintiff's and partly on defendant's land.

A person is not entitled to cut off the overhanging branches and the penetrating roots of a tree belonging to his neighbour and growing partly on his land and partly on his neighbour's land for many years past..

INJUNCTION.

20 Bom. L. R. 826, 19 Bom. 420 ; dist, (*MacLeod, C. J. and Heaton, J.*) SOMESVAR JETHA LAL v. CHUNILAL NAGESHWAR.

44 Bom. 605 : 22 Bom. L. R. 790 : 57 I. C. 544.

—Legal Proceedings—Suit in Foreign Court about the same subject matter

A defendant in a pending suit here should not be restrained from commencing and prosecuting in a foreign Court to enforce rights which he acquired within the jurisdiction of the foreign court against the plaintiff under the law of that foreign country.

In an application for an injunction to restrain the defendant in a pending suit from prosecuting an action in a foreign court about the same subject-matter it is an essential condition that it should be applied for very promptly and that it should not be applied for after a considerable amount of time and trouble has been expended in the foreign suit. (*Rankin, J.*) TICUMCHAND SANTOKE CHAND v. SANTOKE-CHAND SINGHEE. 24 C. W. N. 785.

—Mandatory—Co owners—Obstruction.

Where two co-owners jointly owned a lane 10 feet in breadth and one of them put up two pillars and steps thereby encroaching upon the common lane and making it less convenient for the other to pass through.

Held, the aggrieved co owner is entitled to a mandatory injunction directing the removal of the obstruction. 35 M 648, Ret. 4 C. L. J. 198 and 205; 17 I. A. 120 D. st. (*Seshagiri Aiyar and Moore, J.J.*) VARANASI SUBBAYA v. VARANASI SOMALI GAM. 38 M. L. J. 491 : 27 M. L. T. 176 : 55 I. C. 643:

—Nuisance—Mahomedan mosque—Right to call out the aran—Disturbance by assembly of Hindus—Injunction. See SP. REL ACT S. 55. 1 Lah. 140.

—Nuisance—Right to injunction

A plff. who has established that his common law rights have been violated is entitled to an injunction to prevent a recurrence of that violation, and damages may be given in substitution for an injunction only if (1) the injury to the plaintiff's right (a) is small (b) is capable of being estimated in money, (c) can be adequately compensated by a small money payment, and (2) it would be oppressive to the defendant to grant the injunction. L. R. 1 Ch. 287 foll.

The fact that the legislature has provided for the payment of compensation for damage caused by the exercise of statutory powers does not of itself take away the right to an injunction. (*Robinson, J.*) BURMA RAILWAYS CO. LTD. v. MUNICIPAL COMMITTEE. 13 Bur. L. T. 62.

—Suit for declaration—Ancillary relief—Sonthal Parganas.

A suit for declaration cou led with a prayer for injunction is maintainable in the Sonthal

INJUNCTION.

Parganas. (*Coutts and Adami, JJ.*) TEKAIT DEO NANU SINGH v BHUK LAL RAUT
1 Pat. L. T. 699 : 57 I. C. 196.

—*Suit for—Quia timet action—Perpetual injunction*

A *quia timet* action can be brought only when the opposite party does something towards infringing the plaintiff's rights, or it is so clear that he is on the point of doing something which will infringe the plaintiff's rights so that consequently there must be the prospect of irremediable injury being suffered by the plaintiff unless he takes proceedings to stop the defendant's action. (*Macleod, C. J. and Heaton, J.*) GOVINDLAL MANEKLAL v ICCHA VAGIA
22 Bom L. R. 723 : 57 I. C. 414

—*Tort—Restraining by injunction.*

The grant of an injunction is not restricted to wrongs arising out of contract only, but relief can also be given in respect of an invasion of the rights of any person resting on tort 8 I. C. 687 Ref (*Jewala Prasrd, J.*) RIT LAL MALLAH v. RAG HUBAR RAM

58 I. C. 714

—*Trade-mark—Infringement of—User of one's own name—Not to be restrained. See TRADE MARK* 56 I. C. 709

—*Trade name—User of by rival company—Pecuniary loss if essential—Charitable companies—Principle of applicable to See (1919) Dig Col 611 GURKHA ASSOCIATION, SIMLA v. MAHUMED UMAR.*

1 Lah L. J. 161.

INSOLVENCY — *Discharge—Suit to recover debt from property of insolvent in foreign territory—Jurisdiction of insolvency court to restrain proceedings in foreign court.*

The Insolvency Court in Bombay has no jurisdiction to restrain a decree holder from filing a suit against an insolvent, who has obtained his discharge in the Insolvency Court, in a foreign State, within whose jurisdiction the insolvent has property, for recovering a debt in respect of which the discharge has been obtained.

The order of discharge granted by the Insolvency Court in Bombay would be recognised by all courts in the British Empire, but there is no obligation on Courts outside British India to recognise the order of discharge as a complete release from debts mentioned in the order. (*Macleod, C. J. and Fawcett, J.*) LAKHINAM KEVALRAM BHATT v. PUNAMCHAND PITAMBER.
22 Bom. L. R 1173

—*Minor partner—Adjudication as insolvent—Competency of. See CONTRACT ACT, S. 247.* 18 A. L. J. 611.

See also under Pres. Towns Insolvency Act and Prov. Insolvency Act.

INSURANCE—*Life—Commission agent—Right to commission on renewals of premia—Book of instructions issued by company—Value of.*

INSURANCE.

As per contract between a Life Assurance Company and its agent the agent was to receive commission on policies introduced by him and on renewals of the *premia* by the policy holders and the agent had to perform duties in respect of such renewals. The agent was subsequently dismissed for a proper cause. In a suit by the agent for the recovery of the commission on renewals of *premia* by policy holders introduced by him.

Held, that in the absence of a specific agreement to the contrary the right of the agent to receive commission lapsed on his dismissal and that he was not entitled to claim commission on payments of premia by policy holders introduced by him after the termination of his agency.

Held also, that under the circumstances of the case the book of instructions issued by the Life Assurance Company to its agent embodies part of the contract of agency. Subsequent payment of premia on original policies are renewals of premia in ordinary insurance parlance. English cases on the subject considered by Napier, J. (*Sadasiva Aiyar and Napier, J.J.*) EMPIRE OF INDIA LIFE ASSURANCE CO. v. NANU AIYAR.

39 M. L. J. 577 : 12 L. W. 616 : (1920) M. W. N. 770.

—*Life policy-holder—Rights of—Suit for refund of premia paid—Maintainability—Resolution of company affecting rights to policy-holders—Validity of.*

Plaintiff's mother took out a policy in the Tanjore Life Assurance Company on 22-5-1906 which provided that if the assured paid the future premium at one rupee per mensem until 20th May 1921 or till her death the company would be liable to pay her or her assignee (the plaintiff) such sum shall become due and payable by virtue of the rules contained on the back thereof agreeable to the regulation of the Company on the completion of 15 years premium or on satisfaction of proof of death and title of the assured. Under the rules of the company then in force policy-holders had the option of discontinuing the payment of the monthly premiums after they had paid for 60 months. Plaintiff's mother paid the premia for 61 months, that is, till May 1911, but made no further payment and died on 6-4-1914. In a suit brought by plaintiff for *inter alia* a refund of the premia paid by his mother, the Assurance Company contended that plaintiff was not entitled to a refund because the policy had lapsed owing to the non-payment of the premia and relied upon a resolution passed at an extraordinary meeting of the share-holders of the company in or about January, 1911 to the effect that the premia should be continued to be paid till the death of the assured. No notice was given to plaintiff's mother about this extraordinary meeting and she did not take out the policy subject to the rules then existing as well.

INTEREST.

as to the rules which might be framed or altered otherwise. Held, overruling the contention of the Assurance Company that the rule relied upon by it was not binding on plaintiff's mother and could not affect the rights acquired by her under the policy before the said rule was passed and that plaintiff was therefore entitled to a refund of the premium paid (*Seshagiri Aiyar and Moore, JJ.*) THE TANJORE LIFE ASSURANCE CO., LTD v. KUPPANNA RAO 43 Mad. 333.

38 M. L. J. 135 : 11 L. W. 584 : (1920) M. W. N. 441 : 55 I. C. 660

INTEREST—High rate—Power of Court to relieve against—Hard and unconscionable bargain—No power to interfere with unless case comes under S. 16 or S. 74 of the Contract Act. See CONTRACT ACT, Ss. 16 AND 74.

54 I. C. 785.

Method of calculation may be fixed by long standing practice of parties—Implied contract to pay in accordance with such practice. See

38 M. L. J. 387.

Mortgage—Hard and unconscionable bargain—Power of Courts to relieve—Limits of. See CONTRACT ACT, Ss. 16 AND 74.

24 C. W. N. 444.

Mortgage—Omission to take possession—No right to interest. See MORTGAGE INTEREST.

54 I. C. 814.

Right to—Arrears of rent—No contract to pay interest on—Absence of demand—Landlord not entitled to interest. See INAM AGRAHARAM.

11 L. W. 523.

Right to—C. P. Code S. 34—Interest Act, S. 1

Where the sum due is neither a 'debt' nor a 'sum certain', interest cannot be claimed under S. 1 of the Interest Act.

S. 34 C. P. C. does not provide for payment of interest for period antecedent to suit, but it empowers the Court, when the decree is for the payment of money, to allow interest *pendente lite* as also interest subsequent to decree.

When the sum recoverable by the plaintiff is not a debt but unliquidated damages, interest does not run upon unliquidated damages, *pendente lite*. 7 Bom. H. C. R. 98 (A. C.) Ref. Interest prior to suit cannot also be recovered 31 Mad. 250 (1913) M. W. N. 874. Ref. (*Ashutosh Mookerjee and E. E. Fletcher, JJ.*) J. W. CREWDSON v. GANESH DAS HARI BUX. 32 C. L. J. 239

Right to—Detention of money due for services rendered—Damages.

A creditor, if not entitled to any interest under the Interest Act, is not debarred from claiming interest by way of damages under S. 73 of the Contract, if the creditor proves actual loss : 26, Cal. 955. (965) followed.

Interest by way of damages is not recoverable for the mere wrongful detention of an ordinary debt : 27 Cal. 814. followed.

INTERPRETATION.

The plaintiff built a house for the defendant and sued to recover Rs. 60/- as 7 for labour and materials and Rs. 188 for interest. There was no written contract and no demand in writing of interest. It was not alleged that the plaintiff sustained actual loss by the detention of money :

Held, that neither under the Contract, nor under the Interest Act, the plaintiff was entitled to interest for the money due. (*Walmsley and Shamsul Huda, JJ.*) PROSONNOMOYI GHOSHAIN v. GOPAL LAL SINHA

31 Cal. L. J. 348 : 55 I. C. 737.

INTEREST ACT (XXXII of 1839). S. 1—Money due under building contract—No stipulation to pay interest—Court's power.

Work was done under a building contract which provided that "all work done by the contractor shall be paid according to the rates herein specified within a reasonable time after it has been inspected and finally approved and passed." In a suit for money payable in respect of the building contract.

Held, that there was no provision for the payment of a sum on a certain day and it was not open to the Court to award interest on the sum found due to the plaintiff from the date when the building was handed over to him on completion.

Interest not payable, under the terms of the contract could only be awarded under the Interest Act (XXII of 1839,) or as being in accordance with usage as to the particular class of instruments. (*Wallis, C. J. and Seshagiri Aiyar, J.*) VENKATA KUMARA SURYA RAO BAHDUR GARU v. PALLAMARAJU.

40 M. L. J. 18 : (1920) M. W. N. 717.

INTERPRETATION OF STATUTES—Contradictory sections—Apparent Contradiction—Reconciliation. See Beng. T. ACT, Ss. 18 AND 85.

25 C. W. N. 9.

English decisions—Value of

A Judge should not interpret statutory law, when it provides for a specific procedure, by reference to a decision pronounced under a different system of procedure. (*Mookerjee and Fletcher, JJ.*) RADHA KISSEN KAITY v. LAKSHMI CHAND JAWAHAR. 24 C. W. N. 454 : 31 C. L. J. 283 : 56 I. C. 541.

General and special acts—Applicability of. See LIM. ACT S. 12.

(1920) Pat. 333.

Harmonious construction.

It is a well-known rule of construction that each part of a statute must expound every other part. (*Das, J.*) LALJI TEWARI v. EMPEROR. 5 P. L. J. 58 : 1 Pat. L. T. 147 : (1920) Pat. 125 :

54 I. C. 894 : 21 Cr. L. J. 190.

Illustrations—History of legislation—Reference to, if proper.

An illustration to a section is useful so far as it helps to furnish some indication of the presumable intention of the legislature and

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does not bind the Courts to place a meaning on the section which is inconsistent with the language.

The Court is bound to administer the law as enunciated by the legislature and neither to enlarge nor to restrict the sphere of its application.

Reference to history of legislation can only be legitimately made when reasonable doubt is entertained as to the construction of a statute. The proper course is in the first instance to examine the language of the statute, to interpret it, to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the Law. To begin with an examination of the previous state of the law on the point is to attack the problem on the wrong end; and it is a grave error to force upon the plain language of the section an interpretation which the words will not bear on the assumption of a supposed policy on the part of the legislature not to depart from the English law (*Mookerjee, C.J. Fletcher, Walmsley, Richardson and Buckland, JJ.*) *SATISH CHANDRA CHAKRABARTI v. RAM DAYAL DE.* 24 C. W. N. 982 : 32 C. L. J. 94.

—Legal term—Meaning of.

In interpreting a Statute the settled rule of construction is that where the Legislature uses a legal term which has a known significance, it must be assumed that the term has been used in that sense and in no other. (*Das, J.*) *JHARI SINGH v EMPEROR.* 56 I. C. 235 : 21 Cr. L. J. 443

—Marginal notes. See (1919) *Dig. Col. 647. SHEIK CHAMMAN v. EMPEROR.*

1 P. L. T. 11 : 54 I. C. 623 : 21 Cr. L. J. 143.

—New liability—Imposition of—Effect on old contracts.

When a new liability is imposed by newly enacted provisions of law, it has the effect of annulling all contracts made prior to the enactment. (*Sadasiva Iyer and Spencer, JJ.*) *MUNICIPAL COUNCIL OF CONJEEVARAM v. KUMARA VENKATACHARIAR.* 39 M. L. J. 58 : 11 L. W. 574 : (1920) M. W. N. 469 : 57 I. C. 718

—Penal statute—Acts—Include omissions.

Where the words in a statute used in connection with an offence or a civil wrong refer to acts done, they must be held to extend also to illegal omissions. (*Miller, C. J., and Adami, J.*) *ALLAN MATHEWSON v. DISTRICT BOARD, MANBHUM.* 1 P. L. T. 269 : (1920) Pat. 193 : 58 I. C. 749.

—Proceedings of the Legislative Council inadmissible.

To ascertain the meaning of the words used in an Indian statute a reference to the proceedings in the Legislative Council upon its

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enactment is not permissible. (*Viscount Finlay*) *KRISHNA IVENGAR v. NALLAPERUMAL PILLAI.* 43 Mad. 550 :

38 M. L. J. 444 : 18 A. L. J. 489 : 22 Bom. L. R. 568 : 28 M. L. T. 28 : (1920) M. W. N. 419 : 12 L. W. 92 : 56 I. C. 163 : 47 I. A. 33 (P. C.)

—Public authority—Expropriating Act.

Any statute which enables a public body to interfere w/ private rights of ownership must be strictly construed (*Das and Adami, JJ.*) *PARDIP SINGH v. THE SECRETARY OF STATE FOR INDIA* 5 Pat. L. J. 500 : (1920) Pat. 297 : 1 P. L. T. 395 : 57 I. C. 516.

—Remedy in ordinary Civil Courts when barred.

When an act of the Legislature gives power to any person for a public purpose from which an individual may receive an injury, if the mode of redressing the injury is pointed out by the statute, the jurisdiction of the ordinary Court is sometimes ousted, and in case of injury the party cannot proceed by action. But it must be ascertained from the statute itself whether it is intended to be conclusive and to bar all other remedies. *The Governor Company of Cast Plate Manufacturers v. Meredith* 4 T. R. 794 ; *Stevens v. Jeacocke* 11 Q. B. 731 ; *West v. Downman* 14 Cn. 111 Ref. (*Mullick and Sultan Ahmad, JJ.*) *THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. LOWN KARAN MARWARI.* 5 P. L. J. 321 : 1 Pat. L. T. 451 : (1920) Pat. 253 : 56 I. C. 507 : 21 Cr. L. J. 475.

—Retrospective effect not to be given, unless intention clear.

Every statute which takes away or impairs a vested right acquired under existing laws or creates a new obligation or imposes a new duty, or attaches a new disability in respect of transactions or considerations already passed, must be deemed retrospective in its operation. The rule that enactments in a statute are generally to be so construed to be prospective and intended to regulate the future conduct of persons is deeply founded on good sense and strict justice, and in the absence of clear words to that effect, a statute will not be construed so as to take away vested right of action acquired before it was passed 17. C. L. J. 316. Ref. (*Mookerjee, Fletcher and Richardson, JJ.*) *PROMOTHA NATH PAL CHOWDHURY v. MOHINI MOHAN PAL CHOWDHURY.* 31 C. L. J. 463 : 24 C. W. N. 1011 : 58 I. C. 327.

—Right of action for infringement of right—When taken away.

The burden of proving that the legislature intended to take away the rights of individuals lies on the party asserting such intention.

Metropolitan Asylum District v. Hill (1880) L. R. 6 A. C. 163 followed.

INTERPRETATION.

Where the legislature imperatively directs that a thing shall be done the doing of which if authorised by the legislature, would entitle any one to action, the right of action is taken away.

Hammersmith and City Railway Company v. Bran I. L. R. 4, H. L. 471 followed.

A party seeking to justify a nuisance on the ground of statutory authority must show (a) imperative orders of the legislature, and (b) that the orders could not possibly be carried out without infringing private rights, and committing the nuisance complained of, so that the legislature may be held expressly or by necessary implication to have authorised its commission. (*Robinson, J.*) BURMA RAILWAYS Co. LTD. v RANGOON MUNICIPALITY.

13 Bur. L. T. 62

Stare decisis—Scope of the doctrine

Great importance is to be attached to old authorities on the strength of which many transactions have taken place. But if they are plainly wrong, and specially where the subsequent course of judicial decisions had disclosed weakness in the reasoning on which they were based and practical injustice is the consequence that must flow from them, it is the duty of the final Court of Appeal to overrule them, if it has not lost the right to do so by itself expressly affirming them. (1908) A. C. 1 relied on (*Mookerjee, C. J. and Fletcher Chatterjee, Teunon, Richardson, Chaudhuri, and Shamsul Huda, JJ.*) CHANDRA BINODE KUNDU v. SHEIKH ALA BUX DEWAN.

24 C. W. N. 818 : 29 C. L. J. 605 :
58 I. C. 353 (F. B.)

Statement of objects and reasons—Reference to not permissible.

It is not permissible to refer to the statement of objects and reasons of a statute. (*Wallis, C. J., Ayling and Coutts Trotter, JJ.*) ZEMINDAR OF ETTIYAPURAM v. CHIDAMBARAM CHETTY.

43 Mad 675 :
39 M. L. J. 203 : 28 M. L. T. 75 :
(1920) M. W. N. 460 : 12 L. W. 217 :
58 I. C. 871.

Statutes affecting private rights—Strict construction.

Any statute that enables a public body to interfere with private rights must be construed very strictly as against the public body. (*Das and Adami, JJ.*) PARDIP SINGH v. SECY. OF SATTE FOR INDIA.

1 Pat. L. T. 395 :
5 Pat. L. J. 500 : (1920) Pat. 297 :
57 I. C. 516.

Taxing enactment—Strict interpretation—Construction in favour of the subject. See INCOME-TAX ACT, S. 3 (1) AND (2).

32 C. L. J. 421.

JODI—Agraharamdar—Liability of, if joint and several—Jodi is not rent within S. 3 (1) of the Madras Est. Land Act—Interest on arrears not claimable. See INAM AGRAHAM.

11 L. W. 523.

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JUDGMENTS—Dependent — Judgments—Effect of reversal of principal judgment—Supersession of subordinate judgments—Principal decision treated as authority and not as res judicata—Effect of. See (1919) Dig. Col. 648. SRI RAJAH BOMMADEVARA VENKATA-NARASIMHA NAIDU BAHAUDUR v. RANI VENKATAPPAYYA. 54 I. C. 647.

Title by—Judgment operating as a link in the chain of title. See ESTOPPEL.

11 L. W. 139.

JURISDICTION—Civil Court—Fixing of boundaries by Collector power of Civil Court to decide if any disputant has acquired title by adverse possession See

22 Bom. L. R. 1111.

Civil or Revenue—Claim that plff. has acquired occupancy rights by adverse possession—Punjab Tenancy Act. 77 (3) (d). See (1919) Dig. Col 650. BISHEN SINGH v. JAFFAR. 54 I. C. 911.

Civil or Revenue Court—Suit for partition of trees.

The plaintiff purchased a one-fourth share in certain trees of a village. He did not purchase any share in the zemindari. He brought a suit for partition of his share in those trees Held, that the suit was cognizable by the Civil and not by the Revenue Court. (*Mears, C. J. and Banerjee, JJ.*) SHEO SAMPAT PANDE v. THAKUR PRASAD. 42 All. 574 : 18 A. L. J. 739 : 57 I. C. 128.

Civil or Revenue Court—Test of—Suit by owner for declaration of right.

The question of jurisdiction has to be decided entirely on the allegations in the plaint. Where plffs. sued for a declaration that they were in rightful possession of the land in suit as owners and that deft. set up a rival claim as the heir of a deceased occupancy tenant, while as a matter of fact he had no title to the land.

Held, that on the allegations in the plaint the suit was cognizable by a Civil Court.

The *locus standi* of the plaintiff to ask for relief from a Civil Court had in no way been affected by the subsequent decree obtained by the deft. in a Revenue Court. (*Chevis, A. C. J. and Wilberforce, J.*) KARAM DAD v. MUSSAIN BAKSH.

56 I. C. 458.

Consent—Effect of—Objection—Waiver—Suit for rent filed in the Small Cause Court—Objection by defendant—Suit returned to Original Side—Suit again tried as Small Cause suit.

The plaintiff instituted a suit for rent in a Court of Small Causes and on the objection of the defendant the plaint was returned to the plaintiff under S. 23 of the Provincial Small Cause Courts Act, 1887, for presentation to the proper court having jurisdiction to try the question of title. The plaint was presented to the original side of the same Court (the presiding officer being the same Munsif) and when

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the suit was taken for hearing on the original side, the parties agreed that there was no question of title to be tried and wished the suit was disposed of by the defendant that the Small Cause Court had no jurisdiction to try the suit, as the order under S. 23 had not been set aside.

Held, that the objection was not one which the defendant could be allowed to raise for the first time in revision. 9 All. 191 (P.C.) and 11 Mad. 26 ref. (*Napier and Krishnan, JJ.*) *AREALI VEEMAN v. T. S. SUBBARYAR.*

12 L.W. 423.

—Consent—Waiver—Not material.

On a question of Jurisdiction no consent or waiver can affect the result. (*Chapman and Atkinson, JJ.*) *SHAH DEO NARAIN DAS v. KUSUM KUMARI.*

5 P.L.J. 164

—Divorce—Permanent residence—See DIVORCE ACT, S. 3 (1)

22 Bom L.R. 1077.

—High Court—contempt of inferior Court Power of High Court to protect inferior Courts. See CONTEMPT.

22 Bom L.R. 368

—High Court—Lunatic—Temporary removal of lunatic to moissau—Effect of—Jurisdiction of the High Court not lost. See LUNACY ACT, Ss. 37 AND 62.

57 I.C. 768.

—High Court testamentary suit—Consent terms relating to matters not falling within the testamentary jurisdiction of the Court—Courts jurisdiction to deal with such terms—Procedure See PRACTICE.

22 Bom. L.R. 1286.

—Meaning of—Want of jurisdiction—Erroneous exercise of jurisdiction—Distinction between—Consent—Waiver.

Jurisdiction may be defined to be the power of a Court to hear and determine a cause, to adjudicate or exercise any judicial power in relation to it, in other words it means the authority the Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. This jurisdiction of the Court may be qualified or restricted by a variety of circumstances. Thus the jurisdiction may have to be considered with reference to place, value and nature of the subject-matter. The power of a tribunal may be exercised within defined territorial limits. Its cognizance may be restricted to subject-matters of prescribed value. It may be competent to deal with controversies of a specified character for instance, testamentary or matrimonial causes, acquisition of lands for public purposes, record of rights as between landlords and tenant. This classification into territorial jurisdiction, pecuniary jurisdiction and jurisdiction of the subject-matter is of a fundamental character. Given such jurisdiction, one must be careful to distinguish *exercise* of jurisdiction from *existence* of jurisdiction; for

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fundamentally different are the consequences of failure to comply with statutory requirement in the assumption and in the exercise of jurisdiction. The authority to decide a cause at all and not the decision rendered therein is what makes up jurisdiction; and when there is jurisdiction of the person and subject-matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction.

The extent to which the conditions essential for creating and raising the jurisdiction of a Court or the restraints attaching to the mode of exercise of that jurisdiction, should be included in the conception of the jurisdiction itself, is sometimes a question of great nicety.

In order that jurisdiction may be exercised, there must be a case legally before the Court and a hearing as well as determination. A judgment pronounced by a court without jurisdiction, is void, subject to the well-known reservation that when the jurisdiction of a Court is challenged, the Court is competent to determine the question of jurisdiction though the result of the enquiry may be that it has no jurisdiction to deal with the matter brought before it: 29 C.L.J. (217) 19 C.W.N. 84: Ref.

Jurisdiction does not depend either upon the regularity of the exercise of that power or upon the correctness of the decision pronounced, for the power to decide necessarily carries with it the power to decide wrongly as well as rightly 25 Bom. 337 (347) Ref.

There is a clear distinction between the jurisdiction of the Court to try and determine a matter, and the erroneous action of such Court in the exercise of that jurisdiction. The former involves the power to act at all, while the latter involves the authority to act in the particular way in which the Court does act. The boundary between an error of judgment and the usurpation of a power is this: the former is reversible by an Appellate Court within a certain fixed time and is therefore only voidable, the latter is an absolute nullity.

When parties are before the Court and present to it a controversy which the Court has authority to decide, a decision not necessarily correct but appropriate to that question is an exercise of judicial power or jurisdiction. So far as the jurisdiction itself is concerned, it is wholly immaterial whether the decision upon the particular question be correct or incorrect.

A Court may have the right and power to determine the status of a thing and yet may exercise its authority erroneously; after jurisdiction attaches in any case, all that follows is exercise of jurisdiction and continuance of jurisdiction is not dependent upon the correctness of the determination. (*Ashutosh Mukerjee, Fletcher, N. R. Chatterjea, Teunon and Chaudhuri, JJ.*) *HRIDAY NATH ROY v. RAM CHANDRA.*

31 C.L.J. 482:
58 I.C. 806:

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—Objection to—Can be raised at any stage—Waiver.

It is an elementary principle that where a Court has no jurisdiction over the subject matter of the action in which an order is made such order as made is wholly void, for jurisdiction cannot be conferred by consent of parties and no waiver or acquiescence on their part can be made up for the lack or defect of jurisdiction 38 Cal. 639 ; 36 Cal. 139 ; 17 C. W. N. 116. Ref. (*Mookerjee and Fletcher, JJ.*) KRISHNA KISHORE DEO v. AMARNAKH KHETTRY.

24 C. W. N. 633 : 31 C. L. J. 272.

—Objection to—Duty of Court to finally decide and adjudicate upon—Decision res judicata. See C. P. CODE Ss. 2 (2) AND 100

11 L. W. 3.

—Objection to—Local jurisdiction — Waiver of.

If a plaintiff chooses his own venue for the trial of a suit and the case proceeds without hindrance to judgment the High Court will not, in the absence of prejudice, entertain an objection by that party on the ground of want of jurisdiction in the trial Court. (*Prideaux, A. C. J.*) GANPATI v. DADA. 55 I. C. 442.

—Objection to—To be given effect to by Court at any cost.

Per *Mookerjee, J.*—When a Court is called upon to decide a matter of jurisdiction no question of hardship and no consideration of technicality can be permitted to affect the Judgment.

The rules relating to jurisdiction should be strictly construed and the Court should be astute not to permit litigants to circumvent such provisions of the Code. (*Sanderson, C. J. Mookerjee and Fletcher, JJ.*) LADURAM NATH-MUL v. NANDALAL KARURI.

47 Cal. 555 :
31 C. L. J. 150 : 55 I. C. 747.

—Objection to— Valuation — Privy Council when will interfere.

The Privy Council will not interfere with any question of valuation unless it is shown that some item of valuation has improperly been made the subject of exclusion therefrom or that there is some fundamental principle affecting the valuation which renders it unsound, and it is too late to assert for the first time at the hearing that a valuation has proceeded upon an erroneous footing. (*Lord Buckmaster.*) CHARANDAS v. AMIR KHAN.

39 M. L. J. 195 : 28 M. L. T. 149 :
18 A. L. J. 1095 : 22 Bom. L. R. 1370 :
57 I. C. 606 : 47 I. A. 255 (P. C.)

—Objection to—Waiver — Subsequent objection—Bar—Pecuniary valuation—Decision of.

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Jurisdiction is of two kinds: jurisdiction as to subject matter and jurisdiction as to place of suing. Where a court has no jurisdiction as to the subject-matter of the suit, no waiver on the part of the defendant can confer jurisdiction upon the court. But where a party has undervalued his claim, and brought the suit in a Court which would have no jurisdiction to try the suit, had the suit been properly valued, that court can try the suit or any of the issues arising in the suit if no objection is taken before the Court assuming jurisdiction over it. An objection as to jurisdiction on the ground of undervaluation is capable of being waived by the parties.

A suit valued at Rs. 700 only was instituted in the Court of the Munsif, Second Court, who had special jurisdiction to try suits up to the value of Rs. 2000 and the suit was transferred by an order of the District Judge, to the Court of the Munsif, First Court, who had ordinary jurisdiction to try suits up to the value of Rs. 1000. On defendant's pleading that the suit was undervalued it was found by the Munsif, First Court, that the value of the suit was not less than Rs. 1500 and with the sanction of the District Judge, the suit was retransferred to the Court of the Munsif, Second Court, and on an application under S. 151 of the Code by the Defendant to reconsider his decision on the question of valuation, the Munsif, First Court found that the value of the suit was Rs. 1,985 and then the suit having come before the Munsif, Second Court, the Defendant again raised the question of valuation and asked him to retry the issue of valuation and he held the decision of the Munsif, First Court was not binding on him and he was entitled to go into that question again.

Held, that the defendants having invited the Court of the Munsif, First Court, to try the question whether the proper value of the suit was not more than Rs. 2,000 by their consent, conferred a jurisdiction on that Court which otherwise it had not and there was a complete waiver of the objection as to the jurisdiction of the Court to try the issue as to valuation. His decision will therefore bar further enquiry by the Court of the Munsif, Second Court, into that issue upon general principles of law analogous to those of res judicata. (*Das and Adami, JJ.*) MAHOOD BUKSH v. MUSSR. MAHMOODAN. (1920) Pat. 360 : 57 I. C. 378.

—Revenue court—Power to decide questions of title, if necessary for the disposal of the case (See C. P. CODE Ss. 2 (2) AND 100.

11 L. W. 3 : 54 I. C. 749.

—Valuation of suit—Suit for declaration that certain house is not liable to attachment and sale in execution of decree—Value of property and amount of decree—Subordi-

JURISDICTION.

nate Judge, second Class Amount of decree below Rs. 5,000, but value of house Rs. 1,000—Competency to try.

For the purpose of jurisdiction the value of a suit for a declaration that certain house is not liable to attachment and sale in execution of a decree against both the decree-holder and the Judgment-debtor is the value of the property, whether the Judgment-debtor resists the claim or not. 41 P. R. 1913 : followed.

Consequently although the amount of decree was less than Rs. 5,000, the house in dispute having been found to be of the value of Rs 10,000 or more a subordinate Judge II class who had power only to try cases not exceeding Rs. 5,000 in value had no jurisdiction to try the present case (*Shudi Lal and Martineau, JJ*) SHIV RAM v KHURSHED AHMAD.

1 Lah. L J. 87.

KUMAUN RULES (1894)—Rule 17—Final decree—Meaning of—C.P. Code, S. 2 (2)

The "final decree" mentioned in Rule 17 of the Kumaun Rules (1894) includes any order or decree by which the Commissioner disposes of an appeal brought before him as the High Court of Kumaun from a decision of the Deputy Commissioner acting as a District Court. The definition of "decree" given in the present Code of Civil Procedure cannot logically be applied to the term "decree" as used in the said R. 17.

Held, that an order of the Commissioner dismissing an appeal from an order of the District Court by which the appellant's name was removed from the schedule of creditors in an insolvency matter came within the term "decree" in R. 17 aforesaid. (*Piggot and Kanhaiya Lal, JJ.*) NASIBULLA v. KUNWAR ANAND SINGH.

42 All. 642 : 18 A. L. J. 831 : 57 I. C. 45.

LAMBARDAR—Accounts—Suit against Parties—Co sharers—Liability of lambardar.

A suit against a *lambardar* for accounts in respect of one item of village property by one of the co-sharers interested in a portion of the village is not maintainable unless all the other persons jointly interested are joined either as plaintiffs or as defendants.

As between a *lambardar* and a person who is jointly interested with others in a *patti* there is no such privity of contract as would entitle the latter to treat the former as his agent in respect of the item owned by him. (*Mittra, O. J. C.*) HARIDAS CHATTERJI v. GAHENABAL.

56 I. C. 761.

—Dismissal of ; for failure to assist in recruiting—Whether ground for excluding the

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family from Lambardari Succession. See (1919) Dig. Col. 657, HAIDAR v. EMPORER.

54 I. C. 861.

—Powers of—Imperfect partition of village.

When a village is imperfectly partitioned, the authority of the lambardar to represent his co-sharers is at an end except in their relations with Government. A lease by the lambardar of the *lac patera* is binding on his share but not on those of the other co-sharers. (*Mittra, A. J. C.*) HANIBAJAN v. MUSSAMMAT JAHURANBI.

57 I. C. 318.

—Suit against, for profits—Deduction in respect of revenue—Form of decree.

Although a lambardar has the right to pay the revenue out of the collections realised, he has no right to charge the whole revenue against the share of the profits of any particular co-sharer.

In a suit for accounts, the co-sharer claiming accounts can be awarded what is due to him either from the lambardar, if he has collected in excess, or from the co-sharer, if any, who may have done so. (*Kanhaiya Lal, J. C.*) RAM SARUP v. WAHAJUDDIN.

58 I. C. 546.

LAND ACQUISITION—Compensation—Mode of fixing gravel quarry—Acquisition for the purpose of quarrying—Acquisition as cultivable land, whether adaptability for quarrying an element in fixing compensation.

When a piece of land is compulsorily acquired for quarrying purposes, its special adaptability for quarrying is an element for consideration in fixing the amount of compensation, even though the land may be acquired as cultivable land and not as a gravel quarry.

The basis and mode of valuing a quarry for compulsory acquisition discussed. (*Oldfield and Bakewell, JJ.*) K. RAGHUNATH RAO v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL THROUGH THE COLLECTOR OF TINNEVELLY.

39 M. L. J. 623 : (1920) M. W. N. 759 : 13 L. W. 11.

LAND ACQUISITION ACT, (I of 1894) Ss 9, and 25—Notice—Appearance on date fixed—Written statement filed on subsequent day—Sufficient reason.

In a land acquisition proceeding, notice under S. 9, was served on the Appellant directing him to appear before the Deputy-Collector on a certain date to make a statement and to give particulars of his claims. He appeared before the Deputy Collector on that date and probably made some verbal statements. On the following day he filed a petition stating his

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claim, and about a month afterwards the award was made :

Held—That the petition filed on the following day should be regarded as a sufficient compliance with the notice under S. 9, of the Act or alternatively should be regarded as a sufficient reason for allowing the Appellant to come in under cl. (3) of S. 25. *Richardson and Shamsul Huda, JJ.*) **GYANENDA NATH PAL v. THE SECRETARY OF STATE FOR INDIA.**

25 C. W. N. 71.

—**Ss. 11 and 12—Collector's award**
—When final and conclusive.

An award made by a Land Acquisition Officer as to the amount of compensation for land compulsorily acquired, which is not filed in the Collector's office as required by S. 12, of the Land Acquisition Act 1894 is, though it is signed and dated, not conclusive and binding as an award on Government. 36 Bom. 599 : 14 Bom. L. R. 592 not foll. (*Macleod, C. J. and Heaton, J.*) **KOOVERBAI v. THE ASSISTANT COLLECTOR, SURAT.** 22 Bom. L. R 1136.

—**Ss. 12, 16, 18 and 45—Land acquired after award—Owners served with notice of award only — Property vests in government—Remedy of person aggrieved by award—Suit to contest award in civil court if maintainable.** See (1919) *Dig. Col.* 659. **KASTURI PILLAI v. MUNICIPAL COUNCIL, ERODE.** 43 Mad. 280.

—**S. 18—Inadequacy of award—Application for reference—Grounds if need be stated.**

There is nothing in the Land Acquisition Act which requires a claimant to state the grounds in detail upon which, in applying for a reference under S. 18 of the Land Acquisition Act, he claims a larger sum than that awarded by the Collector. (*Choudhuri and Cuming, JJ.*) **MAHANANDA PAL v. THE SECRETARY OF STATE FOR INDIA.** 24 C. W. N. 716:

58 I. C. 631

—**Ss. 18 and 26—Reference to court—Enquiry—Scope of**

Certain land belonging to the appellants was acquired by Government. The Special Land Acquisition Officer made a separate valuation for wells, buildings, trees and for the land, the total of the various items with 15 per cent. addition amounting to Rs. 11, 613. The appellants raised objections and a reference was made under S. 18 of the Land Acquisition Act to the District Judge of Delhi, who came to the conclusion that, having regard to prices paid for lands in the immediate vicinity, the market value of the property acquired was approximately Rs. 10,000 and as that sum with 15 per cent. addition amounted to slightly less than that awarded by the Land Acquisition Officer maintained the original award. Against this decision the present appeal was presented and

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it was contended that the District Judge had no power to examine the compensation awarded as a whole, but should have confined himself to a consideration of the valuation of the various parts into which it had been split up by the Land Acquisition Officer.

Held, that when a case is referred under the Land Acquisition Act, the whole case is referred, subject to the limitation of S. 26 of the Land Acquisition Act and not merely any particular objection and the District Judge was therefore right and indeed bound to consider the question of the compensation in its entirety. (1912) 14 I. C. 270 followed (*Shadi Lal and Broadway, JJ.*) **ZIA-UD-DIN v. THE SECRETARY OF STATE FOR INDIA**

1 Lah. 352.

—**Ss. 18 and 31—Reference—Right to—Money taken out by opposite party—Duty of Collector and Dt. Judge.**

The right of a person to have a reference under S. 18 of the Land Acquisition Act is not affected by the opposite Party having taken out the money from the Collectorate behind his back.

The proviso to Sub-Sec. 2 of S. 31 clearly provides for such an emergency and makes the person who may have received the whole or any part of any compensation under the Act to pay the same to the person lawfully entitled thereto. Sub-S 2 of S. 31 requires that the Collector shall when making reference under S. 18 and when the parties to the acquisition do not receive the amount tendered by him, deposit the amount of the compensation in the Court to which reference is submitted. The Collector should not permit the money to be withdrawn before the expiry of the term fixed by S. 18 for objecting to the award and applying for reference.

The District Judge has a right to demand the deposit of the money in Court when the reference is made and to insist upon its being done before disposing of the reference so that the money would be ready for payment forthwith in pursuance of the decree passed by him. 35 C. 1104 Ref: (*Jwala Prasad and Das, JJ.*) **RAMHIT SAHU v. MAHADEO CHAUDHURI.** (1920) Pat. 129 : 1 P. L. T. 143. 56 I. C. 126.

—**S. 23—Compensation for land acquisition—Apportionment—Perpetual lease—Market value.**

The market value of the land acquired may be determined on many hypothetical grounds. But the question of apportionment of the sum awarded as between the landlord and his tenant must be based not on hypothetical grounds but on an accurate determination of the value of their respective interests in the land. The moment the land is acquired it ceases to be the property of both the landlord and the tenant, and it is consequently erroneous to bring into consideration the hypothetical assumption that the land would continue to be

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covered by the huts for 42 years and that at the end of that period would be delivered by the tenant to the landlord (*Mookerjee and Panton, JJ.*) NAYAN MANJURI DAS v. HEM LAL DUTT.

32 C. L. J. 137:
58 I.C. 417.

S. 23—Market value of shop—Mode of calculation.

Market value means the price that would be paid by a willing buyer to a willing seller when both are actuated by the business principles prevalent at the time that the transaction takes place in the locality in which it takes place. (*Stuart, J.*) BIRJRANI v. DEPUTY COMMISSIONER, SITAPUK.

23 O.C. 89:
57 I.C. 300.

S. 23—Market value—Sale by Hindu widow—Mode of assessment.

A sale by a Hindu widow of neighbouring land cannot be treated as a fair basis for calculating the market value of land acquired under the Land Acquisition Act, for the full value of the property is seldom fetched at such transactions.

Nor should an isolated transaction at which the price fetched might have been purely artificial be made the basis of such calculation (*Das and Adami, JJ.*) BABU NITYANANDA DAS v. SECRETARY OF STATE FOR INDIA.

57 I.C. 734

S. 23 (1) Cl. (1)—Value of land—Mode of computation—Hypothetical landlord and tenant—Vacant land.

The land when acquired was vacant. Both the Collector and the Land Acquisition Judge in making the award assumed the existence of a hypothetical tenant on each plot and calculated the respective values of what were designated as landlord's interest and Ra'yat's interest. The total of the sums which represented the value of these interests was taken as the value of the land.

Held, that the award was based on unsound principle. How much was recoverable by a landlord from hypothetical tenant might be determined with some approach to accuracy from the rent receivable by him. But the exact value of the raiyat's interest was dependent on a number of unknown factors. (*Mookerjee and Panton, JJ.*) HEM CHANDRA CHOWDHURY v. SECRETARY OF STATE FOR INDIA IN COUNCIL

31 C. L. J. 204:
56 I. C. 758.

S. 23 Sub-S 1 Cl. (1)—Market value of land—Meaning of—Determination of market value—Commercial value or abstract legal rights—Tenancy at will—Valuation.

In a Land Acquisition case there were two sets of claimants one was a tenure holder and the others were sub-tenants in actual occupation of the land acquired. The Collector awarded to the tenure holder the capitalized

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value of the rent actually recovered by him from the sub-tenants. The tenure holder objected that the award was inadequate but the Secretary of State contended that the rent should not be further increased and the capitalized value of the rent was more than adequate:

Held—that when the rent was enhanced, the landlord took premium and did not claim a higher rent as he might well have done if no premium had been paid. Consequently it was not sufficient to award to the tenure-holder the capitalized value of the rent as then settled.

The market value means the price that an owner willing and not obliged to sell might reasonably expect to obtain from willing purchasers with whom he was bargaining for the sale and purchase of the land 17 C. L. J. 34 Rei

The Court below refused to award any compensation to the sub-tenants on the ground that their tenancies were of so precarious a nature that they could not be deemed to have any market value. It was found in evidence that they were tenants-at-will having no transferable interests in the land, but that their interest in the land was frequently sold and substantial prices were paid by the purchasers who thereupon approached the landlord and got his consent to the sale:

Held, that the sub-tenants had an interest in land which had a market value inasmuch as sales were common because purchasers were able in the usual course to secure recognition from the landlords

The question of market value is to be determined rather with reference to the commercial value than with reference to any abstract legal rights. 13 Bom. 483; Ref.

The view that the value of land should ordinarily be determined as a whole and the question of apportionment of the compensation awarded amongst claimants of different degrees should thereafter be taken into consideration, has not always been accepted in practice. The procedure adopted in the present case, namely, that the market value of the interest claimed by persons who held interest of different degrees in the property acquired has been determined successively and independently of each other, has been followed as a matter of convenience. 10 Bom. L. R. 657: (1908) I. L. R. 33 Bom. 483; 34 Bom 618; and I. L. R. 32 Cal. 820 Ref. (*Mookerjee and Panton, JJ.*) GIRISH CHANDRA ROY CHOWDHURY v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

24 C. W. N. 184: 31 C. L. J. 63:
55 I. C. 150.

Ss. 28 (2) and 32—Limited owner—Hindu widow—Nazul land in Civil lines—Mode of assessment of value—Fifteen per cent. on total value including building and trees.

Where the land acquired belonged to a Hindu widow, there was no evidence on the

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record that she had only a limited interest, On the other hand it was alleged that under a custom prevailing in Bikaneer, where her husband had come from, she was the absolute owner, and no other claimant had come forward and asked the Court to protect his right: Held, that the Court was not justified in proceeding under S. 32 of the Land Acquisition Act and directing only the interest of the sum awarded to be paid to her.

In the absence of positive evidence of the prevailing price of adjoining lands the Court calculated the value at 23 years purchase of the average annual letting value of similar Municipal lands

The 15 per cent addition provided by S. 23 (2) of the Land Acquisition Act is to be calculated on the total value including that of the land and of the buildings and trees thereon. (*Banerji and Sulaiman, JJ.*) KRISHNA BAI v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

42 All. 555 : 18 A. L. J. 695 : 57 I. C. 520.

S 48—Land acquisition—Compensation—Agreement between parties as to amount of compensation — Validity — Offer and acceptance by letter—Specific performance. See (1919) *Dig. Col. 661.* THE FORT PRESS CO., LTD v. THE MUNICIPAL CORPORATION OF THE CITY OF BOMBAY.

44 Bom. 797 : 58 I. C. 621.

S. 53—Review of decision—Power of District Judge.

A District Judge is competent to review his own order apportioning the compensation money paid on compulsory acquisition of land between the parties entitled to it. (*Mullick and Sutan Ahmad, JJ.*) SHREE SAKTI NARAYAN SINGH v. BIR SINGH.

5 P. L. J. 253 : 1 P. L. T. 219 : 58 I. C. 510.

LANDLORD AND TENANT—Abadi

—House situate in—Transfer of—Occupation by transferee — Presumption of landlord's consent—Sinking of well in adadi, if improper.

As a general rule, where no objection is made by the landlord to the occupation of the *adadi* site by the transferee of a house standing thereon, it must be presumed that such transferee had permission to occupy it on the same terms as the transferor.

The sinking of a well on premises in the *adadi* occupied by an agriculturist is not necessarily inconsistent with the purpose for which the land was granted, especially where there is no indication of any injury to the interests of the landlord (*Drake-Brockman, J. C.*) RAMDAYAL v. JAGRANI.

54 I. C. 304.

—Abandonment of holding—Proof of possession of proprietor, when adverse. See (1919) *Dig. Col. 664.* MAHOMED UMAR KHAN v. RAZI KHAN.

2 Lah. L. J. 136 : 54 I. C. 873.

LANDLORD AND TENANT.**—Abandonment—House and land.**

The abandonment by a tenant of his house in a village does not amount to an abandonment of the land on which the house stand. (*Adami, J.*) GORALJEE SINGH v. RAM NANDAN SINGH.

54 I. C. 644.

—Breach of covenant—Non-payment of rent—Effect of

Non-payment of rent at a stipulated rate month after month is a continuing breach. The landlord having waived his right to forfeit on such a breach for any particular month or months does not destroy his right to forfeit on similar breaches in a subsequent month. (1898) 1 Q. B. 279 foll. (*Stalvad, J.*) KASTURIBHAI MANIBHAI v. HIRALAL DAHYA BAI.

22 Bom. L. R. 926 : 58 I. C. 69.

—Building of house—Kachcha House originally erected replaced by pucca building—Nature of original grant.

In a suit by a zemindar for demolition of a *pucca* house built by an agricultural tenant in a village it was proved that the land was granted to the tenant for building a house which he had originally built *kachcha*. The zemindar did not prove the nature of the original grant. Held, that the tenant was entitled to make the building a *pucca* building. (*Tudball and Kanhaiya Lal, JJ.*) GHOREY v. SHIB LAL.

18 A. L. J. 781 : 58 I. C. 410.

—Building on land—Residential—purposes—Hut.

It is allowable to a tenant, permanent or otherwise, of agricultural lands to erect a building, however substantial, on his holding in order that he may live there himself when he wants to be on the land for cultivation purposes. (*Macleod, C. J. and Heaton, J.*) BHAU MAHADU TORASKAR v. VITHAL DATTATRAYA.

44 Bom. 609 : 22 Bom. L. R. 793 : 57 I. C. 549.

—Claim of, in temple lands, Tanjore District — Presumption against occupancy rights—Vernacular descriptions of tenure—Value of contract executed by predecessors of tenants negativing claim of occupancy—Onus of persons impeaching the same. (See (1919) *Dig. Col. 672.*) AMBALAVANA PANDARA SANNADHI v. PICHAKKUTTI ODAYAN.

(1920) M. W. N. 163.

—Co-sharer landlords — Occupancy holding—Purchase by some of the landlords in execution of rent decree—Rights of purchasers.

Where some of the co-sharer landlords of a non-transferable occupancy holding purchased the right, title and interest of the tenants in execution of a decreee for their share of the rent and the original tenants or their heirs, after abandoning possession of all the agricultural lands of the holding have accepted subtenancies under the purchasers and repudiated

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any relationship of landlord and tenant as between themselves and the other co sharer landlords, the latter are entitled to a decree for ejection and for *khas* possession jointly with the purchasers in accordance with their shares. (*Tenun and Huda, JJ.*) JOTENDRA NATH CHAKRAVARTHI v. V. GOBINDA CHANDRA CHAKRAVARTHI. 57 I.C. 813

—Covenant against alienation—Breach—Forfeiture—Power of Courts to relieve against English and Indian Law

A mulgen lease contained a covenant against alienation by the lessee with a provision for re-entry by the lessor on breach of the covenant. The lessee alienated the property and thereupon the lessor sued for possession. Held, that the Court had no power to relieve against the forfeiture and that the lessor was entitled to possession on breach of the covenant.

The English law on the subject is applicable to this country as a rule of justice, equity and good conscience 42 Mad. 654 rel. (*Seshagiri Aiyar and Moore, JJ.*) VITTAPPA KUDVA v. DURGAMMA.

38 M.L.J. 190 :
11 L.W. 116 :
(1920) M.W.N. 183 :
55 I.C. 781.

—Covenant against alienation—Breach—Forfeiture, right to, does not exist unless expressly given by contract—Alienation of part of holding—Breach. See LAND TENURE, SERVICE TENURE.

38 M.L.J. 275.

—Covenant against alienation—No provision for re-entry on breach—Covenant not enforceable. See T.P. ACT SS. 3, 10 AND 12.

12 L.W. 45.

—Covenant for quiet enjoyment—Breach—Rent—Suspension of.

The wrongful accumulation of water by a landlord on the land of his tenant is an interference with the tenant's possession and so long as the interference continues, the landlord is not entitled to any rent. (*Sultan Ahmed, J.*) SURENDRA MOHAN SINHA v. SARBA LAL.

57 I.C. 69.

—Covenant for renewal—Tenant holding over after term, if annual tenant.

Certain lands were demised for a period of seven years in 1894. The lease further provided that if the lessee wished to continue the lease he could take it on lease from the lessor on the same conditions. When the lease expired in 1901 nothing was done to renew it; but the lessee remained in possession. He was sued in 1913 in ejectment when he contended that he was a permanent tenant of the lands.—

Held, that whatever rights the lessee had between 1901 and 1908 to ask for specific performance of the agreement to extend the lease for another seven years those rights came to an end after 1908; and that he continued

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thereafter as an annual tenant (*Macleod, C.J. and Heatou, J.*) MANILAL DALPATRAM v. NANDLAL KESHLAL.

22 Bom. L.R. 133. 55 I.C. 610.

—Covenant running with land—What is. See COVENANT. 1 P.L.T. 84.

—Denial of title—Duty of tenant to surrender possession

Once the relationship of landlord and tenant has been established, the tenant must surrender possession before he can set up a claim to be the real owner. 123 P.R. 1919, toll. (*Broadway, J.*) ALLAH BAKHSH v. LAL KHAN.

2 Lah. L.J. 662.

—Division of holding—Co-sharer landlord treating with tenants separately—Effect of.

Where a tenant allows some of the co-sharer landlords to treat with him separately it has the effect of a separation of the tenancy, and if one of the co-sharer landlords creates higher rights in the tenant in respect of his share, from that time there would be a separation of that tenancy with regard to that share. (*Beachcroft, J.J.*) PRIANATH NAIK v. PROMOTHOD NATH ADHIKARI.

57 I.C. 895.

—Easement—Acquisition of by tenant—Right of way.

Although a tenant cannot acquire an easement as against his landlord, he might be held entitled to a right of way as against the landlord if he can prove that there has been such long user as to justify the presumption of a grant. (*Beachcroft, J.*) SRIMATI SARASWATI DASI v. MONMOHINI DASI.

57 I.C. 776.

—Ejectment—Admission of tenancy—Production of lease if essential.

Where in a suit for ejectment the deft. admits the terms of a lease creating the relation of landlord and tenant between the parties, it is wholly unnecessary for the plff. to produce the document in evidence. If the document is produced, the fact that it required registration and was not registered would not discount the defendant's admission. (*Shadi Lal and Martineau, JJ.*) BANARSI DAS v. BUL CHAND.

57 I.C. 262.

—Ejectment—Permanent tenancy—Plea of—Adverse possession.

In a suit for ejectment by a landlord, if the tenant wishes to set up a plea of permanent tenancy by adverse possession, the landlord must have specific notice of the tenant's doing so. (*Macleod, C.J. and Fawcett, J.*) BABUSING RAMCHANDRA RAJESHIRKE v. PANDU TATYA KATE.

22 Bom. L.R. 1413.

—Ejectment—Raiyat against under Raiyat.

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To succeed in a suit in ejectment on the allegation that plffs. are raiyats and the deft. is their under raiyat whose tenancy has been terminated by a notice to quit, it is not enough for plffs. to prove that they are the landlords and that the deft. is their tenant. They must prove their alleged statute, (*i.e.*) that they are raiyats and further that the deft. is an under raiyat under them whose tenancy could be and has been terminated in the manner alleged (*Mookerjee, A. C. J. Fletcher, J.*) ABHOY CHARAN DATTA v. FUTTARI DASI.

57 I. C. 833

Ejectment—Sir land—Lessee of proprietary rights.

Where a proprietor grants a lease of his sir land and assigns to the lessee the right to receive the rents, the lessee becomes the landholder of the tenants in the sir and is entitled to eject them therefrom. (*Ferard, S. M. and Harrison, J. M.*) RAMDIN RAI v. SITA RAM RAI.

55 I. C. 934.

Encumbrance—Mokarrari—Recognition of—Patwari taking rent from mokarraridar.

A landlord who purchases an estate at a revenue sale with knowledge of an encumbrance which he was entitled to avoid instead of avoiding it allowed his patwari to collect rent from the mokarraridar. Held he was bound by acts of his patwari and must be presumed to have recognised Mokarrari. (*Coutts and Sultan Ahmed, JJ.*) SRI RADHAKRISHNAJI v. SUKH NANDAN SINGH.

(1920) Pat. 332 : 58 I. C. 193.

Enhancement of rent—Reclamation leases—Provision for future enhancement of rent—Presumption that maximum rent provided for is to be fixed rent—B. T. Act (1885) Ss. 7 and 9. See 1919 Dig. Col. 666. THE PORT CANNING AND LAND IMPROVEMENT CO., LTD v. KATYAYANI DEBI.

47 Cal. 280 : (1920) M. W. N. 160 : 11 L. W. 296 : 24 C. W. N. 369 : 22 Bom. L. R. 437 : 32 C. L. J. 1 : 27 M. L. T. 195 (P.C.)

Estoppel—Tenant holding over—Tenant bound to restore possession before denying title of landlord. See EVIDENCE ACT S. 116.

22 Bom. L. R. 8.

Forfeiture—Breach of covenant—Mortgage and sale—Destruction—Covenant against alienation,

Where there is no express penalty of forfeiture in respect of a lease or license, a mortgage by the lessee or licensee does not give a cause of action for ejectment but a sale does as it involves an entire abandonment of the transferor's rights in favour of another person., 15 Ind. Cas. 385. (*Ferard, S. M. and Harrison, J. M.*) FATEH BAHDUR SINGH v. NAGENDRA BAHDUR SINGH.

55 I. C. 518.

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Forfeiture—Denial of title—Knowledge of landlord—Permanent tenancy.

A denial of the title of the landlord by a tenant to effect a forfeiture of the tenancy must be clear and unequivocal and the denial must be brought home to the knowledge of the landlord. 41 Mad. 629 and 8 L. W. 109 Rel.

The acceptance by the tenant of a deed which described him as the absolute owner of the property does not operate as a denial by the tenant of the landlord's title.

Where a tenant impeaches the title of the landlord on the ground of there being no subsisting title in the landlord the property having vested in him (tenant) by adverse possession it amounts to a denial of the title of the landlord.

A perpetual lease becomes forfeited where the tenant denies the title of the landlord. (*Oldfield and Seshagiri Aiyar, JJ.*) KOLANGERETH RAMAN NAIR v. MARIYAMMA.

43 Mad. 480 : 11 L. W. 513 : 56 I. C. 13.

Forfeiture—Denial of title—No denial in written statement, effect of—Proof of forfeiture, if essential.

A denial by a tenant of his landlord's title causes a forfeiture of the tenancy. In a suit in ejectment based on a forfeiture by denial of title, the defendants did not deny in their written statement the allegation as to denial of title. Held, that inasmuch as the plaintiff's allegation that the defendants were denying their title as owners had not been traversed in the statement of defence, it was not necessary for the plaintiffs to give evidence in support of their allegation, and that the defendants failing in their other pleas were liable to be ejected. (*Bevan Petman, J.*) KHEM SINGH v. ALI SHER.

54 I. C. 263.

Forfeiture—Relief against—Non payment of rent within period of grace—Power of courts to relieve against. See T. P. ACT S. 114.

22 Bom. L. R. 1439.

Forfeiture of tenancy—Denial of landlord's title—Refusal to perform service, when it was mere obsolete ceremonial—Effect of. See (1919) Dig. Col. 667. MAHARAJAH OF JEYPORE v. SRI SRI SRI VIKARAMA DEO GARU.

27 M. L. T. 137 : 31 C. L. J. 91.

Grove—Right of grove-holder—Ejectment.

A person who plants groves on property to which he has no title, cannot, on being ousted from possession be given the status of a grove-holder in respect of the groves, possession of groves going with the land on which they stand. (*Kanhaiya Lal, A. J. C.*) MAKUND SINGH v. KALKA SINGH.

54 I. C. 856.

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—any land held by the grove—Sirland—Right to tree—Muafi. Ian The land of a grove not being land held for agricultural purposes cannot be the Sir-land of the grove-holders, although it may have been recorded at the last settlement as Sir.

Where the land of a grove was the muafi of the grove-holders they could have no Sir rights in respect of it. (*Banerji and Rufiq, JJ*) *BHAGWAN DIN v. PEARL LAL*,

42 All. 483 : 18 A. L. J. 570 :
58 I. C. 620.

—Grove—Trees—Right of re-entry—Right to plant new trees—General law—*Wajib-ul-arz*—Rights of grove holder

The grove in dispute was planted with the Zemindar's permission by the defendant's predecessor prior to 1372 Fasli. The *wajib-ul-arz* of that year referred to this grove and provided for the planting of new trees.

It appeared that the grove holder had been planting many new trees from time to time but still the number of trees had dwindled from 383 in 1301 Fasli to 108 at the date of suit, not counting a large number of trees very recently planted.

Held, (1) that the land still retained the character of a grove and no right of re-entry had accrued to the plaintiff's, zemindars in respect of any part of it, (2) that under the terms of the *wajib-ul-arz* as well as under the general law the defendant has the right to plant new trees in the grove, and (3) that the trend of decided cases was that under the general law a grove-holder possesses all rights in respect of his grove which are not excluded by the provisions of the *wajib-ul-arz* (*Piggott and Kanhaiya Lal, JJ*) *CHOKHEY LAL v. BHARATI LAL*,

42 All 634 : 18 A. L. J. 820.

—Improvements by tenant—Eviction by landlord—Compensation—Liability to pay.

Where a tenant builds a substantial house on the land leased by him to the knowledge of the landlord, for a considerable number of years, it is not open to the landlord to evict the tenant from the land without compensating the tenant for retaining the building. (*Macleod, C. J. and Heaton, J.*) *RAMCHANDRA v. VISHNU*.

22 Bom. L. R. 948 : 58 I. C. 323.

—Joint tenancy—Co-tenant becoming co-sharer in mahal—Effect of—Devolution of tenancy—Survivorship—Succession

Two brothers were recorded as occupancy tenants. One of them acquired a share in the *mahal*, and at a subsequent settlement, owing to his becoming one of the proprietors of the *mahal*, his name was not recorded along with that of his brother as occupancy tenant. *Held*, that did not affect the occupancy right which he held jointly with his brother. In such a case on the death of one of them the other is entitled to the whole of the occupancy holding by survivorship, and not by succession. (*Ferard S. M. and Hopkins, J. M.*) *KUMAN SINGH v. RAM SARUP*.

54 I. C. 276.

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—Notice to quit—Co-sharer landlords.

Where a tenant has been inducted by all the landlords no single landlord, or group of landlords, representing only some of the shares, is entitled to give notice to terminate the tenancy of a particular share. It would be different where the person sought to be evicted is a trespasser, (*Beachcroft, J.*) *PRIANATH NAIK v. PROMOTHO NATH ADHIKARI*. 57 I. C. 895.

—Notice to quit—Essentials of—Non-agricultural land—B. T. Act if applicable.

To determine whether on a notice the plaintiff is entitled to a decree for ejection two questions are to be investigated: first what is the nature of the tenancy held by the defendant and secondly, if it is a terminable tenancy has it been terminated by a legal notice to quit.

The mere fact that rent is paid annually is not conclusive proof that the tenancy is annual: 20 C. L. J. 448; 20 C. L. J. 455; 44 Cal. 403 Referred to.

The liability to ejection of a defendant who is not a cultivator and whose tenancy was not created for agricultural purposes does not depend upon the provisions of the Bengal Tenancy Act. (*Mookerjee, C. J. and Fletcher, J.*) *GAYA NATH OJHA v. ANUKUL CHANDRA OJHA*.

32 Cal. L. J. 6 :
58 I. C. 835.

—Notice to quit—Permanent tenancy—Assertion of, by yearly tenant.

The setting up of permanent tenancy by a yearly tenant is not tantamount to disclaimer of the landlord's title. Such a tenant is therefore entitled to a notice to quit before he can be evicted by the landlord. (*Macleod, C. J. and Fawcett, J.*) *RAMA RANCHHOD v. SAYAD ABDUL RAHIM*.

22 Bom. L. R. 1214.

—Occupancy holding—Sale in execution of mortgage decree—Rent decree—Co-sharer landlord—Ejection of purchaser.

A mortgage of an occupancy having purchased the holding in execution of his mortgage decree. Subsequently the mortgage was purchased by a co-sharer landlord in execution of a decree for rent obtained by him. *Held* that though latter viewed in his character of purchaser in an execution sale of right, title and interest of the tenant is not entitled to raise the question of transferability of the holdings as against the mortgagee purchaser, yet in his character of a co-share in the superior interest he is entitled to raise the question of transferability to the extent of his own share and on proof that the mortgage was without his consent, can evict the mortgagee purchaser to the extent of his own share. (*Atkinson and Adam, J.*) *NARPAT SINGH v. DOMI LAL CHOWDHURY*. (1920) Pat. 200 : 57 I. C. 511.

—Occupancy Holding—Surrender by one tenant of his share.

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A surrender by one of several joint tenants of an occupancy holding of his share in the holding is valid (*Jwala Prasad, J.*) RAGHU NATH CHATTERJI v JUTHU CHATTAR

56 I C 466

—Occupancy holding—Transfer of portion—Landlord put to proof of title.

The landlord of a non-transferable occupancy holding is not entitled to recover *khas* possession from the transferee of a portion of the holding when one of the original tenants still in possession of his share in the holding. The mere fact that a transferee of a portion of the non-transferable occupancy holding puts the landlord to proof of his title, does not amount to repudiation of the tenancy (*Tenun, Chaulhuri, JJ.*) MEHDIALI KHAN PANEK v. BASIRUDDIN CHOUDHURI. 57 I C 956

—Occupancy holding—Transfer of—Recognition of transfer—Possession—Payment of rent—Ejectment—Limitation.

A *ra-yat* sold his non-transferable occupancy holding and the vendee took possession of the land. Although his transfer was not recognized in the landlord's *shrista*, rent was accepted from him and respects given to the vendee as *marfaatdar* of the original tenant. The vendee again sold the property to the deft. Whom the landlord sought to eject. *Held*, that as the vendee paid rent to the landlord, whether there was no recognition or not, he was not a trespasser, and there was no such adverse possession on his part as could be added to the adverse possession of the deft. who never paid any rent nor recognized the plff's superior title in any way.

The mere fact that, the name of the purchaser of a non-transferable occupancy holding is not entered in the landlord's *shrista* and receipts for rent paid by him are not made out in his name but are given to him as *marfatdar* does not prove that he is not a tenant (*Newbould and Buckland, JJ.*) KALIBROHMA MUKERJI v. SAYIDAR RAHAMAN.

57 I.C. 986

—Occupancy holding—Transferability by custom—*Nazar*—Payment of—Effect of.

In a suit by a landlord to eject the transferee of an occupancy holding transferable by custom on payment of a *nazar* to the landlord the plff. is entitled to a decree for *khas* possession if there is nothing to show that the deit ever paid or offered to pay the *nazar*.

If there is a customary rate of *nazar* which the landlord is obliged to accept, the transferee of an occupancy holding obtains no title under the transfer until he pays or tenders *nazar* at that rate 45 I.C. 747; 8, C.W.N. 214 and 8 C.W.N. 235 ioll. (*N. R. Chatterjee and Panton, JJ.*) RANI MINA KUMARI SAHEBA v. AHORDDI SHEIKH.

57 I.C. 848.

—Occupancy right—Khanda estate—Rafat kardars—No. tenure-holder but raiyats. See LAND TENURE.

5 P.L.J. 373.

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—Occupancy right—*Parti* land—Presumption as to possession of rightful owner—Settlement in good faith by *de facto* landlord—Finding of fact on surmises—Legality.

The land in suit was found to belong to K. the patni of R, and it was also found that they were *parti* and recorded in the survey as appertaining to C's patni, but K's suits for ejectment against G, M and N were dismissed as they held that the defts. had been inducted as tenants in good faith under settlements made by R, the *de facto* landlord in possession and K appealed to the High Court. *Held*, that the lands in suit being *parti* possession will be deemed with K the rightful owner and consequently R could not be said to be in possession at the date of the settlements; that R being not in possession, the defendants did not derive any title under their settlements from R, and they were not protected from ejectment on the ground that they were inducted in good faith by R.

20 Cal. 708, dist 21 C.W.N. 93; 8 C.W.N. 320; 19. C.W.N. 525. Ref.

The principle laid down in *Bind Dal Pakrashi case* (20 Cal. 708,) being an encroachment upon the ordinary rule of law, the grantor is not competent to confer upon the grantees a better title than what he himself possesses, it must be cautiously applied and is not to be extended.

Defendants not having pleaded that R, was in possession at the time of the settlements and there being no evidence in support thereof the finding arrived at by the lower appellate court as to R's possession was not a legal finding of fact, it being based upon a mere surmise, (*Jwala Prasad and Adami, J.J.*) KUMUN DAS v. GULAM ALI NADAF.

1 Pat. L.T. 184 : 57 I.C. 323.

—Occupancy rights—Purchase by proprietor of taluka—Effect of.

The purchase of separate occupancy rights in a *taluka* by a person who has a proprietary interest in part only of the *taluka* has not the effect of causing the occupancy rights to merge in the proprietary right. (*Harrison, J. M.*) HARNANDAN v. SADANAND PANDE.

57 I.C. 319.

—Occupancy right—Ryotwari land claim of occupancy rights—Presumption against—Burden of proof—Evidence of occupancy right.

In a suit for the recovery of possession of agricultural land in a ryotwari tract by a pattiadar, where the plaintiff's title is conceded and it is also admitted that the defendants do claim under the plaintiff the burden is on the defendants to establish their rights of permanent tenancy to which they lay claim.

Permanence is not a universal and integral incident of an under ryot's holding. If claimed, it must be established. This may be done by proving a custom, a contract or a title, and possibly by other means.

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From the long duration of the tenancy, the uniform rate of rent, the exercise of the right of alienation and other circumstances, the Court would be justified in drawing the inference that the relations between the parties were, at their inception, such as conferred occupancy rights in the tenants (*Sir Lawrence Jenkins*) M. R. SETURATNAM IVER v. VENKATACHALA GOUNDAN.

43 Mad. 567 : 38 M. L. J. 476 :
18 A. L. J. 707 : 27 M. L. T. 102 :
11 L. W. 399 : 22 Bom. L. R. 573 :
(1920) M. W. N. 61 : 58 I. C. 117 :
47 I. A. 76. (P. C.)

—Occupancy tenant—Sub-lease—Relinquishment by tenant—Rent payable.

An occupancy tenant of land at a rent of Rs. 25 a year, sublet his entire holding for a term of five years at a rent of Rs. 65 per year. It was agreed that out of this sum the former was to receive Rs. 40 and the Zemindar Rs. 25. It was further agreed that on the sub-lessee paying Rs. 200 in advance to the tenant he would receive possession of the land. The sub-lessee paid the advance and was put in possession. A few months after, the tenant relinquished his occupancy rights in favour of the Zemindar and the question was what rent was payable by the sub-lessee to the latter.

Held, that the Zemindar was entitled to receive only Rs. 25 annually, as it would be inequitable to treat the relinquishment by the tenant as operative so as to affect the position of his sub-lessee. (*Piggot and Khanhaiya Lal, JJ.*) GOBIND PRASAD v. PARMANAND,

57 I. C. 589.

—Permanent tenancy—Dwelling house not a brick built house—Tenancy for over half a century.

Where it was found that the origin of the tenancy was unknown but it had been in existence for at least half a century that the land was let out for residential purposes that it had been held at a uniform rent and that the tenant has actually built a dwelling house thereon and lived there from the inception of the tenancy till the sale to the defendants.

Held, that from these circumstances it could be inferred that the tenancy was permanent and transferable. 15 C. L. J. 220 foll.

The dwelling house need not be in brick in order to indicate that the tenancy was intended in its inception to be of a permanent character (*Mookerjee, C. J. and Fletcher, J.*) SHOROSHI CHARAN GHOSH v. BHAGLOO SAH.

32 C. L. J. 85 : 57 I. C. 877.

—Permanent tenancy—Mulgeni tenant—Sub-tenant of the mulgeni tenant—Recovery of rent from sub-tenant — Landlord's right to recover.

A landlord has the right to recover the rent of his lands direct from the permanent sub-

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tenants of the original mulgeni tenant, (*Macleod, C. J. and Shah, J.*) GANPATI NAGAPPA v. NAGABHATTA SHITARAMBHATTA.

22 Bom. L. R. 118 : 55 I. C. 540.

—Permanent tenancy—Onus of proof.
Under the law the presumption is against the existence of a permanent tenancy and it is upon those who allege it to prove it (*Wallis, C. J. and Krishnan, J.*) CHINNAMMAL v. RATNASABAPATHI CHETTIAR. 12 L. W. 191 : (1920) M. W. N. 532.

—Permanent tenancy—Proof of.

Where the origin of a tenancy is unknown and it is found that the original tenant and his successor have been in occupation for over sixty years during which time the rent has not been varied and the tenancy has been treated by the landlords as heritable, and it is a tenancy for residential purposes and the substantial improvements to the homestead have been effected by the tenants by the formation of a valuable orchard of fruit trees, it is open to the court to draw an inference that the tenancy is a permanent one. (*Tecnon and Newbold, JJ.*) BANGA CHANDRAPAL v. KAILAS CHANDRA PAL.

58 I. C. 189.

—Permanent tenancy—Proof of—onus
Ancient origin—Uniform rent—Effect of. See
BOM LAND REV. CODE, S. 83.

22 Bom. L. R. 1394.

—Permanent tenancy—Trust property
—Presumption against permanent tenancy—
onus.

With respect to temple property, the presumption is against the existence of a permanent tenancy; and it is upon those who allege it, to prove it.

On a question whether the temple authorities granted a permanent lease or not, the presumption is against any intention to make such a grant. 41 Mad. 709 ; 13 M. I. A. 270 and 15 C. L. J. 227 foll.

Where land had been let at the same rate for 32 years and the superstructure on the land was purchased more than 20 years ago and was subsequently mortgaged by the deft. *Held*, that the presumption against permanency was not rebutted and that the land should be surrendered to the trustee after removal of the superstructure. (*Wallis, C. J. and Krishnan, J.*) CHINNAMMAL v. RATNASABAPATHI CHETTIAR. (1920) M. W. N. 532 : 12 L. W. 191.

—Permanent tenure — Incidents of—
Presumption as to—Presumption if any in
temporarily settled district. See (1919) Dig.
Col. 675. AFZAL-UN-NISSA v. ABDUL KARIM.

47 Cal. I. 13 Bur. L. T. 1 :
11 L. W. 176.

—Relationship of—Bonami tenant.

A person cannot be made a tenant without the landlord's knowledge. There is no such

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status known to the tenancy as a benamit tenant. (*Bitten, O. J. C.*) RAMDIN v. KESHAV PRASAD.

58 I.C. 36.

—Relationship—Proof of—Kobala—Payment of sadarjama—Conduct of parties—Entry in record of rights.

Under a kobala it was agreed that a certain sum be paid annually to the proprietor as sadar jama. The conduct of the parties for many years was such that the sum so payable was regarded as rent and in the Record of Rights the person making the payment was recorded as a tenant under the particular Held, that the relationship of landlord and tenant existed between the parties. (*Walmsley, JJ.*) KAILASH NATH ROY CHOWDHURY v. KAMAKHYA CHARAN CHATTOPADHYAYA.

55 I.C. 500.

—Rent—Abatement of—Agricultural holding flooded by sea-water—Proportionate abatement of rent—T. P. Act S. 108 B. See. (1979) Dig. Col. 676. SUBRAMANIA PATTAR v. KATTAMBALLI RAMA.

43 Mad. 132; 1920 M.W.N. 153.

—Rent—apportionment of—Cosharer tenants to be parties.

A landlord is not entitled, in a suit to which all the co-shared tenants of joint holding are not parties, to apportion the rent among the several joint tenants. (*Jwala Prasad and Adami, JJ.*) UDHAB CHANDRA SINGH v. NARAYAN MANJU.

58 I.C. 186.

—Rent—Decree for against holding of tenant—Joinder of all the co-tenants—Necessity for—Money decree.

If a landlord wants to obtain a rent decree good against the land under the Bengal Tenancy Act, he must ordinarily implead all the co-tenants including the heirs or legal representatives of a deceased co-tenant. If however he is content with a money decree he is free under S. 43 of the Contract Act to sue any or all of the tenants provided at the time of the creation of the tenancy it was intended that each of the tenants should be liable to pay the whole rent. 22 C. W. N. 289 foll. 15 C. W. N. 191 not foll. 1 Pat. L. J. 190 Dist. (*Coutts and Adami, JJ.*) BERADAR SINGH v. BACHA MAHTO.

**5 P.L.J. 32: 1 P.L.T. 55
(1920) Pat. 9: 54 I.C. 39.**

—Rent—Decree for—Suit by some of the co-sharers only.

A decree for rent obtained by a co-sharer landlord cannot operate as a rent decree and does not affect the position of a purchaser of the holding previous to the decree. (*Das, J.*) RAMDEHAL SINGH v. JOGINDRA PRASAD SINGH.

57 I.C. 289

—Rent—Enhancement of—Additional area—Presumption.

In a suit for additional rent for additional area, it was found that the standard of mea-

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surement set up by plff was inconsistent with the Kabulyat upon which the suit was based:

Held, that the present standard of measurement could not be presumed to be the standard in use at the time of the inception of the tenancy (*Chatterjee and Panton, JJ.*) MADHABI SUNDARI DASYA v. SYAMA CHARAN BISWAS.

31 C. L. J. 202: 56 I.C. 748.

—Rent—Enhancement of—Permanent tenancy—Patni Taluk—Evidence of conduct.

In a lease granted in 1823, there was a clause as follows:—"I (tenant) shall pay the annual rent of Rs. 173-8-0 as 12 gds. year by year and month by month as per dowl in the Khas taluk." In another clause it was stated "I shall continue to be in enjoyment down to my sons, grandsons etc., on receipt of the talukdari rents according to custom on account of tanks, bberies, etc., lying in the village." The landlord in a proceeding under S. 106 of the B.T. Act alleged that the rent was enhancementable while the tenants contended that the tenure was not merely hereditary but was held on a rent fixed in perpetuity.

Held, that unless the landlord is precluded from the exercise of the right of enhancing rent by a contract binding on him or the lands in question can be brought within one of the exemptions recognized by Bengal Reg. VIII of 1793 he may be presumed to have the right of enhancing rents.

13 M. I. A. 258 followed.

The expression putni taluk in the contract did not import that the tenure was not merely hereditary but was held on a rent fixed in perpetuity. The mere fact that a tenure is hereditary does not show that rent of the tenure has been fixed in perpetuity. In the present case although there were expressions which showed that the tenure was mawashi there was nothing to show it was intended to be mokurasi. 12 W. R. 413 (1850) and 7 Cal. 280; dist. Ref. (*Mookerjee, C. J. and Fletcher, JJ.*) BHUPENDRA CHANDRA SINGH v. HABIBAR CHACKRAVARTI.

24 C. W. N. 874.

—Rent—No covenant to pay—Effect of—Burgdar—Status of.

Where there is no covenant to pay rent and no interest in land created in favour of the lessee there is no tenancy.

A burgdar is not necessarily a tenant.

A burgdar is a person who enters into a profit-sharing arrangement: he cultivates the land, gives a share of the profits to the owner and keeps the remainder as his remuneration. In individual cases, the terms of the contract may indicate that the intention of the parties was to create in the grantee an interest in the land; in other words, if there is a demise a tenancy is created.

A certain land was made over to the defendant respondent who, at the time of the arrangement was a settled raiyat of the village for a period of eleven months on condition first that the defendant would bring the land under

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cultivation, would make over half the produce to the plaintiff and take the other half as his remuneration; and secondly that at the end of the eleven months, the defendant would quit the land without notice.

Hold, on a consideration of the whole agreement that there was no tenancy and that the defendant was bound to quit the land upon the expiry of the prescribed period. (*Mookerjee, C. J. and Fletcher, J.*) BRAHMANOVEE BARMANI v. SHEIKH MUNSUR.

32 C. L. J. 37 · 58 I. C. 859.

Rent—Non-collection of—Presumption of rent-free grant.

Here in a suit for rent plff fails to prove that he has ever taken rent from the debtors. The Court is entitled to presume a lost rent-free grant. (*Adami, J.*) ANANT PRASAD JHA v. BANKER LAL KUMAR. 55 I. C. 36

Rent—Fixity of—Presumption from uniform payment for 20 years. See B. T. ACT S. 50 (2) 31 C. L. J. 11.

Rent—Suit for—Rent accruing during pendency of suit in ejectment.

The right to demand rent from a person which falls due during the pendency of a suit for his ejectment is not in suspense during the pendency of the litigation. Limitation with regard to the claim for rent would not remain suspended during the pendency of the ejectment suit. 9 Cal. 255, and 30 Cal. 1033 ref (*Newbould and Punton, JJ.*) NAGENDRANATH SEN v. SADHU RAM MANDAL. 57 I. C. 992

Rights of—How determined—Building on land.

Every tenant is bound by the terms of the grant and cannot overstep them. Long user and long possession may be good evidence of what the terms of the original grant were. Where the debtors who were tenants of the plff Zamindar, built a chaupal on the site of a cattle shed which had fallen down and which had always been in possession and there was no evidence to show that the building of the chaupal, was contrary to the terms of the original grant, it could not be held that the defendants had overstepped their legal rights. (*Tulbul and Sulaiman, JJ.*) BUDDHU v. BINWAR LAL. 57 I. C. 655.

Service tenure—Inalienability—Proof of custom—Onus on landlord—Karamkari and Adimayavana tenures. See *LUND TENURE, SERVICE TENURE.* 38 M. L. J. 275

Status of tenant—Under raiyat-Korfa chasi or korfa raiyati lands.

In a *kabuliyaat* the holdings were described as *korfa chasi* and *korfa raiyati*. The predecessors in interest of the holders under the *kabuliyaat* had portions at least of the lands comprised in *khas* cultivation. *Hold*, that the status of the holder was that of under *raiyyats* (*Chaudhuri, J.*) ANWAR BEWA v. SURENDRA NATH RAHUT. 56 I. C. 844

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Suit for rent—Transference—Rights and liabilities of.

The parties cannot have a mutual relation in law which is contrary to the true state of facts; if the facts show that the parties are co-ordinate in position they cannot be treated in law as if they were superior and subordinate holders respectively.

Where the plaintiff transferred to the defendant a share of land.

Hold, that the latter was not a tenant of the former, (*Mookerjee, C. J. and Fletcher, J.*) CHANDRA KANTA CHAKRABARTY v. ADI NATH SHOME. 32 C. L. J. 81.

Tenancy—Duration of—Rent payable yearly—Effect of.

The fact that rent is payable yearly in respect of a non-agricultural holding does not necessarily imply that the tenancy is from year to year. The nature of the holding should be taken into account in determining whether the tenancy is from year to year or from month to month. (*Chaudhuri and Ghose, JJ.*) JOGENDRA CHANDRA KAR v. SYAM SUNDER DAS. 57 I. C. 798.

Tenure or raiyati interest—Brahmottar—Mahasil.

The word "mahasil" when used in connection with cultivation, means the produce of land. There is no presumption in favour of a *brahmottar* holding being a tenure. It may be either a tenure or a *raiyat's* holding. It depends entirely upon the intention of the grantor. (*Sultan Ahmad, J.*) CHANDRA KISHORE Joshi v. SUDAMA RAI. 57 I. C. 756

Termination of tenancy—Enhancement of rent.

Mere enhancement of rent under the terms of a lease does not put an end to an existing tenancy. (*Chetis, O. C. J.*) RADIA KISHEN v. RATTAN LAL. 56 I. C. 7.

Thekadar, if a landlord—Ejectment suit if maintainable.

If a proprietor transfers his proprietary rights to a *thekadar*, the latter becomes the tenant's landlord and unless the proprietor has reserved to himself the right of ejectment he has the power to eject the tenant. (*Ferard, S. M. and Harrison, J. M.*) KUDAI KHAN v. JAGAT NARAIN DUBAY. 54 I. C. 569.

Trees—Right to—Thekadar.

A *thekadar* has, in the absence of any contract or local usage to the contrary, no right to fell timber, nor does the mere grant of protected status confer on him any right to cut down trees and appropriate them to his own use if he had no such right before the grant of that status.

The position might, however be different if the trees are planted by the person claiming the right to cut them or by his forefathers, the principle of S. 108 (h) of the T. P. Act, being

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applicable to such a case. 38 B. 716. (*Drake-Brockman, C.J.*) **TIKARAM v. RAM CHANDRA.**

54 I.C. 789.

—Under proprietary right—*Acquisition of by prescription.*

Held, on the facts that after the expiry of the settlement in 1896 the possession of the tenants notoriously claiming to be under-proprietors was adverse to the landlord and that the tenants had acquired such right by prescription. (*Kanhaiya Lal and Daniels, A.C.J.*) **SHEO DAYAL v. PIRTHIPAL SINGH.** **54 I.C. 100.**

—Under proprietary right—*Assertion of—Prior litigation between parties—Adverse possession.*

In a suit for declaration of right to certain land deft alleged that he had acquired under-proprietary rights in the land by prescription. Deft failed to establish that any decree had been passed in his favour for under-proprietary rights at the time of the first regular settlement. There was documentary evidence to show that at the time his predecessor in interest had set up a claim to proprietary rights which failed. A claim was put forward for sub-settlement of the village, but that also was unsuccessful. In 1869, while an appeal in the latter suit was pending a notice of ejectment was issued against the predecessor in interest of the deft who alleged that the land was held in hereditary right and that his claim for sub-settlement was pending in appeal, he also stated that he was in possession of the land as Sir. These proceedings resulted in the notice being cancelled and a decree in favour of the deft, for certain areas of sir lands. There was further litigation between the parties, and the courts held, that the parties to whom notices were issued were not liable to ejection as mere tenants.

Held, that there was sufficient evidence of the assertion of an under-proprietary right as early as 1869 and that, consequently, the suit must fail. (*Lindsay, J.C.*) **MAHOMEDUL HASAN KIRMANI v. SHEOPARSHAN SINGH.**

7 O.L.J. 296 : 57 I.C. 419.

—Under proprietary right—*Grant of, for life without power of transfer—Provision for lapse on death of grantee—Failure to enforce right of reversion—Effect of Estoppel.*

A tenure which is not transferable cannot be treated as under-proprietary but a superior proprietor can confer under-proprietary title on a person for life without any power of transfer.

An under-proprietary title for life without power of alienation was granted to a person by the superior proprietor on condition that the under-proprietary title should lapse on the death of the grantee and the superior proprietor would then be entitled to reversion of that title. When the grantee died, the superior proprietor did not enforce the reversion but

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allowed a trespasser to assert that title and continue to pay the under-proprietor rent, so that on the faith of the trespasser being treated and recognised as an under-proprietor by the superior proprietor the trespasser did certain acts which were to the detriment of herself and to the advantage of the superior proprietor.

Held, that the superior proprietor was estopped from denying the right of the trespasser to hold the property in question as an under-proprietor for life without any power of alienation. (*Kanhaiya Lal and Daniels, A.J.C.*) **MUSSAMAT JANAKI KUNWAR v. MITRA SEN SINGH.**

54 I.C. 901.

—Under raiyati interest—*Transfer of—Usufructuary mortgage.*

An under-raiyati interest is *prima facie* not transferable; hence an usufructuary mortgagee of an under-raiyati interest acquires no title to the mortgaged property. 4 Cal. 135; 20 C.L.J. 548, 42 Cal. 751, foll. (*Mookerjee, C.J., and Fletcher, J.J.*) **BISWAMBHAR MONDAL v. NASARAT ALI.**

32 C.L.J. 46 : 57 I.C. 912.

—Under raiyat—*Tenant holding under a raiyat at fixed rent.*

A tenant who holds at a fixed rent is an under-raiyat whether the person under whom he holds is a raiyat holding at a fixed rate of rent of an occupancy raiyat or a non-occupancy raiyat. (*Mookerjee and Fletcher, J.J.*) **KALI DAS CHAKRABARTY v. SHEIKH NASARAT.**

32 C.L.J. 130 : 58 I.C. 413.

—Zemindar—*Jeth raiyat—Resumption of grant.*

Instead of paying wages to a *jeth raiyat* the zemindar allowed him a certain deduction from the rent: *Held*, that the grant to the raiyat was the grant of an office, the performance of whose duties was remunerated by the use of the lands and that the zemindar could resume the lands when the office was terminated.

Neither the fact that the land has been allowed to devolve from father to son nor the fact that the tenancy was created very many years ago, could lead to the inference that the grant which was purely in lieu of personal services to be rendered to the zemindar was of a permanent character such that the zemindar was not entitled to resume when the grantee refused to perform the service or the services were no longer required. (*Das, J.*) **MAHARAJA SIR RAMESWAR SINGH v. BHAGWAT MANJHI.**

57 I.C. 41.

LAND TENURE—Ganti tenure—Settlement holder of Mehal if bound to recognise tenure created by previous settlement holder where he is bound by Kabuliyat to respect recorded rights of under tenure holder. See (1919) *Dig. Col. 682.* **JARIP SARDAR v. JOGENDRA NATH CHATTERJEE.** **31 C.L.J. 78 : 54 I.C. 719.**

—Khurda estate—*Rafa Tanikdars—State of—Occupancy rights.*

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In the Khurdah Estate, and in zemindaries which at one time formed part of that estate, *raja tankidars* are occupancy *raiyats* and not tenure-holders. (*Coutts and Das, JJ*) HARAYAN PATNAIK v. RAGHUNATH PATNAIK

5 P. L. J. 373 : 57 I C 225.

—Rent free grant—Presumption from non-payment of rent for a long time. See LANDLORD AND TENANT, RENT. 55 I. C. 36.

—Service tenure — *Karamakari* and *Adimayavana* tenures—Inalienability and forfeitability—Custom—Forfeiture —Waiver evidence of.

Karamakari and *Adimayavana* tenures are not inalienable by custom in South Malabar and the *jeammi* is not entitled to forfeit them on alienation.

The burden is on the landlord to prove the custom of inalienability and forfeitability of such tenures. Evidence relating to *Pravarthi-anubhavam* grants which are grants for the performance of future services is inadmissible in considering the question of the existence or otherwise of the custom of inalienability and forfeitability as the resumption of *Pravarthi-anubhavam* grants arises under the general law itself and not from any special custom.

A right of forfeiture of a holding on alienation and even inalienability of it cannot be inferred from the mere existence of a right of escheat in the landlord on failure of the grantee's heirs.

Resumability does not follow from inalienability : the right of resumption and re-entry on alienation must be expressly given.

Prima facie alienation of a portion of a holding will offend against the rule of inalienability if there is one and unless it can be shown that under the very custom which imposes the rule of inalienability the rule does not apply to partial alienations. A partial alienation will be sufficient to work a forfeiture.

Ignorance on the part of the alienee of an inalienable holding as to the inalienability and forfeitability of such a tenure cannot raise any estoppel against the landlord if he was in no way responsible for such ignorance, nor can the fact that the landlord did not exercise his right of enforcing forfeiture in the case of previous alienations. (*Ayling and Krishnan, JJ*) ZAMORIN OF CALICUT v. UNIKAT KARNAVAN SAMU NAIR. 38 M. L. J. 275 : 27 M. L. T. 111 : 55 I. C. 380.

—Construction — *Istimirari* — Heritability.

A lease described as *istimirari*, is in the absence of specific clauses referring to succession and transfer, good only for the life time of the lessee. It is no defence to a notice of ejectionment against the successors of the lessee. (*Harrison, J. M.*) HARDUTT SINGH v. JAIKARAN SINGH. 56 I. C. 656.

—Construction of—Maurasi Mokarari—Rent payable in cash and partly in kind—Value

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of paddy—Jaamma Dharya. See (1919) *Dig. Col* 685. ASUTOSH MUKERJEE v. HARAN CHANDRA MUKERJEE. 47 Cal. 133.

—Construction—Offer and acceptance—Optional clause in acceptance—Not binding on lessor.

The defendant wrote to the Presidency Post Master, Bombay, to let his premises for ten years at Rs. 175 per month. The Presidency Post Master on behalf of the plaintiff, the Secretary of State for Ind'a accepted the offer but in the letter of acceptance said that the Post Master General desired him to insert an optional clause in the lease giving the Post Office the option to renew the lease for another five years:—

Held, that the optional clause was a counter offer and unless in its turn it was accepted by the defendant it would have no effect on the acceptance of the offer. (*MacLeod, C. J. and Heaton, J.*) SIR MOHAMMAD YUSUF ISMAIL BART v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL. 22 Bom. L. R. 872 : 57 I. C. 971.

—Construction—Permanence—Heritability.

Ordinarily a lease which upon the face of it purports to be perpetual but contains no specific condition about succession or any statement that it is heritable, does not confer a right of succession. (*Ferard S. M. and Harrison, J. M.*) MUSSAMMAT KAUSILA KUNWAR v. BENI LAL. 57 I. C. 316.

—Construction—Provision for lessee giving security within a fortnight—Provision for lessors benefit-waiver.

A lease was executed in favour of certain persons. The agreement was that the lessess were to give security within 15 days. The security bond was executed after the expiry of the 15th day and then the lessor made over possession to the lessees. *Held*, that the defendant was liable to perform the obligation he entered into under the document. It might well have been construed to be a clause solely for the benefit of the lessors. (*Mears, C. J. and Banerji, J.*) KIFAYATULLAH KHAN v. SRI RAGUNATHJI. 18 A. L. J. 105 : 55 I. C. 230.

—Co-sharer—Lease by some—Consent of others.

A lease granted by one co-sharer creates a tenancy although not assented to by other co-sharers. Whether the lessor has full authority to grant a lease or not is immaterial. It is for the co-sharers who object, to seek their remedy in any way they may be advised. (*Ferard, S. M. and Harrison, J. M.*) HARDEWA v. HARDWARI. 57 I. C. 439.

—Covenant — Assignment — Consent necessary for—Consent not to be withheld unreasonably—Scope of the clause. See CALCUTTA HIGH COURT RULES.

24 C. W. N. 1007.

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—*Covenant for renewal—Terms of,*
Where a lease contains a stipulation for renewal the tenant is entitled in the absence of other facts to a renewal on the original terms contained in the lease. (*Beachcroft, J.*) EPASAN ALI v. RAM KUMAR DE. 55 I. C. 375.

LEGAL PRACTITIONER—Misconduct—Civil disobedience to laws—Satyagraha—Agreement—Signing of the pledge. See LETTERS PATENT (BOM CL. 10)

22 Bom. L. R. 13.

—Professional misconduct—Presenting petition containing allegations made recklessly without grounds and without instructions from client—Suspension. See LETTERS PATENT (ALL) S. 8. 18 A. L. J. 419.

—Professional misconduct—Vakil entering into trade—Isolated transactions—Allahabad High Court Rules R. 26. See. (1919) Dig. Col. 687. IN THE MATTER OF TIKA RAM. 42 All. 125

LEGAL PRACTITIONERS ACT (18 of 1879) Ss. 13 & 14—Grave criminal charges against pleader—Summary procedure

—*Reasonable cause*

The proceedings under the Legal Practitioners Act being summary proceedings, a pleader should not ordinarily be proceeded thereunder for what are in reality grave criminal charges. 31 C. L. J. 471 ret.

Although the phrase "any other reasonable cause" in clause (f) of S. 13 has been interpreted not as *ejusdem generis* with preceding ones, and a court has ample jurisdiction to investigate cases of moral turpitude unconnected with the discharge of professional duty the case of a pleader's conduct in the capacity of a suitor stands on a different footing. 23 C. L. J. 237 foll. (*Das and Adami, JJ.*) NARENDRA NATH DAS v. SHIVA KUMAR JHA.

5 Pat. L. J. 601 : 1 P. L. T. 571 : 58 I. C. 151 : 21 Cr. L. J. 726.

—*Ss. 13 and 14—Mukhtear suspected of taking money from client for bribing court.*

There is no reason why a different standard of proof of guilt should be required in a case under the Legal Practitioners' Act from that which is necessary in any other legal proceeding *viz.*, that the offence has been committed beyond any reasonable doubt. To remove a person from his profession for what amounts to a criminal charge upon mere suspicion cannot possibly be justified—the suggestion to adopt a less stringent mode of proof would be an entirely novel departure and unjustifiable on any known principles of law. (*Dawson Miller, C. J. Mullick and Jwala Prasad, JJ.*) EMPEROR v. SURJYA NARAIN SINGH.

1 P. L. T. 372 : 57 I. C. 460 : 21 Cr. L. J. 636. F. B.

—*Ss. 13 and 14—Unprofessional Conduct—whether subordinate Courts can enquire into charge falling under Cl. (f) of S. 13. See*

LEG. PRACTITIONERS ACT. S.13.

(1919) Dig. Col. 688. IN THE MATTER OF LEGAL PRACTITIONERS ACT.

2 Lah. L. J. 51 : 54 I. C. 982 : 21 Cr. L. J. 198.

—(XVII of 1879) Ss 13 (f) and 14—"Any other reasonable cause" meaning of—Criticism of administration of criminal justice in a newspaper—Proceedings under S. 14 not justified.

The phrase 'for any reasonable cause' in the residuary cl (f) of S. 18 of the Legal Practitioners Act 1879 is not to be understood in an *ejusdem generis* sense but it covers cases other than those of professional misconduct in the ordinary sense, but which unfit a pleader for the practice of his profession, for instance conviction for a crime involving dishonesty or moral turpitude or gross and habitual contempt of Court. 26 M. 448 ; 44 C. 639 ; 29 A. 95 ; 39 M. 1045 Ref.

The remedy provided by S. 14 of the Legal Practitioners Act, 1879, is not intended to apply to cases in which a pleader as an ordinary member of the public criticises the administration of justice generally in a particular District even though such criticisms may on enquiry be found not to be wholly justified and cl. (1) of S. 13 cannot be properly utilised in punishing a pleader for making comments on matters of public interest in the newspapers merely because such comments exceed the limits of fairness or accuracy. L. R. 1 P. C. 283 foll.

Per Krishnan, J.—The Legal Practitioners Act, 1879, deals with the pleader only in his professional, and not in his private capacity and though misconduct other than professional may fall under cl. (1) S. 13 its impropriety must be such as would render the continuance of the pleader in practice undesirable or unfit him from being a member of the profession. (*Abdur Rahim, O. C. J., Spencer and Krishnan, JJ.*) K. V SUBRAHMANYA IVER v. THE DISTRICT MAGISTRATE OF SALEM.

38 M. L. J. 230 : 11 L. W. 122 : (1920) M. W. N. 105 : 55 I. C. 198 : 21 Cr. L. J. 246.

—*S 13 (f)—Misconduct—Abusive letter to Subdivisional Magistrate. See (1919) Dig. Col. 688. IN THE MATTER OF A MUKTEAR.*

42 All. 86.

—*S 13 (f)—Pleader suspected of criminal offence—Evidence insufficient for—Criminal prosecution—Disciplinary proceedings—Propriety of.*

Where a District Judge, being of opinion that the evidence available in respect of certain charges against a pleader, which if established would show that he was guilty of grave criminal offences, was of such a character that a criminal prosecution was not likely to succeed directed the institution of proceedings against him under S. 18 (1) of the Legal Practitioners Act :

LEG. PRACTITIONERS ACT, S 13.

Held, that although a criminal conviction may not always be a pre-requisite to the adoption of disciplinary measures, summary investigation under the Legal Practitioners Act of what in reality is a grave criminal charge may in particular instances be to the prejudice of the pleader and where this is so the procedure should not be followed.

This was not an appropriate procedure to follow in the circumstances of the present case.

The rule deducible from the cases is that an attorney will be struck off the roll if convicted of felony or if convicted of a misdemeanour involving want of integrity even though the judgment be arrested or reversed for error, and also, without a previous conviction if he is guilty of gross misconduct in his profession or of acts which, though not done in his professional capacity, gravely affect his character as an attorney, but in the latter case if the acts charged are indictable and are fairly denied the Court will not proceed against him until he has been convicted by a jury: and will in no case compel him to answer under oath to a charge for which he may be indicted (*Mookerjee, O. C. J. and Fletcher, J.*) IN THE MATTER OF CHANDI CHARAN MITTER

24 C W. N. 755 : 31 C L. J. 471.

—S 13 (6) and (f)—*Pleader—Misconduct—Minor—Application for appointment as guardian of minor's properties—Guardian directed to furnish security—Pleader advising client to pay moneys from minor's estate to the sureties as consideration for suretyship—Propriety of the transaction*

The father of a minor Hindu widow applied to the Court to be appointed guardian of her properties. Being unable to find the required security, he sought the advice of a pleader who directed him to two other persons who consented to become sureties under an agreement by which a portion of the income of the minor's estate was to go to them for four years as consideration for their suretyship. It appeared that in case the father of the minor was not appointed guardian, a salaried guardian would have been appointed by the Court and in view of this contingency, the agreement between the guardian and the sureties was not detrimental to the interest of the minors. Moreover there was nothing to show that the pleader in advising the guardian to enter into the agreement with the sureties did not believe it to be a proper transaction and one that was beneficial to the minor.

Held, on these facts, that there was no cause for proceeding against the pleader under S. 13 (b) or (f) of the Legal Practitioners Act (1900) 1 I. R. Rep. 292 Ref. I. A. 751, dss. (*Abdur Rahim, O. C. J. Sadasiva Aiyar and Burn, J.J.*) IN THE MATTER OF A FIRST GRADE PLEADER.

28 M. L. J. 58 : 11 L. W. 38 : 27 M. L. T. 127 : (1920) M. W. N. 125 : 54 I. C. 163 : 21 Cr. L. J. 19,

LEG. PRACTITIONERS ACT, S 28.

—S 14—*Identifying unknown person—Professional misconduct.*

A legal practitioner who identifies a person whom he does not know, is guilty of professional misconduct (*Mears, C. J. Banerji and Walsh, J.J.*) IN THE MATTER OF JOSHUA PETERS.

57 I. C. 818 :

21 Cr. L. J. 658.

—S. 14—*Procedure—Jurisdiction of Dt. Magistrate to institute proceedings—Offence committed before another court—Judge importing personal knowledge.*

Where the District Magistrate who was moved to transfer a case, declined to stay proceedings in the case pending before the Subdivisional officer, and the junior pleader drafted a petition stating that proceedings had been stayed and the petition was filed before the Sub Div. Officer and the District Magistrate having been subsequently informed, started proceedings under Ss. 13 and 14 and the Legal Practitioners' Act and referred the case, through the Sessions Judge, to the High Court, and in his order of reference based his conclusions as to the misconduct of the pleader upon his own recollection of facts which took place on the date the transfer petition was moved, which differed materially from that of the other pleader witnesses, who gave evidence in the proceedings before him.

Held—(1) that under S. 14 of the Legal Practitioners Act the proceedings could be instituted only by the Deputy Magistrate in whose Court the alleged misconduct or offence took place. 1 P. L. J. 275 foll. The District Magistrate acted improperly in relying upon his own recollections of facts when they differed from those of other witnesses and it was undesirable for him to sit as a Judge to determine the matters in respect of which he might have been called upon to report or examined as a witness. (*Dawson Miller, C. J. Mullick and Jwala Prasad, J.J.*) EMPEROR v. SATYENDRA NATH RAY. 1 P. L. T. 379 : (1920) Pat. 225 : 57 I. C. 277 : 21 Cr. L. J. 613.

—S. 28—*Suit by mukhtiar for fees and travelling expenses—Suit for work done, if affected by S. 28.*

A mukhtiar, who had conducted a criminal case for a client, brought a suit for recovery of money due, on account of fees and travelling expenses, for his services. He stated that his fee was Rs. 20 a day plus travelling expenses; that he had received Rs. 40, and that a balance of Rs. 95 was due. The main plea in defence was one based on S. 28 of the Legal Practitioners' Act. This plea was overruled and the suit was decreed to the extent of Rs. 50 as a reasonable remuneration to the plaintiff for the work done by him. *Held*, that the suit was one for work done and that the decision of the court below was correct. (*Banerji, J.*) HAR SHAI MAL v. BRIJ LAL. 18. A. L. J. 373 : 58 I. C. 182.

LEG. PRACTITIONERS ACT, S 36.

S. 36—Declaring a person a tout—Evidence—Mode of taking.

An order under S 36 of the Legal Practitioners Act declaring a person to be a tout can be made only by one of the authorities specified in that section and upon evidence taken by such authority himself. (*Mookerjee, C. J., and Fletcher, J.*) IN THE MATTER OF NAFAK CHANDRA MANDAL. 24 C. W. F. 1074.

Ss 36 and 39—Enquiry under the Legal Practitioners Act—No power to revise under S. 115, C.P. Code. See C. P. CODE S 115.

13 S. L. R. 212.

LESSOR AND LESSEE—Assignment of lessee's interest—Sub-lease—Covenants running with the land.

A person who acquires a leasehold interest is bound to investigate the title of his lessor and is affected with the constructive notice of any covenant contained in the documents forming part of the claim or title of his lessor. All under-lessees has constructive notice of the covenants of the head lease when the under-lessor on the face of the under-lease appears himself to be holding under a lease. (*Das and Foster, JJ.*) THE LODNA COLLIERY CO., LTD v. BIPIN BEHARI BOSE. 1 P. L. T 84: 55 I. C. 113.

Collusion between to evade statute, effect of. See B. T. ACT S. 85 (2).

25 C. W. N. 4.

Dispute as to boundary—Rival lessees from same lessor—Alteration of boundary by agent of lessor—Lessee if affected.

Plif and deits claimed respectively two plots of land in mouzah P. 175 bighas and 212 bighas in area on either side of a common boundary under two registered leases granted in 1895 by the Pandeys to their predecessors. The correct boundary line between the two plots was determined by a Commissioner appointed in the suit but the defendants set up another fixed in 1900 by one T. P at the instance of the Pandeys. There was no evidence that the then lessees of the several plots were informed that the partition made by T. P. was an arbitrary parcelling out of the land of the mouzali according to the acreage leased out without regard to the boundaries prescribed in the leases:—

Held, that in order to affect rights conferred by the leases, it would have to be shown that all the then lessees entered into an agreement that the plots so marked out should be substituted for those granted under the respective leases, and in the absence of any such agreement the rights created in 1895 would not be affected by any events happening in 1900. (*Lord Moulton.*) DEBENDRA NATH GHOSH v. NEW TETTURYA COAL COMPANY, LIMITED. 24 C. W. N. 746. (P. C.)

Ejection—Expiry of lease—Foreclosure of lessor's rights.

LETTERS PATENT (All) S. 8.

The representatives of a lessor, whose rights have been foreclosed, has, on the expiry of the lease, no right to eject or redeem the lessee who has redeemed the mortgagor from the lessor for his own benefit (*F. Mittra, A. J. C.*) GULAM NABI v. KANHAISINGH.

16 N. L. R. 180.

Ejection of trespasser—Lessee holding over—Right of lessor to sue. See ADVERSE POSSESSION, LESSOR AND LESSEE.

57 I. C. 994.

Forfeiture by denial of title—Acts necessary to constitute denial. See (1919) Dig. Col. 697 SATYA KINKAR SAHAYA v. SHIBA PRASAD SINGH. (1920) Pat 17.

Permanent lease—Reclamation

A tenancy from year to year can be put an end to by notice to quit. From the mere fact the land was given for cultivation when it was waste and that money was sent upon it does not necessarily follow that a Court must presume that the lease was a permanent one. (*Mittra, A. J. C.*) MANALAL v. SUKILAL.

57 I. C. 311.

Permanent tenancy—Mulgani tenant—Recovery of rent from sub-tenant—Landlord's right. See LANDLORD AND TENANT.

22 Bom. L. R. 118.

Sub-lease—Rent—Damages for breach of covenant—Right of lessor against sub-lessee.

Where a lessee in contravention of the terms of his lease grants a sub-lease, the lessor has no cause of action against the sub-lessee either for rent or for damages. His right to recover damages for breach of covenant is restricted to the lessee. (*Mittra, J.*) SITARAM MAHARAJ v. NARAYAN. 56 I. C. 268.

Trees—Right to enter on land for cutting timber—Permission of lessee if required.

A lessor is not entitled as owner of the trees standing on the land leased out to enter and fell them at his pleasure 3 C. P. L. R. 18; (1907) A. W. N. 150; 29 A. 484 foll.

If the lessor desires to take out timber he must by arrangement with his lessee acquire permission to go on the land for the purpose. It is not however open to the lessee to arbitrarily refuse permission when the lessor as owner of the timber desires to fell what he is entitled to take, but reasonable notice of the lessor's intention to enter and fell should be given. (*Drake Brokerman, J. C.*) TIKARAM v. RAM CHANDRA. 54 I. C. 789.

LETTERS PATENT (All) S. 8—Vakil—Professional misconduct—Presenting petition containing allegations made recklessly and without grounds of belief—No instruction from client—Suspension.

A Vakil was retained to defend in the Court of Sessions certain persons accused of murder. In the course of such engagements he prepared

LETTERS PATENT (Bom) Cl. 10.

and put before the Sessions Judge a statement which purported to be a petition issuing from his clients and drafted on their instructions, whereas in truth and in fact it was a petition which originated with him without instructions from his clients, and which contained allegations which were made recklessly and without reasonable grounds of belief :—*Held*, that the vali was guilty of professional misconduct and in exercise of the powers conferred by section 8 of the Letters Patent the Vali was suspended from practicing his profession. (*Mars, C. J. Banerji and Walsh, JJ.*) IN THE MATTER OF A VALI.

42 ALL. 450 :
18 A. L. J. 419 : 56 I. C. 501 :
21 Cr. L. J. 469.

—(Bom.) Cl. 10—Disciplinary jurisdiction—Advocates and pleaders—Resistance to law—Passive resistance—Signing of pledge to civilly disobey laws named by a committee—Unprofessional conduct—Bombay Regulation II of 1827 S. 56.

As a protest against the passing of the Anarchical and Revolutionary Crimes Act (XI of 1919), known popularly as the Rowlatt Act, certain barristers and pleaders practising in the Courts of the Ahmedabad District joined a movement called the Satyagraha Sabha and signed a pledge whereby they undertook "to refuse civilly to obey these laws (*viz.* the Rowlatt Act) and such other laws as a Committee to be hereafter appointed may think fit. On a reference from the District Judge of Ahmedabad the High Court issued a notice to show cause why they should not be dealt with under the disciplinary jurisdiction of the High Court for taking the pledge :—

Held, that the barristers and pleaders had, by signing the pledge, rendered themselves amenable to the disciplinary jurisdiction of the High Court, but that under the circumstances a warning was enough.

Per Macleod, C. J.—Advocates and pleaders are a privileged class enrolled not only for the purpose of rendering assistance to the Courts in the administration of justice, but also for giving professional advice, for which they are entitled to be paid, to those members of the public who require their services. Their position, training and practice give them immense influence with the public, and their example must necessarily have a much greater effect whether for good or for evil than the example of those who do not occupy this privileged position. It is not necessary in order for us to be able to exercise our jurisdiction that any offence should have been committed, nor is it necessary that what the respondents have done should have subjected them to any thing like general infamy or imputation of bad character. (*Macleod, C. J., Heaton and Kajiji, JJ.*) In re JIVANLAL DESAI.

44 Bom. 418 :
22 Bom. L. R. 13 : 54 I. C. 679 :
21 Cr. L. J. 151.

LETTERS PATENT (Cal) Cl. 12.

—(Bom) CL. 12—Leave of Court—Presumption—Defendant outside the jurisdiction of the Court—Third party notice—Issue of—Effect of—See BOMBAY HIGH COURT RULES, RR. 117, 128 AND 129.

22 Bom. L. R. 863.

—(Bom) Cl. 15—Directions to third party—Order refusing—Judgment—Appeal.

An order refusing directions under Rr. 130 and 131 of the High Court Rules is not a judgment within the meaning of clause 15 of the Letters Patent, and therefore it is not appealable (1872) 8 Beng. L. R. 433 Foll. (*Macleod, C. J. and Fawcett, J.*) CHARANDAS CHATURBHUI v. CHANGANLAL PITAMBARDAS.

22 Bom. L. R. 1169.

—(Bom.) Cl 15—Judgment—Order allowing plff. to withdraw suit with liberty—Appeal.

Where the Court of first instance heard the evidence in a suit and delivered a judgment as to a number of points that arose in the suit but did not decide the suit on the merits but passed an order allowing the plff's. leave to withdraw their suit with liberty to take such action thereafter as they might be advised against the defts. *Held*, that the order of the Court was a judgment within the meaning of S. 15 of the Letters Patent, and an appeal lay from it. (*Heaton, A. C. J. and Marten, J.*) NARANDAS v. SHANTILAL.

22 Bom. L. R. 1012 :
58 I. C. 1004.

—(Cal.) Cl. 12—“Carrying on business” Meaning of—Ordinary original jurisdiction of High Conrt.

The expression “carry on business” is not defined in the Letters Patent. The phrase is a very elastic one, almost incapable of definition and the tribunal must in each case look to the particular circumstances.

In a suit for damages for alleged breach of contract entered into beyond the local limits of the High Court’s Ordinary Original Civil Jurisdiction plff. contended that the suit was maintainable within such jurisdiction as the defendant was to be deemed to be carrying on business within the local limits of the said jurisdiction of the Court by virtue of an agreement of managing agency between him and a certain company which had its office in the town of Calcutta :

Held on a construction of the agreement, that the plaintiff's contention failed and the suit was not maintainable. (*Sanderson, C. J., Mookerjee and Fletcher, JJ.*) MAHARAJA MONINDRA CHANDRA NUNDY BAHADUR v. CHUNDY CHARAN BANERJEE.

24 C. W. N. 582 :
31 C. L. J. 827 : 57 I. C. 211.

—(Cal.) Cl. 12—Contract—Breach—Cause of action—Forum,

A and B respectively carrying on business in Cawnpore and Calcutta agreed to accept for accommodation of Z's firm in Cawnpore a

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hundi drawn on A and B in Calcutta by one C in Delhi in favour of E also in Delhi and in the case of payment by acceptors of the amount of the said hundi to debit the same to the accommodation party Z's firm. The acceptors sued the accommodation party to recover the amount of the said hundi which was duly accepted and the amount of which was paid to D in Calcutta:—

Held, that the plaintiffs' cause of action would not be complete unless they proved the fact that they had accepted the hundi in Calcutta in accordance with their undertaking to the drawers of the hundi and paid the bill into Calcutta on due date in accordance with their acceptance.

As part of the cause of action arose within the local limits of the ordinary Original Jurisdiction of the High Court the said Court had jurisdiction to hear the case. (*Sanderson, C. J., Mookerjee and Fletcher, JJ.*) RAMCHANDER GAURISHANKAR v. GANPATRAM BISWANATH.

47 Cal. 583.

—**Cl. 12—Jurisdiction — Mortgage comprising properties outside Calcutta—Sub-mortgage including properties in Calcutta—Suit on Sub-mortgage if maintainable in Calcutta.**

On the 30th August 1907, A mortgaged to B certain immoveable properties situated outside Calcutta and outside the Ordinary Original Jurisdiction of the High Court. On 13th December 1907 B mortgaged to C certain immoveable properties in Calcutta together with his interest as a mortgagee under the mortgage of 30th August 1907. On 25th November 1912 C instituted a suit in the High Court to entorse his mortgage against A and B by the sale of properties comprised in both the mortgages after having obtained leave under Clause 12 of the Letters Patent. The preliminary decree was passed *ex parte* on 2nd September 1914 and the final decree was passed on 24th August 1917. On 20th June 1916 D purchased the right, title and interest of A at an execution sale and in July 1918 D filed the present suit for a declaration that the decrees in the previous suit were without jurisdiction so far as they affected properties outside Calcutta and that the leave under Cl. 12 of the Letters Patent was improperly obtained. *Held* that the decrees were without jurisdiction in so far as the immoveable properties outside Calcutta were concerned and that leave under Cl 12 of the Letters Patent should not have been granted. (*Mookerjee and Fletcher, JJ.*) KRISHNA KISHORE DE v. AMARNATH KSHETTRY.

24 C. W. N. 633 : 31 C. L. J. 272 : 56 I. C. 582.

—**Cl. 15—Appeal under—Whole case open.**

Where the transactions were separate and independent, and if the learned Judges of the Division Bench were agreed as to one or more of them effect should be given to their view,

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though they disagreed as to another or the others.

The whole case is open in an appeal under the Letters Patent against the decision of the Division Bench and all the points necessary to be investigated for the determination of the question of the correctness of the decree are open for consideration. 22 C. L. J. 452. Ref. (*Mookerjee, Fletcher and Richardson, JJ.*) GOPESWAR PYNE v. HEMCHANDRA BOSE.

31 C. L. J. 447 : 57 I. C. 226.

—**(Cal.) Cl. 15—Judgment — Order refusing to issue commission to examine witnesses—Appeal.**

No appeal lies from an order refusing to issue commission for the examination of witnesses, as the order is not a Judgment within the meaning of clause (15) of the Letters Patent. (*Sanderson, C. J., Mookerjee and Fletcher, JJ.*) TOREMULL DILSOOK ROY v. KUNJ LALL MANOHAR DASS.

31 C. L. J. 162 : 55 I. C. 766.

—**(Cal.) Cl. 15—Judgment—Order rejecting application for—Judgment on admissions—Appeal. See (1919) Dig. Gol. 693. KORAMULL RAMBULLABH v. MUNGILAL DALIM CHAND.**

54 I. C. 836.

—**(Cal.) Cls. 25 and 26—Case stated for opinion of Full Bench—Right of accused to begin.**

Where in a sessions trial the Judge convicts the accused but reserves the question of admissibility of the evidence objected to for the opinion of the Full Bench, the counsel for the accused should begin and have a right of reply before the Full Bench. (*Sanderson, C. J., Mookerjee Fletcher, Chaudhuri and Walmsley, JJ.*) EMPEROR v. PANCHU DAS.

24 C. W. N. 501 : 31 C. L. J. 402 : 58 I. C. 929.

—**(Cal.) Cls 25 and 26—Case stated Powers of Full Bench—Acquittal.**

Under cl. 25 and 26 of the Letters Patent the full Bench is not competent to order a retrial but should finally decide the matter on review. 44 C. 477 ; 2 B. 61; I C. 207 ; 17 C. 642 Ref.

The Full Bench is competent to investigate, independently of the evidence erroneously admitted, whether there was sufficient evidence, to justify the verdict of the jury.

Held, by the majority (*Chaudhuri and Walmsley, JJ.* dissenting) that as it was doubtful whether a reasonable jury would have found the accused guilty on the residue of the evidence, the conviction must be set aside. (*Sanderson, C. J. Mookerji, Fletcher, Choudhuri and Walmsley, JJ.*) EMPEROR v. PANCHU DAS. 47 Cal 671 : 24 C. W. N. 501 : 31 C. L. J. 402 : 58 I. C. 929.

—**Cl 36—Original Side Appeal—Costs Difference of opinion as to—Opinion of senior Judge prevails.**

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As regard the judgment about the costs of the appeal the Judges having differed, it was held that S. 98 C. P. C. was not applicable but S. 36 of the Letters Patent applied and the opinion of the Chief Justice prevailed. (*Sanderson, C. J. and Woodroffe, J.*) JUSTAIN HULL v. ARTHUR FRANCIS PAUL.

24 C. W. N. 352 : 58 I. C. 421.

—C1 36—Proceedings under S. 145 Cr. P. C.—Revis on by High Court—Difference of opinion between members of Division Bench—Opinion of Senior Judge prevails. See CR. P. CODE Ss. 145 AND 439. 47 Cal. 438

—(Patna) Cl. 10—Appeals under—Preliminary hearing—Practice — Legality — High Court Rules — Validity — Effect. See. (1919) Dig. Col. 625. JAGDIS CHANDRA v. CHANDRA MOHAN DAS. 54 I C. 230.

—(Punjab) Cls. 10, 29 and 30—“Judgment”—Meaning of—Interlocutory order—Stay of execution.

The term ‘Judgment’ in the Letters Patent is a very wide one, having a not much narrower connotation than the definition given in the C. P. Code. This view receives confirmation from the language employed in Ss. 29 and 30 of the Letters Patent which gives a right of appeal to His Majesty’s Privy Council, subject to certain conditions from even a preliminary or interlocutory Judgment, decree or order.

‘Judgment’ in S. 10 of the Letters Patent includes any interlocutory Judgment which decides so far as the Court pronouncing such Judgment is concerned, whether finally or temporally, any question materially in issue between the parties and directly affecting the subject matter of the suit.

An order on an application to stay execution pending appeal comes within the definition of ‘Judgment’ and so is appealable 24 M. 356; 21 C. 472; 35 M. 1; 8 B. L. R. 432; 43 C 827; 5 M. H. C. 384 Ret. (*Le Rossignol, Bevan and Petman, JJ.*) GOKAL CHAND v SANWAL DAS

1 Lah. 343 :
2 Lah. L. J. 32 : 55 I. C. 933

—Cl. 10—Point not raised before single Judge—When allowed before Division Bench

It is not open to the parties to raise in appeal under the Letters Patent a contention which was not urged before the Court from the Judgment from which the appeal is preferred.

12 W. R. 498 relied on

Held also, that the appellants are not entitled to ask the Division Bench hearing an appeal under the Letters Patent to set aside the Judgment of the Single Bench, when it is found that Judgment is correct on all the points upon which the Single Judge was called upon to adjudicate. (*Shahi Lal and Broadway, JJ.*) AHMAD SHAH v. FAUJIDAR KHAN.

2 Lah. L. J. 1 : 55 I. C. 983.

LIMITATION ACT, S. 4.

LIMITATION—Defence, no bar by when. See LIM. ACT, ART. 12 (a).

22 Bom. L. R. 1082.

—Payment of adjustment of order certifying to Court—Limitation.

22 Bom. L. R. 1120.

—Starting point—Fresh cause of action—Debtor and creditor—Annulment of satisfaction on the ground of coercion, etc.

A debtor who satisfied, by payment, his creditor’s claim for balance of money due sued to annul the satisfaction on the ground of coercion and obtained a decree for refund.

Held, that the annulment gave the creditor a fresh cause of action upon the original claim, and time began to run from the date of annulment 12 M. I. A. 244 9 Cal. 255 at 259 (P. C.) ioll, (*Wallis, C. J. and Sesagiri Iyer J.*) MUTHUVEERAPPAN CHETTY v. ADAIKKAPPA CHETTY. 43 Mad. 845:

39 M. L. J. 312 : (1920) M. W. N. 505:
12 L. W. 240.

LIMITATION ACT—Construction to—Third column—Cause of action to be started only from the date when a remedy by suit or application is available to the party. See LIM. ACT, S. 9 AND ART. 180.

38 M. L. J. 1 (F. B.)

—Defences—Act not applicable.
The Limitation Act provides periods for suits and does not apply to defences. (*Shahi Lal and Broadway, JJ.*) AKBAR HUSSAIN v. RAGNANDIN DAS. 57 I C. 348.

—(IX of 1908) S. 3—Appeal—Presentation beyond time allowed by Limitation Act—Duty of Court to reject though respondent does not object. See LIM. ACT, S. 5. 54 I C. 36.

—S. 3—Limitation—Plea of raised on appeal for the first time—Investigation of facts necessary—Effect of. See (1919) Dig. Col. 697. *Bhadri Sakhu v. Manowar Ali.*

(1920) Pat. 91.

—S. 4—Applicability of private contracts between parties—Execution of decree—Appeal by Judgment-debtor—Decree-Holder agreeing to receive money within 2 months after sale court closed on the due date—Deposit on re-opening day—Effect.

S. 4 of the Limitation Act has no application to a case where a certain date has been fixed for payment by agreement of parties.

N obtained a decree against A, and in execution the Court assessed the value of the properties attached by N. and A filed an appeal against the order of assessment but during the hearing of the appeal on 28-5-18 N filed a petition agreeing to have the sale set aside on receipt of the decretal amount with costs etc., within two months from the date of sale and to file a petition certifying payment and the sale took place on 27-7-18 and was confirmed on 26-8-18 and the Court having closed for the

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Puja Vacation on 17-9-18 it re-opened on 21-10-18 on which date A deposited the decretal amount and the 1st Court set aside the sale, but on appeal by N. the lower appellate court held that the sale could not be set aside and A filed a second appeal to the High Court.

Held, (1) that A not having paid the decretal amount etc., within 2 months from the date of sale the sale could not be set aside and that time was of the essence of the contract. (*Mullik and Sultan Ahmad, JJ.*) ADYA SINGH v. NASIB SINGH. 1 P.L.T. 227 : 56 I.C. 495

—S. 5—Appeal filed out of time—Delay excused subject to objection—Court subsequently dismissing appeal *suo motu*—Illegality—Practice of "admitting subject to objections" undesirable. See (1919) DIG COL. 697. TELENDRAJIT RAJ KUMAR v. GUNENDRAJIT RAJ KUMAR. 31 C. L. J. 1.

—Ss. 5 and 3—Appeal filed out of time—Sufficient cause—Burden of proof—Duty of Court to decide the question of excusing the delay before final hearing—Question of limitation—Powers of Court to take note of though waived by parties.

Where an appellant seeks the benefit of the provisions of S. 5 of the Limitation Act, he must adduce distinct proof of sufficient cause on which he relies and must furnish a detailed affidavit explaining the cause of the delay.

Where an Appellate Court exercises the discretion vested in it by S. 5 of the Lim. Act, it must record the reasons for allowing an extension of the period of limitation.

Where a respondent fails to object to the admission of a time expired appeal the Court is not precluded from considering the question of limitation. Even an agreement between the parties that the objection should not be raised would not prevent the High Court from interfering. 3 Pat. L. J. 132 Ref.

The practice of admitting appeals out of time provisionally, without notice to the respondent and allowing objection to its admission to be taken at the hearing should be discontinued. Provision should be made for the final determination at the stage of admission of any question of limitation affecting the competence of the appeal. (*Adami, J.*) CHATURBHUI. SAHAY v. MUHAMMAD HABIB. 54 I.C. 38.

—S. 5—Applicability of—C. P. Code, O. 20, R. 1—Presumption of notice of the date of judgment.

An application for extension of time under S. 5 of the Limitation Act was made on the ground that though arguments were heard on the 15th March 1918, the Judgment was not delivered until 17th April 1918 and no notice of delivery of Judgment was given to the parties and it was not until the 15th of July 1918 that the applicant heard that Judgment had been delivered.

Held, that in the absence of any indication to the contrary, it must be presumed that the

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notice required under O. 20, R. 1 of Civil Procedure Code was given.

Held, further, that a person who wishes to take advantage of the provisions of S. 5 of the Limitation Act must show that he has not been negligent and that he has been prosecuting his case with due diligence. (*Lyle, J.*) HABIBULLAH v. BANAKSI DAS. 22 O. C. 379: 55 I. C. 837.

—S. 5—Application for leave to appeal in *forma pauperis* presented beyond thirty but within 90 days—High Court—Power of single Judge to excuse delay.

Where a Judge sitting in admission excuses ex parte the delay of the applicant in applying for leave to appeal in *forma pauperis* which appeal was however presented within the time prescribed for filing of appeals on the proper stamp, the respondent is entitled after notice served on him in the appeal to show cause why the delay should not have been excused and why such leave ought not to have been granted. 41 Mad. 412 foll. (*Wallis, C. J. and Seshagiri Aiyar, JJ.*) KRISHNASWAMI NAYAKAR v. VEERAPPA NAYAKAR. 12 L. W. 500.

—S. 5—Delay in filing appeal—Sufficient cause—Carelessness of party.

Delay due to carelessness is not sufficient cause to enable a Court to grant the indulgence allowed by S. 5 of the Lim. Act. (*Roe and Coutts, JJ.*) SHEIKH PALAT v. SARWAN SAHU. 55 I. C. 271.

—S. 5—Delay in filing appeal—wrong Court—Dismissal.

Where appeals are filed in the wrong Court and are out of time the Court on the appeals being brought on, is entitled to dismiss them and not to return them for presentation to the proper Court in order that the latter might consider the question as to whether the time could be extended (*Lord Buckmaster.*) CHARANDAS v. AMIRKHAN. 39 M. L. J. 195: 28 M. L. T. 149: 18 A. L. J. 1095: 22 Bom. L. R. 1370: 57 I. C. 606: 47 I. A. 255. (P. C.)

—S. 5—Delay—Sufficient cause—Alteration of Judgment.

A judgment was altered at the instance of the defendants. The other defendants questioned the propriety of this alteration by means of an application for revision, and, after dismissal of this application they filed the present appeal against the decree in terms of the altered judgment. The appeal, however, was filed beyond time counting the period from the date of the decree, but was within time if the period was reckoned from the date of the dismissal of, the application for revision:

Held, that, as the matter was one about which more views than one were possible, and the appellants might reasonably have been in doubt as to the course they should pursue, the delay in filing the appeal was excusable.

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(*Kanhayi Lal, J. C. and Ashworth, A. J. C.*)
R. P. HEWLETT v. BEHARI LAL.

58 I. C. 995.

—S. 5—Second Appeal—Time taken in obtaining Copy of first Court's Judgment—Deduction of. See (1919) Dig Col. 700 BHAN SINGH v. GOKAL CHAND. 1 Lah. 83

—S. 5—*Sufficient and cause—Criminal appeal filed in wrong Court—Error of law.*

On the 12th Jan 1920 the petitioner was sentenced by the Additional District Magistrate to two sentences of 4 years and 9 months' rigorous imprisonment, respectively, the sentences to run concurrently. On the 2nd February 1920 his counsel erroneously presented an appeal to the High Court which was returned on the 21st February for presentation to the proper Court and was filed in the sessions Court on the same day. The sessions Judge dismissed it as time-barred, relying on 118 P. R. 1908. The petitioner filed a revision to the High Court.

Held, that the case of 118 P. R. 1908 is distinguishable from the present case on the facts and especially inasmuch as that was a civil Appeal. This appeal being a criminal one there is no "successful litigant" who has secured any "valuable right". The crown cannot be said to gain anything by the appeal being dismissed as time-barred as all that the Government is or should be, anxious for is that Justice should be done.

30 Bombay 329, referred to in 118 P. R. 1908.

Held, also that the appellant who is in Jail should not be deprived of the advantage of having his appeal heard merely because his council had been somewhat careless in filing the appeal in a wrong Court and the period of appeal should accordingly be extended. (*Scott Smith, J.*) SURTA SINGH v. EMPEROR.

1 Lah. 508.

—S 5—*Sufficient cause—Mistake of law—Leave to appeal to Privy Council—Two appeals decided by one judgment—Delay in preparing decrees.*

Where M's suit for account against G was decreed in part by the Court below, and M and G having both appealed the High Court dismissed M's appeal and decreed G's appeal by one and the same judgment on 22-5-19, and 10 days time was spent in obtaining copy of the judgment of the High Court and on 2-12-19, the application for leave to appeal was filed by M in respect of both the decrees, and on 25-2-20 the Bench having ordered the filing of 2 petitions in respect of the two decrees M confined his application to the decree dismissing his own appeal and on 16-3-20 M filed another application in respect of the decree in G's appeal which was beyond the six months' period prescribed under O. 45, R. 7, C. P. Code but the decree was signed on 24-2-20 and M applied for extension of time under S. 5 of the Limitation Act and relied upon S. 12 (2)

LIMITATION ACT, S. 6.

of the Act he having applied for copy of the decree on 19-11-19. *Held*, the practice of the Patna High Court was to insist upon the filing of the decree either along with petition for leave to appeal or if it is not ready, to allow the decree to be filed later on when it is obtained, that the period of six months was not to be computed from 24-2-20 when the decree was signed but from 22-5-19 the date of the decision and the time actually spent in obtaining a copy of the decree could only be deducted under S. 12 (2) of the Limitation Act.

13 Cal. 104 not foll. 12 All 461 F. B; 23 Bom. 442; 39 Cal. 766 Relied upon.

Where there are two appeals decided by one and the same judgment two petitions for leave to appeal have to be presented in respect of the two decrees. The above practice being well known and the later decisions having settled the law, no indulgence could be granted under S. 5 of the Limitation Act. (*Dawson Miller, C. J. and Adami, J.*) MAHADEO PRASAD SAHU v. GAJADHAR PRASAD SAHU.

1 P. L. T 262 : 57 I. C. 312.

—S 5—*Sufficient cause—Negligence of servant of agent.*

The Court has power to extend time under S. 5 of the Lim. Act only in cases where sufficient cause has been shown.

The negligence of a servant in the performance of the duties entrusted to him does not amount to sufficient cause within S. 5 of the Lim. Act. (*Miller, C. J. and Mullick, J.*) JAMADAR JALESWAR DAYAL SINGH v. RAM HARI SAHU.

55 I. C. 17.

—S. 5—*Sufficient cause—Presentation of appeal in wrong Court—Mistake.*

An appeal against a decree passed in a suit valued at Rs 8,375 odd was filed in the Court of the District Judge and when the appeal was returned for presentation in the proper Court and filed in such Court, the period of limitation had expired.

Held, that there was not a shadow of excuse for filing the appeal in the wrong Court and that the mistake was inexcusable and the appeal was clearly barred by limitation. (*Shadi Lal and Broadway, JJ.*) NATHU v. MOHAMMED SHAFI.

2 Lah. L. J. 390.

—S. 6—*Applicability of—Cause of action accruing before birth of minor.*

A minor is not entitled to the benefit of S. 6 of the Lim. Act in respect of a right to sue which accrued before his birth. (*Shadi Lal and Dundas, JJ.*) MIRAN DITTA v. BIHARI MAL.

54 I. C. 838.

—Ss. 6 and 9—*Minority—Effect of trespass before birth of minor.*

Where a person trespasses on immoveable property belonging to a person and after such trespass the owner dies leaving a minor son, the minor is not entitled to the exemption from

LIMITATION ACT, S. 6.

limitation in S. 6 of the Lim. Act. (*Scott-Smith and Wilberforce, JJ.*) **GHULAM MUHAMMAD v. AHMAD KHAN.** 55 I. C 335.

S. 6 and art. 120—Suit for declaration by after born sons—Limitation.

One H. B. sold his occupancy rights on the 27th August 1900. On 7th May 1913 his four sons instituted the present suit for a declaration that the sale should not affect their reversionary rights. The four plffs. were born in 1891, 1904, 1908 and 1911, respectively. As regards the eldest son L. D., he being over 21 years of age when the suit was lodged, it was admitted that the suit was barred by limitation. The other three sons who were born after the alienation were minors at the time when the suit was instituted, and it was claimed that so far as they were concerned the suit was in time having regard to the provisions of S. 6 of the Lim. Act inasmuch as two of them were born before their eldest brother had attained the age of 18 and the period of limitation only began to run from that date.

Held, that the three minor plffs. not having been in existence at the time when the right to sue accrued, could not take advantage of the provisions of S. 6 of the Lim. Act, and that the suit was consequently barred by limitation. 40 Cal. 966 dist. (*Chevins and Dundas, JJ.*) **LACHMAN DAS v. SUNDAR DAS.**

1 Lah. 558.

Ss. 7 and 8 and art. 44—Mitakshara Joint Family—Suit by younger brother more than three years after attaining majority.

A suit brought by a younger undivided brother of a Mitakshara joint family is wholly barred under Ss. 7 and 8 and Art. 44 of the Lim. Act, if brought more than three years after the elder brother attained majority, even though the elder brother attained majority within three years prior to the suit. 38 Mad 118 foll. 44 Cal. 1 P. C. dist. (*Oldfield and Phillips, JJ.*) **KUPPUSWAMI AIVANGIR v. KAMALAMMAL.** 43 Mad. 842 : 39 M. L. J. 375 ; 12 L. W. 243.

S. 7 and art. 44—Sale by mother as natural guardian—Suit by her sons one of whom is more than 21—Suit barred against all.

Where a Hindu mother acting as a natural guardian of her sons sells their property without necessity, a suit to set aside the sale is barred by limitation, under S. 7 and Art. 44 of the Limitation Act (*i.e.*) three years after the eldest of her sons attains majority (*Macleod, C. J. and Fawcett, J.*) **BABU TATYA DESAI v. BALA RAOJEE DESAI.** 22 Bom. L. R. 1383.

S. 9 and art. 180—Execution sale—Confirmation—Subsequent application for setting aside sale—Sale set aside regarding Some items—Application for possession—Limitation—Starting point—Suspension of time—Fresh cause of action.

LIMITATION ACT, S. 9.

A Court sale was confirmed without opposition on 26—4—1913 and an application was made on 3—1—1914 to set it aside on the ground of fraud. It was set aside on 25—6—1915 as to part of the properties sold. The auction purchaser applied on 17-2-1917 for delivery of possession of the remaining properties.

Held, by the Full Bench (*Oldfield, J.* dissenting) that the application was not barred under art. 180 of the Lim. Act, as time should be computed from the date of the order disallowing the petition to set aside the sale on the ground of fraud, and not from the date of the first confirmation 23 C. 775 P. C. followed.

Per Abdur Rahim, O. C. J. and Burn, J. Where an application is made for delivery of possession of properties sold in execution of a decree, the sale does not become absolute within art. 180 until the application made to set aside the sale has been disallowed and the sale upheld, though the order confirming the sale had been passed before the application to set aside the sale was made.

Any deduction of time based on a rule of exclusion or suspension of time covering a larger ground than that traversed by Ss. 12, 14, 15 and 16 and other similar provisions of the Limitation Act would be unjustified.

Per Oldfield, J.—The existence of the cause of action for an application for delivery to which art. 180, applies is not suspended during the pendency of the proceedings for the setting aside of the sale, if in the circumstances time had begun to run. There is no general equitable principle apart from the provisions of the Limitation Act under which time which has only begun to run is suspended.

Per Sadashiva Aiyar, J. Whenever proceedings are being conducted between the parties *bona fide* in order to have their mutual rights and obligations in respect of a matter finally settled, the cause of action for an application or for a suit the relief claimable wherein follows naturally on the result of such proceedings should be held to arise only on the date when those proceedings finally settled such rights and liability. Notwithstanding S. 9, of the Limitation Act there are some exceptional cases where suspension even as regards the running of time on the cause of action for a suit can take place. Though S. 9, of the Limitation Act in terms relates only to a suit and not to an application the words ‘to sue’ have been taken as including ‘to apply’ in execution. 29 Bom 68, 36 Bom. 498 ref.

Per Seshagiri Aiyar, J.—Subject to the exemption, exclusions, mode of computation and excusing delay etc., which are provided in the Limitation Act, the language of third column of the first schedule should be so interpreted as to carry out the true intention of the legislature dating the cause of action from a date when the remedy is available to the party. This is a rule of construction and not a rule of law (*Abdur Rahim, O. C. J. Oldfield, Sadashiva Iyer, Seshagiri Iyer and Burn, JJ.*)

LIMITATION ACT, S. 9.

MUTHU KORAKKI CHETTY v. MAHOMED MADAR AMMAL.

43 M. 185 : 38 M. L. J. 1 (F. B.)

—S. 9—*Suspension of Temporary Satisfaction of claim—Annulment of Subsequent cause of action.*

Certain disputes between a principal and an agent were referred to arbitration and under the award thereon certain moneys were paid by the agent in satisfaction of the claim. The agent afterwards sued to set aside the proceedings on the ground that they were brought about by coercion and succeeded in getting back the amount paid. The principal subsequently sued the agent to enforce the original liability to account.

The defendant *inter alia* pleaded that the suit was barred.

Held, that the setting aside of the satisfaction in the former proceedings gave rise to a fresh cause of action and that the suit was therefore in time. (*Wallis, C. J. and Sesagiri Aiyar, J.*) MUTHUVEERAPPA CHETTY v. ADAIKEPPA CHETTY.

43 Mad. 845 :

39 M. L. J. 312 : (1920) M. W. N. 505 : 12 L. W. 240.

—S. 10—*Applicability of—Trustee de son tort—Suit for documents against.*

A trustee *de son tort* stands in the same position as an express trustee and a suit for accounts in respect of trust property comes under S. 10 of the Lim Act (*Chatterjea and Panton, JJ.*) DHANPAT SINGH v. MOHESH NATH TEWARI.

24 C. W. N. 752 : 57 I. C. 805.

—S. 10 and Art. 120—*Implied trust—Suit for accounts against manager of joint Hindu family.*

S. 10 of the Limitation Act does not apply to an implied trust, but to an express trust. A Karta of a Hindu joint family is not vested with the property belonging to a joint family.

Art. 120 of the Limitation Act which provides 6 years limitation applies to a suit for accounts against a Karta of a joint Hindu family. (*Chauduri and Newbould, JJ.*) BISWAMBAR HALDER v. GIRIBALA DASI.

32 C. L. J. 25 : 58 I. C. 877.

—S. 10—*Mortgagor and Mortgagee—Purchase of equity of redemption by mortgagee in contravention of O. 34, R. 14 C. P. C. (S. 99 of the T. P. Act)—S. 10 not applicable—Mortgagee not a trustee. See C. P. CODE O. 34, R. 14.*

24 C. W. N. 229.

—S. 12—*Copy of decree—Application for—Date fixed for attendance to obtain copy—Copy ready before time—Deduction of time.*

Where judgment was delivered on 18-9-18 and application for copies of the judgment and decree was made on 23-9-18 and the requisite number of stamps and folios was filed on 28-9-18 and on the counterfoil of the application, it was notified that the applicant was to attend for copies on 3-10-18 but the copies were

LIMITATION ACT, S. 12.

made ready on 30-9-18 and the applicant obtained the copies on 2-10-18 and filed his appeal on 1-11-18 which was rejected as barred by limitation counting the period from 30-9-18 when the copy of the decree was ready for delivery.

Held,—that under the General Rules and Circular Orders of the Calcutta High Court followed in the Courts of this province the copying department notified on the counterfoil of the application for copies the date when the applicant was to attend the office for them, and the applicant was entitled to a deduction of time under S. 12 of the Lim. Act from the 30th of September to the 3rd of October, when he was required to attend the office for copies and the appeal was not time-barred (*Jwala Prasad JJ. v. FAUDA OAONA v. GANPAT RAM*

1 P. L. T. 383 : (1920) Pat. 271:

57 I. C. 266.

—S. 12—*Copies—Deduction of time spent in obtaining—Delivery of copies to Copying agent.*

Against a decree of 11-12-1918 plff. appealed to the District Judge on 21-1-1919. The copies of the decree and Judgment were applied for by the copying agent on 18-12-1918 and were attested on the 23rd, but were not made over to the copying agent till 2-1-1919.

Held, that the copying agent must be taken as an agent of the appellant's and delivery of the copies to him must be regarded as delivery to his principal. The whole of the time from 18-12-1918 to 2-1-1919 could therefore be deducted.

The appeal to the District Judge was consequently within time. 61 P. L. R. 1911. (*Broadway, J.*) FAIZAHMAD v. KARIM ELAHI.

55 I. C. 406.

—S. 12—*Copies—Exclusion of time spent in obtaining—Copies sent by post.*

Where an applicant for certified copies asks that they should be sent to him by post the time requisite for obtaining the copies under S. 12 of the Lim. Act is the time from the date of the application to the date of posting the copies irrespective of the fact that the copies are ready for delivery before the latter date. (*Lyle, A. J. C.*) MUSSAMMAT IQBAL JEHAN BEGAM v. MATHURA PRASAD.

54 I. C. 831.

—S. 12—*Letters Patent appeal—Copies of Judgment appealed from—Time spent in need not be deducted.*

Where an appeal under cl. 10 of the Patna Letters Patent was filed more than 30 days after the date of the judgment, and it was contended that the Appellant was entitled to get a deduction of the time required for the obtaining of the copy of the judgment, although a copy of the judgment need not be filed along with the memorandum of the appeal under the said rule;

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Held, S. 12 of the Limitation Act has no application at all. It is excluded by the operation of R 2 Chap VII of the High Court Rules by virtue of the provisions in S. 29 of the Limitation Act.

S. 29 of the Limitation Act gives expression to the principle that where there is a statute or special law laid down regarding particular and special cases the legislature does not intend by an enactment of general import to interfere with the provisions already made in an earlier enactment in the special cases (*Miller, C. J. and Mullick, J.*) **DEOKILAL v RAMANAND LAL.** (1920) Pat. 333

S. 12 and Art. 151.—Limitation—Copy applied for after expiry of time for appealing—Exclusion of time.

In computing the time to be excluded under S. 12 of the Limitation Act the time requisite for obtaining a copy does not begin until an application for a copy has been made. 12 All 461 foll

An appellant is not entitled to deduct the time requisite for obtaining a copy if the application for copy was made after the expiry of the period prescribed for appealing in the first schedule to the Limitation Act.

Time may be extended when a litigant has been misled by a change in the practice of the Court. (*Mookerjee and Fletcher, JJ.*) **NIBARAN CHANDRA DUTT v MARTIN & CO.**

32 Cal L.J. 127 : 58 I.C. 408.

S. 12—Miscellaneous appeal—Decree drawn up—Time spent in obtaining copy of decree—Deduction of.

Where a formal decree has been drawn up in a miscellaneous case under S. 47 C. P. Code the time requisite for obtaining a copy of such a decree which embodies the complete adjudication in the case is to be deducted under S. 12 of the Lim. Act. 17 All. 213. foll. 6 C. W. N. 283 dist. 14 I. C. 1005 foll (*Das and Foster, JJ.*) **MAHESH KANT CHOWDHRY v. CH. RAM PRASAD RAI** 1 P. L. T. 33 : (1920) Pat. 75 : 54 I. C. 630.

S. 12—“Time requisite for obtaining copies of judgment”—Vacation time—Intervention of—Applicant if can deduct

Where the Judgment appealed against was delivered on 21st December, 1918 the first day of the Christmas vacation the appellant applied for copies on 7th January, 1919 which was some days after re-opening.

Held, that the time for appeal began to run from the day following that on which Judgment was delivered and that the appellant was not entitled to add the days during which the Court was closed for Christmas as part of the time requisite for obtaining copies under S. 12 of the Limitation Act.

The express time requisite for obtaining copies means time reasonably requisite on the fact of the case. (*Wallis, C. J. and Krishnan*

LIMITATION ACT, S. 14.

J.) DONEPUDI SUBRAMANYAM v. NUNE NARASIMHAM. 43 Mad. 640 : 38 M. L. J. 465 : 11 L.W. 483 : (1920) M. W. N. 293 : 56 I. C. 67.

S. 12 (2) and (3)—Copies of Judgment and decree—Time spent in obtaining—Deduction of—Mode of calculation. See (1919) Dig. Col. 706. ALI MAHOMED v. NATHU.

1 Lah. L.J. 106 : 54 I. C. 879.

S. 12 (2) and (3)—Time requisite for obtaining copies of judgment—Judgment on the last day of the Court—Application.

Where judgment was pronounced sufficiently early on the last days preceding certain holidays during which the Court remained closed and an application for copies of judgment and decree was made on the reopening date.

Held, that the holidays could not be deducted in computing the time for appealing. 11 I. C. 339 and 11 L. W. 483 foll 27 Mad. 21 dist. (*Ayling and Coutts Trotter, JJ.*) **MASILAMANI v. ARUNGA MUDALI** 12 L. W. 460.

S. 12 (2)—Time requisite for obtaining copy of decree appealed from—Meaning—Appeal with copy of decree obtained by another party—Appellant if entitled to a deduction under the section.

When it appeared that the appellant in an appeal preferred to the High Court applied within the prescribed period for a copy of the decree appealed against but allowed the application to be dismissed for non-payment of the copying charges and subsequently filed the appeal together with a copy of the decree which had been obtained by another party *held*, that the appellant was entitled under S. 12 (2) of the Limitation Act to deduction of the time taken in obtaining such a copy. 12 M. L. J. 385 not foll. 29 A. 264 foll.

There are no grounds for importing into S. 12 the restriction that the copy of the decree must have been obtained on the application of the appellant himself. (*Wallis, C. J. and Krishnan, J.*) **AMINUDEEN SAHIB v. PYARI BAI.** 43 Mad. 633 : 38 M. L. J. 340 : 11 L. W. 370 : 56 I. C. 73.

S. 12 (3)—Connected appeals—Only one copy of judgment filed—Time for obtaining copy of judgment.

According to the settled practice of the Patna High Court, when several suits are disposed of by one judgment, in appeal to the High Court only one copy of the judgment is required to be filed.

Under S. 12 (2) of the Lim. Act the time taken for obtaining a copy of the judgment will be deducted in computing the period of limitation for each of the several analogous appeals 17 All 213 appl. (*Miller, C. J. and Mullick, J.*) **MUSSAMMAT BIBI UMTUL v. RAM CHARAN CHAMAR.**

1 P. L. T. 562 : 58 I. C. 991.

Ss. 14 and 29 (b)—Applicability—Suit to enforce registration of a document—

LIMITATION ACT. S. 14.

Registration Act, S. 77—Suit instituted in wrong court within time but beyond that time in the proper Court. See (1919) Dig. Col. 707. **KALIMUDDIN MOLLAH v. SAHIBUDDIN MOLLA.**

47 Cal 300 : 54 I. C. 705.

—**Ss. 14 and 29 (1) (b)**—Applicability—Suit for registration of document—Registration where it is refused by registrar—Period if can be extended if proceedings were instituted in wrong Court in good faith. See (1919) Dig. Col. 707. **KHAGENDRANARAYAN ROY v. BAMNI BARMANI.**

54 I. C. 228.

—**S. 14—Exclusion of time—Plaint presented in wrong court—Order for return—Vacation time—Exclusion of.**

A suit to recover money due on transactions from 20th May 1913 to 26th June 1913 was filed in the Hubli Court, when it opened after the vacation on 7th June 1916. It was then found that the Hubli court had no jurisdiction to entertain the plaint, and the plaint was ordered, on the 15th January 1917, to be returned for presentation to the proper court. The plaint was however, actually returned on the 25th item and presented on the same day to Haveri-Court:—

Held, (1) that the plaint was entitled to exclude the period from 7th June 1916 to 25th January 1917, under S. 14 of the Indian Limitation Act 1908.

(2) that the plaint could, in excluding the time which was taken up by the proceedings in the Hubli Court, also take advantage of these days during which the court had been closed for the vacation; that is the period from the 20th May 6th June 1916. 38 Mad 131. diss. from. (Macleod, C. J., and Fawcett, J.) **BASVANAPPA v. KRISHNADAS GOvardhan Das.**

22 Bom. L R 1387.

—**S. 14—Period during which proceedings were pending in competent court, not to be excluded.** See **CHOTA NAG TEN. ACT**, S. 87.

(1920) Pat. 302.

—**S. 14—Sufficient cause—Delay in seeking execution—Prosecution of a suit.** See C. P. CODE, S. 47. 22 Bom. L. R. 238.

—**S. 15, and arts. 181 and 182—Application for execution—Limitation—Suspension of, when.**

Where no obstacle actual or resulting is imposed upon the execution of a decree by the Court executing the decree or by a Court before which an appeal from an order passed in the execution proceeding is pending or by the Court before which a suit or appeal to contest the validity of the decree or the order passed in execution is awaiting trial there is nothing to stop the running of limitation either under Art. 181 or under Art. 182 of the Lim. Act. (*Kanhaiya Lal, A. J. C.*) **KALKA SINGH v. GUR SARAN LAL.**

54 I. C. 428.

—**S. 15 and Arts. 181 and 182—Execution of decree—Temporary suspension of execution by injunction—Limitation.**

LIMITATION ACT. S. 18.

A final decree for sale was passed in a mortgage suit on 29th August 1913, and an application for execution of the decree was made on 18th April, 1914. While this application was pending a suit was instituted for a declaration that the decree had been obtained by fraud, and on 9th December, 1914 an injunction was obtained in that suit restraining the decree-holder from executing the deeree. On 26th April, 1915 that suit was dismissed and the bar of injunction came to an end. An appeal was filed and it was dismissed on 19th April, 1917. Thereafter the decree-holder applied in execution on 11th June 1918. Held that assuming that this application was, one in continuation of the former application Art. 181 of the Limitation Act would apply, and it was necessary for the decree-holder to come into Court within three years of the date of the removal of the bar of injunction: the present application was accordingly time-barred. 26 All 156 foll; 2 A. L. J. 275 and 2 A. L. J. 397 (P. C) dist. (*Tudball and Sulaiman, JJ.*) **BALWANT SINGH v. BUDH SINGH.**

42 All. 564 : 18 A. L. J. 642 : 56 I. C. 1006.

—**Ss. 15 and Art. 182—Stay of execution of decree—Order permitting execution only on security being furnished by decree holder within specified time—Effect of—Deduction of time during which order was in force.** See (1919) Dig. Col. 710. **PANDEY SATDEO NARAYAN v. SRIMATI RADHEY KURA.**

5 Pat. L. J. 39.

—**S. 15—Stay of execution—Time not to be deducted under S. 48 C.P. Code.** See C. CODE, S. 48.

54 I. C. 279.

—**S. 15, (2)—Suit against private person—Joinder of Secretary of State unnecessary—Limitation—Computation of.**

Where a plif, under a mistake of law or fact conceives that he has a cause of action against the Secretary of State or a public body in addition to his cause of action against a private person and joins without reason the Secretary of State or the Public body he shall not be entitled to invoke the assistance of S. 15 of the Lim. Act and to extend the period of limitation ordinarily allowed against the private person by two months. (*Stuart, J.*) **LADLI PRASAD v. NIZAM UD-DIN KHAN.**

22 O. C. 342 : 54 I. C. 535.

—**Ss. 18 and 20—Acknowledgement of payment by manager when effective to extend time against other members of the family who are co-obligors—Payment by an agent through his servant, payment on behalf of the principal.** See (1919) Dig. Col. 714. **DURAI SWAMI AIYAR v. KRISHNAIER.** 54 I. C. 318.

—**S. 18 and Art. 164—Fraud—Application to set aside ex parte decree—Starting point.**

To take the benefit of S. 18 of the Limitation Act on an application to set aside an *ex parte*

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decree it must be proved not that the *ex parte* decree, was obtained by fraud but that the defendant was kept from knowledge of the decree having been passed by fraud.

The words "when the summons was not duly served" in Art. 164 of the Limitation Act refer to the summons given for the first hearing of the suit. Where there has been due service of such summons the mere fact that the defendant has not received notice of an adjourned hearing will not cause limitation to run from the date on which the defendant becomes aware of the decree having been passed.

An application for setting aside an *ex parte* decree cannot be regarded as one for review and the law of limitation cannot be evaded merely by altering the description of the application and calling it a review. 13 I. C. 518; 131 P. W. R. 1912 foll. (*Chevins, J.*) MUSSAMAT LAL DEVI v. AMAR NATH. 57 I. C. 15.

S. 19—Acknowledgment—Construction—Conditional acknowledgment. See (1919) DIG. COL. 712. PERUMAL GOUNDAN v. DANASEKHARA SANKANIDHI.

58 I. C. 447.

S. 19—Acknowledgment—Effect of Barred debt not revived.

An acknowledgment under S. 19 of Lim. Act saves limitation if it is made before the original debt, which is always the basis of the suit, is time barred. (*Jawala Prasad, J.*) SURAJ PRASAD PANDY v. W. W. BOUCKE.

5 P. L. J. 371 : 1 P. L. T. 190;
56 I. C. 379.

S. 19—Acknowledgment implied—Liability in dispute—Acknowledgment as to principal—Effect on interest.

An acknowledgment of liability within the meaning of S. 19 of the Limitation Act need not be express but there must be a necessary implication so that the acknowledgment is clear and unequivocal.

The acknowledgment must also distinctly and definitely relate to the liability in dispute and not to pay liability.

An acknowledgment of liability in respect of the amount due as principal does not invoke an admission to pay interest. (*Fawcett, J. C.* and *Raymond, A. J. C.*) FIRM OF MESSRS. FILIP & CO., v. MAHOMEDALLI ESSAJI.

13 S. L. R. 183 : 55 I. C. 822.

Ss. 19 and 20—Acknowledgment of liability—Account debiting a particular sum against plff.—Part payment of principal.

Where the defendants sent a letter and memorandum of account to the plaintiff stating that they were squaring an account of Rs. 1,654 by debiting against the plaintiff Rs. 1,497 odd due to the defendants from a third party and remitting the balance to the plaintiff, Held, there was an acknowledgment within the meaning of S. 19 of the Limitation Act in respect of the whole sum of Rs. 1,654.

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A part payment of principal, appearing in the handwriting of the person making it, is not required by S. 20 of the Limitation Act to be expressly stated as being such. (*Piggott, and Gokul Prasad, JJ.*) A CURELDER v. ABDUL HAMID.

18 A. L. J. 1131.

S. 19—Acknowledgment of liability—No presumption that claim acknowledged was not barred on that date—Mortgage—Redemption. See MORTGAGE, REDEMPTION.

18 A. L. J. 789.

S. 19—Acknowledgment of liability—Suit for balance of account and damages.

In this case the plff. relied on an acknowledgment of the defendants to bring his suit within limitation. This acknowledgment was contained in a *Jawab-i-Dawa* in a previous suit and was to the following effect. "Paragraph No. 2 of the plaint is to this extent correct that we with other partners entered into a contract on the 23rd September, 1909 to supply 4,000 maunds of cotton and in this connection a *Satta* was executed and on account of this contract the defendants have been supplying cotton to the plaintiff and have been taking money from time to time. The accounts have not yet been settled with the plaintiff."

Held, that where the existence of an account is admitted the inevitable deduction must be that the person making such an admission acknowledges his liability to pay his debt, if any debt is found against him.

33 C 1047 P. C. 25 C. 844 at p. 851 ; 3 I. C. 19 ; 43 P. R. 1910 ; 35 B. 302, relied on.

12 I. C. 378 ; 36 M. 68 ; 32 I. C. 497 : 155 P. L. R. 1906 referred to.

Consequently that the admission relied on in this case amounted to an acknowledgment of liability to pay and that the bar of limitation was saved thereby. (*Shali Lal and Wilberforce, JJ.*) GANGA SAHAI v. KHANZAN CHAND.

1 Lah. 357 : 2 Lah. L. J. 107 :
58 I. C. 787.

S. 19—Acknowledgment—Suit for possession of land mortgaged—Acknowledgment contained in bonds—Part of consideration entered as being interest due on mortgage.

Plffs. sued for possession of certain land which had been mortgaged to them and claimed an extended period by reason of the existence of certain acknowledgments by the mortgagor. This extension was claimed on the basis of acknowledgments contained in bonds, dated 1899 and 1903 executed by the mortgagor in the plaintiff's favour. In these bonds part of the consideration was entered as being the interest due to the plaintiffs on the mortgage in the suit.

Held, that the admission of liability to pay interest under the mortgage in the bonds of 1899 and 1900 amounts to an acknowledgment of liability under the mortgage including liability to give possession to the mortgagors,

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25 Cal. 844; 54 I.C. 985 foll. (*Leslie Jones and Dundas, JJ.*) ANANT RAM v. INAYAT ALI KHAN
2 Lah. L.J. 549

—S. 19—Duly authorised agent acknowledgment by—Person having general authority to settle claim may acknowledge to save time. *S. 2 (1919) Dig. Col. 714. RAJA BRAJA SUNDAR DELE v. BHOLA NATH.*
55 I.C. 543.

—S. 19 Expl 1.—Acknowledgment—Requirements of valid acknowledgment.

An acknowledgment of suit in order S. 19 Indian Limitation Act need not necessarily be in respect of the particular relief prayed for in a suit or application. It is a sufficient acknowledgment if it is of a liability, whether pecuniary or in relation to other obligations, and is in respect of the property or right which is the subject-matter of the suit or application.

Explanation to S. 19 Indian Limitation Act does not mean that an acknowledgment will be insufficient if it omits to specify altogether the nature of the property or right though it will be sufficient if it omits to specify the "exact" nature of the property or right. The word "exact" is intended to qualify the specification of the nature of the property or right rather than of the property or right itself. *53 I.A. 162; 21 O.C. 151 Rel. 6 O.L.J. 248 foll. (Wazir Hasan, J.C.) JAGESHAR SINGH v. BIR RAM.* **23 O.C. 176.**

—S. 20—Part payment of principal—Handwriting of person making the same—Satisfaction of the debt not appearing in writing—Sufficient part payment.

The defendant, who owed the plaintiff two sums of Rs. 371 and Rs. 1,350 paid Rs. 745 with a letter which ran thus.

"The reason for writing the letter is that your letter is received. I have sent currency notes of Rs 500 and a Hundi for Rs. 235 in all Rs. 735. Credit them."

A question having arisen whether this constituted part payment of principal of the debt of Rs. 1,350 within the meaning of S. 20 of the Indian Limitation Act, 1908:—

Held, that there was part-payment of the principal within the meaning of S. 20 of the Limitation Act, 1908, inasmuch as the fact of payment appeared in the handwriting of the person making the same and as it appeared on the evidence in the case that the payment was in part satisfaction of the principal of the debt.

Where a creditor proves that the fact of the payment appears in the handwriting of the person making the same and also that the payment is really in part-satisfaction of the principal of a debt, he is entitled to have the benefit of the saving provision of S. 20 of the Indian Limitation Act, 1908. (*Shah and Hayward, JJ.*) *SAKARAM MANCHAND GUJAR v. KEVAL PADAMSI GUJAR.* **44 Bom. 392.**

22 Bom. L.R. 313: 56 I.C. 429.

LIMITATION ACT, S. 21.

—S. 20—Part payment of principal—Payment in the handwriting of debtor, if essential—Authority to agent to be proved.

Under S. 20 of the Lim. Act when an agent makes payment it is he who should endorse the entry of payment and the debtor's handwriting is not required. *23 Cal. 546; 26 Bom. 246 dist. 13 C.W.N. 17* commented upon.

The law of limitation must be strictly interpreted, and the plaintiff has to prove that the person making payment is a duly authorised agent. (*Adami, J.*) *BABU BANWARI LAL v. RAM CHANDRA SINGH.* **1 P.L.T. 17:**
54 I.C. 802.

—S. 20 (2) and Art 116—Mortgage of Vatan lands—Mortgage void on mortgagor's death—Bom. Hereditary Officers's Act (III of 1874) S. 5—Mortgagor's heir recovering possession of mortgaged property—Suit by mortgagee to recover mortgage money—Limitation.

Certain Vatan lands were mortgaged in 1893 by the then Vatandar with possession for a period of twelve years for a sum of Rs. 2000. The deed of mortgage contained a covenant: "If there be any hindrance to the continuance of the land, I shall pay the said sum together with interest thereon out of my other estate and personally in the year in which the hindrance may arise." The mortgagor died in 1901. The mortgage having thereafter become under S. 5 of the Bombay Hereditary Officer's Act, 1874, the mortgagor's son sued to recover possession of the property and obtained possession in 1914. Shortly afterwards the mortgagee's sons sued to recover the mortgage amount:—

Held, (1) that the suit was barred by limitation;

(2) that the covenant in the mortgage deed, meant only a personal obligation by the mortgagor and came to an end with his death; that the date of the subsequent dispossession or the hindrance caused to the enjoyment of the property after the death of the mortgagor had nothing to do with the question of limitation and that the time against the mortgagee could not be taken to commence from the date of such hindrance; and

(3) that the suit was not saved under S. 20 (2) of the Lim. Act, for after the death of the mortgagor the possession of the mortgagor was only the possession of a trespasser claiming a limited interest in the property as a mortgagor. (*Shah and Crump, JJ.*) *KRISHNAJI SAKHARAM DESHPANDE v. KASHIM MOHIDDINSAHEB HAVALDAR.* **44 Bom. 500:**
22 Bom. L.R. 385: 57 I.C. 76.

—S. 21—Joint Mortgagors—Payment of interest by one—Effect as against others.

The distinction between simple debts and real debts maintained in the English statutes of Limitation is abrogated by S. 21 of the Limitation Act. There is no distinction made by the section between the case of co-mortgagors and that of co-mortgagors.

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The word "joint contractors" in the section includes joint mortgagors also.

S. 21 of the Lim. Act is really an explanation to S. 19 and 20 of the Act. The object of the explanation is to provide that one only of the contracting parties shall not ordinarily impose a liability on the matter by anything done by him. Limitation whether treated as a right or as a disability is *prima facie* personal and unless the Legislature so provides a co-operative right or liability should not be imposed. (*Spencer and Sesagiri Aiyar, JJ.*) MUTHU CHETTIAR v. MUHAMMAD HUSSAIN.

55 I. C. 763

S. 22—Addition of parties—Limitation.

If a person is already represented in a suit by a party to the suit, his joinder is not the joinder of a new plaintiff or a new defendant, within S. 22 of the Limitation Act. (*Mittra, A. J. C.*) NARHAR v. NARAIN.

56 I. C. 386.

S. 22—Addition of party—Necessary party.

Where a necessary party has been omitted without whose presence on the record the suit cannot be adjudicated upon, and such party is added after the period of limitation has expired, the suit is barred against all the defendants. (*Scott Smith, J.*) KARM NARAIN v. SALAMAT RAI.

57 I. C. 52.

S. 22—Application under S. 105 of the B. T. Act—Addition of parties—Lim. Act S. 22 applicable. See B. T. ACT, SS. 105 AND 188.

25 C. W. N. 38.

S. 22—Partition—Suit—All sharers to be impleaded—Omission—Failure to implead some within period of limitation—Suit bad. See PARTITION.

55 I. C. 62.

S. 23 and Art. 120—Suit for injunction restraining deft. from discharging water on to plffs. shop—Limitation—Continuing—Wrong—Terminus a quo—Injunction—Damages—New Case

Article 120 being the residuary article prescribes the period of limitation for a suit for injunction; but the terminus a quo is the date when the right to sue accrues.

The plaintiffs had a fresh cause of action on each occasion when the defendant discharged water through the parnala on to the plaintiffs' roof and they are entitled to rely upon the last occasion when this was done as the starting point of limitation unless the defendant has acquired an indefeasible right or easement by 20 years' enjoyment. 24 W. R. 97; 25 I. C. 185 foll.

The question that as the plaintiff's have not suffered any substantial injury they should have been granted not a mandatory injunction but monetary compensation was not raised in either of the Courts below and it cannot be raised for the first time in the Court of second

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appeal. (*Shadi Lal, C. J.*) NUR MUHAMMAD v. GAURI SHANKAR 2 Lah L. J. 463: 56 I. C. 1003.

Ss. 26, and 28—Limitation governing defence plea. See LIM. ACT, ART 12 (a) 22 Bom. L. R. 1082.

S. 26—Right to maintain ferry—Easement.

The right to establish and maintain a ferry over the property of another is a right of easement within the meaning of S. 26 of the Limitation Act and in order that the right should be absolute and indefeasible it is necessary that the right should be exercised as an easement and as of right for 20 years.

Where acts of possession can be attributed to mere easement, they are consistent with the possession remaining with the owner, and the latter is not consequently dispossessed thereby. 19 Cal. 253 ref. (*Das and Adami, JJ.*) PARDIP SINGH v. THE SECRETARY OF STATE FOR INDIA.

5 Pat. L. J. 500: 1 Pat. L. T. 395: (1920) Pat. 297: 57 I. C. 516.

S. 26—User as of right—Presumption.

Plffs. and defts. were co-sharers in a well. To gain access to this well from the road it was necessary for the plaintiff to go across certain fields belonging to defts. Plaintiffs had used this road without let or hindrance for a period of 20 years and this road was the only road they could use to gain access to the well.

Held, that having regard to the habits of the people of this country the enjoyment of the road "as of right" within S. 26 of the Lim. Act should have been presumed. (*Broadway, J.*) DIWAN v. JAGTA.

1 Lah. 206:

56 I. C. 728.

S. 28—Adverse possession—Essentials of.

The act of the District Magistrate in maintaining a ferry over the property of the plffs. did not constitute adverse possession to bring into operation the rule of 12 years' limitation as there was no intention to dispossess the latter, and the right to establish and maintain a ferry over the property of another is a right of easement for which 20 years' user is necessary under S. 28 of the Limitation Act.

It is the intention of the defendant, which guides the entry and fixes its character. 19 Cal. 253; (1900) 1 Ch. 19 applied. (*Das and Adami, JJ.*) PARDIP SINGH v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

5 P. L. J. 500: 1 P. L. T. 395: (1920) Pat. 297: 57 I. C. 516.

S. 28—Adverse possession for statutory period—Acquisition of like—Subsequent dispossession.

A person who has, by adverse possession, acquired an indefeasible title to property under S. 28, of the Lim. Act, is entitled to maintain a suit for its possession if he subsequently

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loses it. (*Jwala Prasad, J.*) RAM BRICH SINGH v. MUSAMMAT SANJHARI KOER.

58 I C 380.

—S. 28 and Art. 135—*Mortgagor and mortgagee—Constructive—Possession of prior mortgagee—Puisne mortgagee entitled to obtain possession on redemption—Rights of puisne mortgagee—Limitation.*

Plaintiff, son or one of the mortgagors, sued the defendants 1 and 2, sons of a puisne mortgagee and impleaded the other mortgagor as defendant No. 3. The mortgage in favour of the father of defendants 1 and 2 was made on the 24th November 1899. The lands mortgaged with the exception of 2 banals were already mortgaged to the previous mortgagees and were in their constructive possession through the mortgagors as their tenants. The puisne mortgagee was put in possession of two banals of land and the possession over the land already under mortgage was deferred and the puisne mortgagee was empowered to take possession by effecting redemption of the prior mortgages. In 1915 puisne mortgagee made an application to the Revenue Court seeking redemption and on the 26th of July 1915 the Court made an order for the redemption of the previous mortgages. Possession was awarded to the puisne mortgagee (or his sons defendants 1 and 2) on the 31st July 1916. The final order directing mutation of names was made on the 29th January, 1917. In the same year the defendants 1 and 2 served a notice of ejection on the plaintiff and defendant No. 3. Thereupon the present suit was instituted by the plaintiff for a declaration that the land in dispute was not under mortgage with defendants 1 and 2 that the plaintiff and defendant No. 3 were in possession thereof as owners.

Held, that the right of the defendants to obtain possession under the mortgage in their favour was in no way extinguished and they had full right to obtain possession within 12 years from the date of the redemption of the prior mortgages 48 I. C. 916, foll; 38 P. R. 1894 Ref; 14 C. W. N. 439, dist. (*Abdul Raoof, J.*) BASANTA v. INDAR SINGH.

2 Lah. L. J. 419.

—Art. 11—*Applicability of—Person not a party to claim proceedings.*

Article 11 of the Limitation Act does not apply to a person who was not a party to the proceedings in which the order sought to be set aside was made 32 A. 88, foll. (*Scott Smith, J.*) KARM NARAIN v. SALAMRAT RAI.

57 I. C. 52

—Art. 11—*Applicability of—Sale in execution of money decree—Application by prior mortgagee to sell subject to mortgage—Dismissal for delay—Suit for possession—Limitation.*

In execution of a simple money decree properties of the judgment-debtor, which had been usufructuarily mortgaged by him to A, were attached and sold and purchased by B. A few

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days before the sale however, A applied to have the properties sold subject to his mortgage and asked the Court to have it so stated in the sale proclamation but his application was dismissed as being too late. In a suit brought by A against B more than a year after the date of the order dismissing A's application for the recovery of possession of the properties on the strength of the mortgage, held that the suit was barred under Art. 11 of the Limitation Act and that it was open to B to raise the plea that it was so barred. (*Sadasiva Aiyar and Spencer, J.J.*) VELU PADAYACHI v. ARUMUGAM PILLAI.

38 M. L. J. 397 : 11 L. W. 343 : 27 M. L. T. 312 : 56 I. C. 481.

—Art. 11—*Scope of—Order under C.P.C., O. 21, R. 103 without investigation—Limitation.*

Art. 11 of the Limitation Act is sufficiently wide to cover the cases brought under O. 21. R. 103 C. P. Code and there is no justification restricting the operation of the Article only to those cases where investigation has taken place (*Coutts and Sultan Ahmad, J.J.*) SAIVED RAZIUDDIN HASSAIN v. BINDRESI PRA-SAD SINGH.

5 Pat. L. J. 652 : 58 I. C. 37.

—Art. 11—*Suit to establish title—Execution—Objection to attachment overruled.*

Where an objection to the attachment of property in execution of a decree is disallowed the remedy of the aggrieved party is by a suit under O. 21. R. 63 C. P. C. to establish his right to the property and such suit must be brought within one year from the date of the order disallowing the objection. (*Walsh, J.J.*) RAM NIRANJAN TEWARI v. KHANU RAI.

57 I. C. 5.

—Art. 11 (a)—*Suit for possession—Order under O. 21, R. 99 C. P. C. refusing possession to execution purchaser—Limitation.*

If an execution purchaser asks to be put in actual possession, when he is not entitled to such possession, and his application is dismissed under O. 21, R. 99 C. P. C. a suit for actual possession must be brought within one year under art. 11 of Lim. Act. (*Lord Dunedin*) BALDEO v. KANHAIYA LAL.

16 N. L. R. 103 : 24 C. W. N. 1001 : (1920) M. W. N. 545 : 12 L. W. 408 : 58 I. C. 21. (P. C.)

—Art. 12—*Minor—Suit to set aside execution sale—Irrregularity.*

A suit for possession of the property sold in execution of such a decree is governed by art. 12 of the Lim. Act. (*Scott-Smith, J.*) IMAM DIN v. PURAN CHAND.

1 Lah. 27 : 55 I. C. 833.

—Art. 12 (a) and Ss. 26 and 28.—*Revenue sale—Suit to set aside—Limitation for defence that a revenue sale is void—Rev-*

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Revenue sale and court sale—Effect of—Defence Limitation governing.

M. an inferior holder, brought a Civil suit against S. the Inamdar Khot, for a declaration that his hands were exempt from payment of assessment this suit was pending, S brought Assistance suits (*madat*) in the Mamalatdar's court to recover arrears of assessment from him and obtained a decree. The assessment not having been paid, the lands were sold at a revenue sale on the 27th May 1904, and the sale was confirmed on the 6th August 1904. About that time M obtained a decree in the Civil Court that the lands were held free of assessment. Notwithstanding the revenue sale the land's remained in M's possession as before. In 1914 the auction-purchaser at the revenue sale sold his right to L. In 1915, R sued to recover possession of the lands from M. In this suit M pleaded in defence that the revenue sale was void and gave no right to R. M also brought another suit against R and S for cancellation of the revenue sale and for a declaration that R did not obtain any right at the sale:—

Held, (1) that the second suit by M was barred by the provision of 12 (a) of the Limitation Act 1908 (2) that in the first suit by R M was entitled, irrespective of Art. 12 (a), to raise the question whether or not the revenue sale was valid.

(3) That the revenue sale, was under the circumstances, invalid.

Unless a suit falls under S. 26 or 28 of the Lim. Act, 1908, there is no bar of Limitation to a defence.

When a decree is passed against a defendant in a civil suit and his property is put up for sale in execution proceedings and he does not ask for a stay of execution, the purchaser at the execution sale acquires a good title although it may happen that eventually the decree against the defendant is set aside on appeal. There is a very great distinction between sales in execution of Civil Court. Decrees and sales by revenue courts for arrears of assessment. If it appears that as a matter of fact the defendant in the revenue proceedings is entitled to hold his lands free of assessment, any sale which takes place on the footing that he is bound to pay assessment is invalid and the purchaser at such sale cannot acquire a good title except by adverse possession. (*Macleod C. J. and Heaton, J.*) MAHADEV NARAYAN DATAR v. SADASHIV.

22 Bom. L. R. 1082.

Art. 13—Decree—Execution—Attachment—Suit by purchaser from Judgment-debtor to raise attachment—withdrawing of suit on attachment being withdrawn suit by purchaser to recover possession of property from vendor.

In 1910, the plaintiff purchased a house from the defendant, who passed a rent-note about the same time and remained in possession. The house was subsequently attached by a

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creditor of the defendant. The plaintiff applied under Order 21 of the Civil Procedure Code to raise the attachment, but the Court rejected the application, on the 4th December 1915, on the ground that the sale in favour of plaintiff was inoperative as it was effected to defraud the creditors of defendant. To set aside this order, the plaintiff filed a suit, but it was withdrawn on the 15th August 1916, because the defendant settled with his creditor and the attachment was withdrawn. The plaintiff filed the present suit on the 25th May 1917 to recover possession of the house and arrears of rent. It was contended that the plaintiff not having sued within a year of the order passed in the attachment proceedings, the present suit was barred:—

Held, negativing the contention, that as soon as the attachment was withdrawn there was no longer any attachment or any proceedings in execution in which the order against the plaintiff would operate to his prejudice; and that the defendant was not a party to the attachment proceedings and once those proceedings were withdrawn the plaintiff and the defendant were restored to the position which they occupied before the property was attached. (*Macleod, C. J. and Fawcett, J.*) MANILAL GIRDHAR PATEL v. NATHALAL.

22 Bom. L. R. 1446.

Art. 14—Bom. Land Rev. Code (V of 1879)—Land forming part of river bed—Lease by Collector—Order negativing plff's right to the land—Appeal by plff.—Suit to recover possession of land.

Lands forming part of a river-bed were leased by the Collector for cultivation to defendant No. 2. Plff. who owned lands on the bank of the river laid claim to the lands in dispute but his claim was negatived by the Collector under S. 37 of the Bombay Land Revenue Code on 16-7-1912. Plff. appealed against the Collector's order, the last appeal having been decided on the 16th June, 1913. The plaintiff sued, on the 6th April, 1914, to recover possession of the lands:—

Held, that the suit was barred under art. 14 of the Lim. Act inasmuch as the Collector's order having been passed before S. 37 of the Bombay Land Revenue Code was amended by Act XI of 1912 time began to run from the date of the order and not from the final order in appeal. (*Macleod, C. J. and Heaton, J.*) CHHOTUBHAI GOVINDJI DESAI v. THE SECRETARY OF STATE FOR INDIA.

22 Bom. L. R. 146. 55 I. C. 591.

Art. 14—Forfeiture of land—Order of forfeiture—Suit to set aside order—Limitation—Bom. Rev. Jurisdiction Act, S. 11.

The plaintiff's land was forfeited on 6th May, 1911; after which he applied first to the Collector and then to the Commissioner to set aside the order. Eventually he filed a suit on 14th October, 1915 for a declaration that the proceedings held by the revenue authorities in

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respect of the forfeiture were illegal and *ultra vires*.—

Held, that the suit was barred by limitation since if the plaintiff wished to have a decision of the Court upon the legality or illegality of the order of forfeiture he was bound to put his plaint on the file within one year of the date of the order. (*Macleod, C. J., and Heaton, JJ.*) **GANESH SHESHO DESPANDE v. THE SECRETARY OF STATE FOR INDIA.**

44 Bom. 451 : 22 Bom. L. R. 212 :
57 I. C. 587.

—**Art. 14**—Order of confiscation by Government—Illegal order—Suit for recovery of property—Art. 14 not applicable *See Cr. P. CODE, Ss. 617 AND 524.*

5 P. L. J. 321.

—**Art. 14**—Settlement entry—Suit for cancellation of—Limitation.

A suit for cancellation of a settlement entry is governed by Art. 14 of the Limitation Act the period of limitation being one year from the date of the entry. (*Skiinner, A. J. C.*) **DINA v. DADU.** 57 I. C. 319.

—**Art. 16**—Water cesses—Zemindari lands—Govt levying cess from ryots—Ryots executing mukhilika to Zemindar relinquishing right to amount of cess when recovered by Zemindar from Govt.—Suit by Zemindar—Levy of cess for subsequent year—Suit for recovery of cess paid for subsequent years.

In 1904 the Government levied water cess in respect of certain lands belonging to Zemindar V. V paid the amount under protest but brought a suit for the recovery of the same as illegally levied. This suit was decided in favour of V. in 1914. During the interval, the Government levied the cess direct from the ryots. V. remitted from the amount of rents payable by them to the Government in the mukhilika executed by the ryots to V. the ryots agreed that if V. recovered the amount of cess from the Government V. alone should take it. In 1914. V brought a suit for the recovery of the cess paid from 1905 to 1913 :

Held, by *Ayling and Coutts Trotter, JJ.* (*Wallis, C. J.* dissenting) that the payments by the ryots were as agent of V and that V could sue for the recovery of the same.

Held, by *Ayling and Coutts Trotter, JJ.* that the suit was barred except as to the amount of cess paid within one year from the date of suit and that the fact that the subsequent payments were made during the pendency of the first suit by V and the illegality of the levy was declared in 1914 only and did not give a fresh cause of action for the recovery of the amount paid. 10 M. I. A. 203. discussed. 37 M. L. J. 591 dissented by *Coutts Trotter, J.* (*Wallis, C. J. Ayling and Coutts Trotter, JJ.*) **THE SECRETARY OF STATE FOR INDIA v. RANGANAVAKAMMA.** 12 L. W. 334

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—**Art. 23**—Damages for malicious prosecution—High Court setting aside order for further inquiry—Limitation—Starting point.

A Magistrate purported to make an order of discharge. The complainant moved the District Magistrate in revision, who directed further enquiry. The High Court set aside the District Magistrate's order holding that the order of the trial Court, amounted to an acquittal. In a suit to recover damages for malicious prosecution by the accused. *Held*, that the time commenced to run from the date of the High Court's order and that the second part of Art. 23 of the Limitation Act applied to the case.

The second part of Art 23 of the Lim. Act is not necessarily excluded where there has been an acquittal. (*Bakewell and Phillips, JJ.*) **TANGUTURI SRIRAMULU v. VIRASELINGAM GARU.** 57 I. C. 635.

—**Arts. 29 and 36**—Applicability of—Attachment before Judgment—Suit for damages—Limitation.

Art. 29 of the Lim. Act is not restricted in its application to cases in which the seizure is intrinsically wrongful as for instance when it is made without jurisdiction. It applies also to cases where the foundation of the claim is that the defendant procured the seizure of the plaintiff's property under a perfectly legal process but by misrepresentations to the Court. 19 M. 80. Relied on. (*Oldfield and Seshagiri Aiyar, JJ.*) **SOKKALINGAM CHETTY v. KRISHNASWAMI AYYAR.** 38 M. L. J. 324 : (1920) M. W. N. 192 : 27 M. L. T. 259 : 11 L. W. 479 : 55 I. C. 786.

—**Art. 31**—Suit against Railway Company—Non-delivery of goods despatched—Suit by consignor—Limitation.

The plff. consigned on 16-1-13 to a Railway Company a bundle of gunny bags to be delivered to a consignee at a certain destination. The bundle was not delivered. The plaintiff was subsequently informed that it was lying in the Lost Property Office of the Railway Company, and that he might take delivery if he liked. The plaintiff did not take delivery. On 17th March, 1916, the Railway Company offered to pay to the plff. Rs. 26 in satisfaction of his claim on account of the non-delivery but the offer was not accepted. On 17th January, 1919 the plaintiff sued the Railway Company for recovery of Rs. 50 as compensation for the loss occasioned to him by the non-delivery of the bags. *Held* (1) that Art. 31 of the Lim. Act applied to the suit; (*Banerji, J.*) **MUTSADDI LAL v. B. B. AND C I. RAILWAY.** 42 All. 390 : 18 A. L. J. 377 : 58 I. C. 547.

—**Art. 36**—Attachment before Judgment—Suit for damages—Limitation. *See LIM. ACT, ARTS, 29 AND 36.* 38 M. L. J. 324.

LIMITATION ACT, ART. 44.

Art. 44—Alienation by mother as natural guardian—Suit by minor to set aside—Limitation.

During the minority of a person, his equity of redemption was sold by his mother acting as his natural guardian, without any legal necessity. The minor did not seek to set aside the sale within three years of his attaining majority. After his death, the plaintiff, as his next reversioner, sued to redeem the mortgage—

Held, that the minor, not having sued to set aside his mother's alienation within three years of his attaining majority, was not competent to dispute the alienation over afterwards, and that much less could the plaintiff do so. (*Macklood, C. J. Heaton, and Shah, JJ.*) FAKIRAPPA LIMANNA PATIL v LUMANNA MARIADU.

44 Bom. 742 : 22 Bom. L. R. 680 : 58 I. C. 257.

Art. 44—Applicability—Suit to set aside sale—Inclusion of property not intended to be conveyed for registration in a District Registration, validity. See REGISTRATION ACT Ss. 28 AND 29.

38 M. L. J. 272.

Art. 44—Suit for recovery of property transferred by natural guardian—Limitation.

A suit for the recovery of property transferred during the minority of the plaintiff by his natural guardian must under Art. 44 of the Limitation Act be brought within three years of attaining majority, such a transfer being voidable and not void. (*Mookerjee, C. J. and Fletcher, J.*) BROJEN CHANDRA SARMA v. PRASONNA KUMAR DHAR.

24 C. W. N. 1016 : 32 C. L. J. 48.

Art. 47—Order under S. 145 Cr. P. C.—suit for declaration for right of way

A suit for a declaration of a right of way over the land of the debt need not be instituted within 2 years of an order made in favour of the debt in a proceeding under S. 145 of the Cr. P. Code inasmuch as the proceedings under that section have reference to the possession of the soil and involve no question of a right of way. (*Tewari and Huda, JJ.*) KALA CHAND MUKHAPADHYA v. JOTINDRANATH CHAKERBUTY.

57 I. C. 852

Art. 47—Scope of—Attachment of property under S. 146 Cr. P. C.—Suit by party aggrieved—Limitation.

The suit contemplated in Art. 47 of the Limitation Act is one for possession by a party against whom an order is passed by a Magistrate. The principle underlying Art. 47 is that as possession is outstanding, the party who is out of it should sue within three years to recover it. If he fails to sue within that period under S. 28 of the Limitation Act his right to possession is extinguished. 38 M. 432 Rel. (*S. Shagiri Aiyar and Barwell, JJ.*) SOLEMAMMAL v. JOGI CHETTY.

27 M. L. T. 53 : 56 I. C. 675.

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LIMITATION ACT, ART. 59.

Art. 49—Applicability of—Wrongful removal of coal from adjacent mine.

A suit for value of coal wrongfully extracted and carried away is governed by art. 48 of the Lim. Act, (*Das and Foster, JJ.*) THE LONDA COLLIERY CO., LTD v. BIPIN BEHARY BOSE.

1 Pat. L. T. 84. 55 I. C. 113.

Art. 49—Moveable property—Loan of—Conversion by borrower—Suit for recovery of property—Limitation.

In the case of property loaned to be returned when asked for, no action would lie until a return has been demanded and refused and the mere fact, that the borrower has, unknown to the lender, wrongfully converted the subject of the loan, would not affect the question of limitation.

The period of limitation in such cases would run from the date of demand and refusal and not from the date when property was converted wrongfully. (1871) 6 C. P. 206, followed. (*Ismay, O. J. C.*) BHAI SINGH v. BIHARI LALL.

54 I. C. 159.

Arts. 52 and 115—Suit for recovery of money—Price of articles sold—Limitation—Punjab Loans Lim. Act (I of 1904) art. 52.

The plaintiff suing for a sum of money as representing the price of certain articles sold by him to the defendant is governed by art. 52 of the Lim. Act and not Article 115. (*Rattigan, C. J.*) GANGA RAM v. NANDA.

2 Lah. L. J. 191.

Arts. 59 and 60—Thavanai account—Money payable on demand—Limitation.

A thavanai account is a fixed deposit account. Money deposited on thavanai account is not repayable until the end of the period of deposit. If it is not withdrawn at the end of the period of deposit it remains on deposit in current account, and is repayable "on demand" in the legal sense of the term (*i.e.*, forthwith and without demand).

Article 57 of the Limitation Act applies to suits for money deposited on current account.

Articles 57 and 59 of the Limitation Act seem to overlap. Both apply to suits for money payable "on demand" in the legal sense of the term (*i.e.*, forthwith and without demand), the former being applicable to cases where there is no special agreement to repay forthwith and the latter to cases where there is a special agreement to repay forthwith.

Article 60 of the Limitation Act applies to cases of money deposited under an agreement that it shall be repayable "on demand" in the popular sense of the term, *i.e.*, after demand is made, 37 M. 175 explained and foll.

A thavanai account being a fixed deposit account, a suit to recover money deposited on a thavanai account is governed by Article 60 of Limitation Act and must be brought within three years from the time when the demand is

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made. (*Towney, C. J. and Robinson, J.*) M. M. K. K. CHETTY v. PALANIAPPA CHETTY.

13 Bur. L. T. 21 : 57 I. C. 908

—**Arts. 60 and 63—Thavanai deposit—Suit for recovery of—Limitation.**

Art. 63 of the Lim. Act is applicable only when interest is payable in cash, and the starting point under that article is when the interest becomes due and payable.

In cases of deposits on Thavanai where the agreement is that interest is not to be paid until demanded but should be added to the principal as an increment, the whole amount being treated as a fresh deposit at the end of each Thavanai the proper article applicable to a suit for the recovery of the same is art. 60 and not art. 63. (*Wallis, C. J. and Krishnan, J.*) NARAYANAN CHETTY v. SUBBAI CHETTY.

43 Mad. 629 : 38 M. L. J. 437 : 11 L. W. 418 : 58 I. C. 639.

—**Arts. 61, 99 and 120—Contribution—Suit for—Limitation.**

Where a right of contribution exists against co-debtors, it does not matter whether the money in respect of which the right arises, was actually handed over by the party seeking contribution, or was realized from him by coercive process by the creditor, for instance, by execution of a decree. In either case, the right of contribution arises from the fact that one of the co-debtors had paid in excess of his share and the joint liability of all of them has been discharged.

Plff. and deft. were owners of five different jotes in respect of which decree for rent were obtained by the landlord. In execution of one of these decrees one of the jotes was purchased in the year 1909 by the plaintiff *beiamai* for a third person. After the confirmation of the sale the landlord took out a portion of the sale proceeds in satisfaction of his decree for rent in respect of the other four jotes. Thereafter the sale of the first jote was set aside in 1912, the plff. having failed to get a refund of the amount realized from the landlord brought a suit in 1915 for contribution against his co-tenants:

Held, that although at the time the purchase money was paid by plff., there could not be any question of intention of benefiting anybody by paying any money "without intending to do so gratuitously" yet after the sale was set aside, the purchase money deposited by the plff. should be treated as having been lawfully paid, or appropriated in payment of the decrees for rent under which the plff. and the defts. were jointly liable, so that the joint liability having been discharged with the money of the plff. the defts. were liable to make the contribution.

If Arts. 61 or 99 of the Lim. Act applied to the case, then the cause of action must be taken to have arisen when the sale was set aside. If neither of the two articles applied, then art. 120 was applicable. (*N. R. Chatter-*

LIMITATION ACT, ART. 64.

jee and Panton, JJ.) GOTI NATH MUNSHI v. CHANDRA NATH MUNSHI. 57 I. C. 884.

—**Arts. 61 and 116—Repairs to a common well—Suit for contribution—Limitation.**

The plaintiff spent on the 13th May, 1911 a sum of money on repairs to a well he owned jointly with the defendant under a registered deed which provided that the necessary repairs were to be made by both the owners. He sued in 1916 to recover from the defendant his contribution to the expenses on repairs:—

Held, that the suit was barred by limitation since it was governed by Art. 61 and not by Art. 116 or the Indian Limitation Act 1908. (*Macleod, C. J. and Heaton, J.*) SURAJ PRASAD DWARKADAS v. KARIMALI ABDULMIYA.

44 Bom. 591 : 22 Bom. L. R. 777 : 57 I. C. 532.

—**Arts. 62 and 97—Applicability of—Suit by dispossessed vendee for recovery of purchase-money.**

A suit by a vendee who is dispossessed, for return of the purchase money is governed by art. 97 and not by art. 62. Where money received by the defendant is not in fact or law received to the plaintiff's use, Article 62 would not apply nor would the fact that subsequent events had the effect of making the money received to plaintiff's use render that article applicable. (*Prideaux, A. J. C.*) PREM-SUKHDAS v. NAMDEO. 55 I. C. 93.

—**Arts. 62 and 120—Land Acquisition—suit for recovery of compensation money.**

A suit for a share of compensation money for the house acquired by the Government within 3 years of the date of final award is not time-barred. (*Broadway, J.*) ABDUL HAMID v. MAHOMAD SHARIF. 2 Lah. L. J. 353.

—**Arts. 62 and 120—Mortgage—Land acquisition—Substitution of proceeds—Suit for recovery of—Limitation.**

Where the mortgaged property is acquired compulsorily and the mortgagee sues to recover the compensation allowed for the mortgagor, the suit is governed by art. 120 and not by art. 62 of the Lim. Act. (*Stuart, J. C.*) LADLI PRASAD v. NIZAM-UD. DIN KHAN.

22 O. C. 342 : 54 I. C. 535.

—**Arts. 62 and 97—Patni sale—Setting aside—Suit for recovery of moneys paid as rent to Zamindar by purchaser in the interval—Limitation.** See BENG. REG. (VII OF 1819) S. 14. 24 C. W. N. 617.

—**Art. 63—Applicability of—Thavanai deposit—Suit for recovery of—Art. 60 applicable and not Art. 63. See LIM. ACT, ARTS. 60 AND 63.** 11 L. W. 418.

—**Art. 64—“Account stated”—Meaning of—Limitation.**

A mere statement of the balance, which is due on a particular date cannot be called an account stated within Art. 64. An account

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stated is one where several cross items are set off one against the other and the balance is struck off in favour of one of the parties, the law implying a new promise by the other party to pay the balance in consideration not merely of past debts, but also of the extinguishment of the old debts on each side; and hence it is not necessary that it should be made within the period of limitation 9 Bom. H. C. R. 449; 23 All. 502; 9 Bom. 516; 22 Bom. 213; 19 C. L. J. 263; 35 I. C. 577 Relied upon (*Jwala Prasad, J. J. SURAJ PRASAD PANDEY v. W. W. BOUCKE.*)

5 P. L. J. 371:

1 P. L. T. 190 : 56 I C 379

Arts. 66, 80 and 116—Mortgage bond—Money repayable within fixed period—Stipulation for payment of interest in instalments—Whole amount realisable on default—Limitation.

A mortgage bond provided that the money was to be repaid in five years, that interest was to be paid every six months, that in case of non-payment of interest for four six monthly periods the creditor would have power to realise the whole of the amount due to him in a lump sum within the fixed period, and that if after the time fixed the amount remained unpaid with the consent of the creditor or for some other reason than the same conditions and rate of interest would be applied and maintained after the time fixed and up to the satisfaction of the amount in full. In a suit to enforce the bond, the mortgage as such was held to be invalid, and a simple money decree was passed in the plaintiff's favour. The suit was instituted within six years of the expiry of the period fixed for repayment but beyond six years of the non-payment of two years' interest. Held, that the suit was not time barred. 15 A. L. J. R. 318; 17 A. L. J. R. 647 Referred to (*Banerji, and Tudball, JJ*) SHAM LAL v. TEHARIYA LAKSHMI CHAND.

18 All L. J. 478 : 58 I. C. 278

Art. 67—Book entry—Suit for recovery of money due on—Limitation.

A book entry containing a promise to pay at a certain rate of interest and attested by witnesses is a bond and a suit for recovery of the money due thereon is governed by art. 67 of the Limitation Act. (*Wilberforce, JJ*) HARI SINGH v. FAZAL.

56 I C. 117.

Arts 68 and 120—Suit on administration bond—Limitation—Starting point.

Art. 68 of the Lim. Act does not apply to a suit on administration surety bond, such bond not being a bond subject to a condition i. e. a bond which becomes enforceable only when a specified condition is broken.

Semble Article 120 applies to such a suit 33 A. 414 referred to.

The right to sue on an administration surety bond accrues on failure by the administrator to comply with any of the conditions of the bond or on the administrator putting it out of

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his power to comply with them. The fact that no action is taken on the breach of one or more of the various successive conditions of the bond would not bar a suit on a subsequent breach 17 M. L. T. followed. (*Twomey, C. J. and Ormond, J.*) KOPU v. MA THEIN YIN. **12 Bur L. T. 225 : 56 I. C. 968.**

—Arts. 69, 73 and 80—Promissory note payable on demand—Contemporaneous agreement postponing date of payment—Admissibility of, in evidence—Limitation for suit on the note.

In a suit upon a promissory note executed by the defendant in favour of the plaintiff bank, it appeared that it was customary for the bank, to fix a period for payment and that the defendant's application for the loan was in a printed form in which he added the words "for six months thavanai" and on which the officer of the Bank concerned made an endorsement to the effect that the amount might be lent to defendant "for six months thavanai"

Held, that the application form, with the endorsement thereon, formed part of the same transaction as the suit note and was receivable in evidence for fixing the date of payment of the amount of the note and that the suit on the note was governed by art. 69 or 80 of the Limitation Act, the starting point of limitation being six months after the date of the note.

Quare whether art. 73 was applicable to the case (*Seshagiri Aiyar and Moon, JJ*) PONNUSWAMI CHETTY v. THE VELLORE COMMERCIAL BANK LTD.

38 M. L. J. 70 : 27 M. L. T. 81 : (1920)
M. W. N. 75 : 11 L. W. 28 :
56 I C. 384.

—Art. 73—Applicability of—Promissory note payable on demand—Contemporaneous agreement postponing date of payment—Suit on note—Limitation—Art. 69 or 80 applicable. See Lim. Act, Arts. 69, 73 AND 80.

38 M. L. J. 70.

—Art. 75—Suit on instalment bond—Entire debt payable on demand—Acceptance of overdues instalment—Waiver

Plaintiffs sued on a bond payable by instalments, in default all to be payable at once. He alleged that the first two instalments were paid, but not subsequent instalments, so he sued for the rest of the money.

Held, that Art. 75 of the Lim. Act applies and limitation runs from date of default or where the payee has waived the provisions as to a default incurring liability to pay the whole at once then from the time of the next default.

Although the first two instalments were paid a little after due time, their acceptance should be held to constitute waiver.

The third instalment fell due within six years of date of institution so the suit was within time. (*Chevis, C. J.*) RAM JAWAYA SHAH v. RAM SINGH. **2 Lah. L. J. 314**

LIMITATION ACT, ART. 80.

—Arts. 80, 73 and 69—Promissory note payable on demand—Contemporaneous agreement postponing date of payment—Suit on promissory note—Limitation. See LIM ACT, ARTS. 69 73 AND 80. 38 M. L. J. 70

—Art 83—Indemnity clause—Breach of—Cause of action arises only on actual damage. See C. P. CODE. SCH. II PARA 16.

38 M. L. J. 470.

—Art. 85—Mutual open and current account—Bahi account—Balance struck and carried forward—Reciprocal demands—Limitation.

Plff. sued for recovery of a certain sum of money to be due on a *bahi* account. Plff. had supplied defts. on occasions not merely wth money but wth various articles the values of which were given in the account and debited against defts. There were mutual demands between the parties on balances struck up to a certain date. The account was not closed even on that date, but the balance was carried forward.

Held, that looking at the dealings as a whole the accounts between the parties were mutual open and current and that the suit, governed by art. 85 of the Lm. Act 75 P. R. 1910 D'st (*Sir Henry Rattigan, J.*) DOGARMAL v MULA

9 P. L. R. 1920 : 54 I. C. 453.

—Art 85—Suit for balance due on current account—Last item within time but advanced more than 3 years after close of year in which preceding item was entered

Where the last item in a mutual open and current account w was advanced to defts. w thin limitation but this item was advanced more than 3 years after the close of the year in which the last preceding item was entered the suit is barred by limitation in respect of the previous account. (*Scott Smith and Martineau, JJ.*) GOBIND RAM v JAWALA RAM

1 Lah 12 : 55 I. C. 872

—Art 89 62—Joint property—Partition—Portion of property kept joint—Suit to recover share in property and for account—Limitation.

Where at a partition between members of a joint Hindu family, a portion of the family property is left undivided with the senior member of the family with a view to the property being realised and its proceeds divided, a suit for account and for recovery of a share in such property by a member of the family is governed by Article 89 and not by Article 62 of the Indian Limitation Act 1908. 24 Cal. 309 dissented from. (*Macleod, C. J. and Fawcett, J.*) GABU v ZIRNU.

22 Bom. L. R. 1289.

—Art. 91—Scope of—Document fictitious and not intended to be acted upon, need not be set aside.

Article 91 of the Limitation Act has no application to a case in w'ch document in question is merely fictitious and was not intended to be

LIMITATION ACT, ART. 97.

acted upon. (*Jwala Prasad, J.*) RAM BRICH SINGH v. MUSAMMET SONJHARI KOER.

58 I. C. 380.

—Art. 91—Suit for possession—Avoidance of instrument—Cause of action when arises.

Though a person suing for possession of immoveable property whose right to possession is blocked by an instrument must set aside that instrument time under art. 91 of the Limitation Act does not begin to run, until the necessity to sue for possess on accrues.

A person who has had no occasion to sue for possession of property cannot have his right to property extinguished by the lapse of three years under art. 91, (*Batten, A. J. C.*) SHESHRAO v. MAROTI

55 I. C. 407.

—Art. 97 and 62—Sale of land—Dispossession of vendee by third party—Suit for recovery of purchase money—Limitation.

Where a vendee of land was put into possession by the vendor but was subsequently dispossessed by a stranger and the vendee sues for recovery of the purchase money, the question arose as to whether Art. 62 or Art 97 of the Lm. Act applied to the suit.

Held, that Article 97 had been rightly applied and as the vendee's possession under purchase was an ex stng consideration so long as such possession lasted limitation commenced from the time he was dispossessed. (*Prideaux, A. J. C.*) PREMSUKHDAS v NAMDEO.

55 I. C. 93

—Art. 97 and 116—Usufructuary mortgage—Mortgagee unable to obtain possession—Suit for refund of purchase money

A suit by a mortgagee who could not obtain possession, of the mortgaged property by reason of a defect in the mortgagor's title is governed by Art. 97 and Art. 116 of the Limitation Act. (*Rattigan, C. J.*) RAM NATH v SUNDAR DAS.

2 Lah. L. J. 153 : 55 I. C. 413.

—Art 97—Vendor and purchaser—Covenant for quiet enjoyment—Breach—Suit for damages—Limitation—Starting point

Owing to a defect in the title of the vendor, the original sale having been by a widow, a suit was brought aganst the vendee and a decree was obtained on 30th March 1911 and this decree was upheld by the High Court finally on 7th October 1914. The vendee had been dispossessed in execution of the decree of the 1st Court on 29th November 1911; and he brought his suit for damages for breach of covenants on 16th October 1917.

Held, that the cause of action for breach of the covenant for title arose on the date of the decree of the 1st Court on 30th March 1911.

46 Cal 670 followed.

Held, that the breach of the covenant for quiet enjoyment was broken only on the date of dispossession of the vendee and the suit viewed as one for damages for breach of that covenant was not barred. (*Abdur Rahim and*

LIMITATION ACT, ART. 99.

Phillips, JJ.) MUHAMMAD ALI SHERIFF SAHIB v VENKATAPATHI RAJU
39 M L J. 449 : 27 M L T 305
11 L. W. 537

—Art. 99, 120 and 132—*Mortgage—Co-mortgagor redeeming mortgage—contribution—Suit against Co-mortgagor—Limitation.*

The position of a co-mortgagor redeeming a mortgage is that of an assignee of the original security, and the period of limitation applicable to a suit for contribution brought by him against mortgagors is the same as that within which the original mortgagee could have brought his suit on his mortgage had he not been redeemed (*N. R. Chatterjee and Panton, JJ.) SRIMATI RAJ KAMINI DEBI v. MUKANDA LAL BANDOPADHYA.*

57 I. C. 868

—Art. 106, 115 and 120—*Partnership—Dissolution—Suit for declaration of rights as partner and accounts—Limitation.*

P. had an agreement in his favour for sale of certain mica mines. A deed of sale was executed but not registered as he could not find the entire purchase money. P entered into negotiations with D, with respect to the mines and letters were exchanged between the parties on 4th February 1907. P. in his letter to D. said he was unable to work the business and agreed that D. should buy the property and carry on the business and undertook to get a conveyance in his favour, and stipulated that D. should bear all the expenses, carry on the business and pay P. 2 annas share out of the profits. As soon as D. paid the owner of the property, he should execute a Kararnama embodying these conditions. D. in his letter to P., referred to the terms as the agreement between the parties, and added that if he failed to execute the Kararnama by a certain date he would give up all his rights in the property under these documents. Thereafter there was a conveyance of the property in favour of D. by the owner and P. in which it was recited that the transaction between P. and the owner had fallen through. The Kararnama was not executed. P. in 1910 instituted a suit claiming that he was the sole owner of the mines. In his written statement D. claimed that he was the owner absolute of the property and P. had no right in the business. P. adduced no evidence whereupon the suit was dismissed. P. then applied for the restoration and for permission to amend the plaint by adding a prayer in the alternative that D. directed to execute the Kararnama. The suit was restored, but the amendment was refused. In 1914 P. withdrew the suit with liberty to bring a fresh suit. In 1916 P. instituted a suit for a declaration that he was a partner with D. for accounts and for share of the profits:—

LIMITATION ACT, ART. 115.

Held, a partnership was created between the parties on 4th Feb 1907, and that the constitution of that partnership was not made conditional or contingent on the execution of the Kararnama. The partnership was dissolved as the effect of the repudiation contained in the pleadings of the parties in the suit of 1910.

The present suit, having been brought more than six years after the dissolution of the partnership, was barred under Article 120.

The present suit was not maintainable by virtue of Order II, R. 2 C. P. C. as P.'s cause of action in both the suit of 1910 and the present suit, was based on the contract of partnership contained in the letters of 4th Feb. 1907, and as in the previous suit the relief claimed by him was that his right to the property might be established it was not now open to him to claim relief on the basis that he was a partner with D. and entitled to a 2-anna share. (*Abdur Rahim and Spencer, JJ.) AMALUR VENKAYYA NAIDU v. VISSA LAKSHMINARASAYYA NAIDU*

58 I. C. 969.

—Art. 113—*Contract for sale of immoveable property—No time fixed for performance—Purchase of property in execution sale with notice of the contract—Suit for specific performance—Limitation—Starting point.*

On 17-2-1907 the first defendant agreed to sell a house to the plaintiff, no time being fixed for the performance of the contract. The seventh defendant purchased the house in execution of a money-decree on 17-4-1913 with knowledge of the contract. Plaintiff instituted a suit for specific performance on 26-11-1913 within 3 years of first defendant's refusal to perform the contract. The seventh defendant was not originally made a party to the suit but was added on 22-12-1914 which would be more than 3 years from the date of refusal by the first defendant to perform his contract. It was not alleged or proved that the seventh defendant had refused performance of the contract more than three years before he was impleaded. The Court below dismissed the suit as barred by time against the seventh defendant.

Held, that the suit was instituted within time under Art. 113 of the Limitation Act both against the 1st defendant and the seventh defendant. (*Abdur Rahim, O. C. J. and Odgers, J.) DUNDIGALLA KESAVALU v. KALAVAGUNTLA RAJARAM.*

38 M. L. J. 29 : 11 L. W. 35 : (1920) M. W. N. 122 : 55 I. C. 353.

—Art. 113—*Specific performance—Agreement to execute lease—Limitation—Starting point. See (1919) Dig. Col. 733. SATYA KINKAR SAHAYA v. SHIBA PRASAD SINGH.*

(1920) Pat. 17.

—Art. 115 and 120—*Suit for return of goods delivered with interest—Limitation.*

LIMITATION ACT, ART. 116.

In a suit for the recovery of a quantity of wheat, plff. alleged that deft. had signed a balance in his favour of 8 $\frac{1}{2}$ manis with interest payable in kind at the rate of 50 per cent per annum.

Held, that the suit was governed either by Art 115 in which case limitation began to run when payment was demanded and refused or by Article 20, and in either case the suit was in time. 49 Ind. Cas. 231 not foll. (*Wilberforce, J.*) SOHAN SINGH v. MUHAMMAD DIN
56 I.C. 162

Art 116—Malabar law—Kanom—Claim for arrears of rent by assignee.

Art. 116 of the Lim. Act is applicable to a suit by a Malabar landlord for recovery of arrears of rent due by an assignee from a Kanomdar if the kanom deed is registered, the liability of such assignee arising from a privity of estate. 26 M.L.J. 282 not foll. (*Spencer and Krishnan, JJ.*) NARAYANAN MOOPIL MOOSSAD v. RAMUNNI MENON. 11 L.W. 38

Art. 118—Adoption—Birth of plaintiff after—Limitation—Starting point

A suit for a declaration that an adoption made by a Hindu widow is invalid is a representative suit and time for such a suit begins to run when the adoption comes to the knowledge of the next reversoners and laches or fraud and collusion on the part of the next reversoners will not give an extended period of limitation to any subsequently born reversoners. 41 Mad. 659 rel. (*Wallis, C.J. and Sesagiri Aiyar, J.*) POLEPEDDI VENKATASIVAYYA v. POLEPEDDI ADENNA. 39 M.L.J. 621 : (1920) M.W.N. 783 : 12 L.W. 499

Art. 118—Applicability of—Suit for possession.

A suit for possession of property where the plaintiff questions the validity of an adoption is not governed by Art. 118 of the Act. (*Prideaux and Macnair, A.J.C.*) SONIBAI v. DHANRAJ
56 I.C. 620

Arts. 118 and 141—Suit for recovery of possession from adopted son—Limitation.

Art. 141 and not Art. 118 of the Lim. Act applies to a suit for the possession of property when the defendant holds under a title by adoption. 15 Bom. L.R. 535 not foll; (*Chapman and Atkinson*) SHAH DEO NARAIN DAS v. KUSUMKUMARI. 5 Pat. L.J. 164.

Art. 119—Adoption—Gift to Adopted son—Challenge by reversoner.

If an adoption remains unchallenged, and the right to impeach it is barred by limitation, a gift made subsequently in favour of the adopted son does not give the reversoners a fresh cause of action, for it does not involve any further denial of their rights than was involved in the adoption. (*Leslie Jones and Abdul Raof, J.J.*) KHUSHAL SINGH v. KANDA.
56 I.C. 931.

LIMITATION ACT, ART. 120.

—Art. 119 and 141—Suit by widow of adopted son—Limitation—Starting point—Son's death—Estoppel—Evidence Act, S. 115.

Plff.'s husband was taken in adoption in 1878. On his death in 1904, the deft.'s name was entered in the Record of Rights as owner of his property. In 1913, the plff. passed an agreement to the deft. stating, "according to agreement, whereby I am to receive Rs. 70 for my maintenance, I have this day received in all Rs. 33 for the year....." In 1914, the plff., having sued to recover the property as heir of her husband, the deft. resisted the claim on the ground of limitation and estoppel.

Held, (1) that assuming that the plff. was bound to obtain a declaration that her husband's adoption was valid, there could not be, after his death, any circumstances which would amount to an interference of his right, as such adopted son; (2) that therefore, Art 119 of the Lim. Act had no application to the case and the case fell within the purview of art. 141. 26 Bom. 720 applied. There was no estoppel against the plff. preventing her from ascertaining her right, for even assuming that she had induced the deft. to believe that she had no claim to her husband's property, there was nothing to show that he had acted on such belief. (*Macleod, C.J. and Heaton, J.*) GIRIJABAI v. SADASHIV.

22 Bom. L.R. 974 : 58 I.C. 394.

Art. 120—Administration bond—Suit on—Limitation—Art. 120 applicable—Starting point. See LIM. ACT ARTS. 68 AND 120.

12 Bur. L.T. 225.

Art. 120—Declaration—Cause of action—Wrongful interference with mines.

A fresh cause of action for a declaration that the mineral rights in certain land are vested in the plaintiff arises whether any particular portion of minerals is removed. (*Dawson Miller C.J. and Coutts, J.*) KUMAR PRAMATHA NATH MALIA v. A.J. MEIK. 5 P.L.J. 273 : (1920) P. 146 : 1 Pat. L.T. 360:
56 I.C. 184.

—Art 120—Declaratory suit—Cause of action—Assignee of recorded proprietor—Claim of, to balance of sale proceeds denied by collector—Right of assignee to bring suit for declaration of title—Cause of action arises only on denial of title. See BENG. LAND REV. SALES ACT, S. 31. 24 C.W.N. 294.

—Art. 120—Injunction—Suit for. Article 129 of the Limitation Act being the residuary article, prescribes the period of limitation for a suit for injunction but the *terminus a quo* is the date when the right to sue accrues. (*Shadi Lal, C.J.*) NUR MAHOMED v. GOURISHANKAR. 2 Lah. L.J. 463 : 56 I.C. 1003.

LIMITATION ACT, ART. 120.

—Arts. 120 and 125—Mortgage by Hindu widow—Suit for declaration by remote reversioner—Limitation.

Where a Hindu widow creates a mortgage on the estate and her nearest male reversioner sues for a declaration that the mortgage is not binding on the estate and it is found that on the date of suit the widow had a daughter who would be the next heir.

Held, that the suit was governed by Art. 120 (and not by Article 125 of the Lim. Act, and that the starting point of limitation is the date of the mortgage 41 Mad. 659 Ref.

9. C. W. N. 25 14 Mad. L. J. 209. dis.

“Semble” Land” in Art. 125 includes a house and its site. 5 I. C. 842; 32 P. R. 1904; 108 P. R. 1912. ref. 70 P. R. 1914. dist. (Bevan, Petman, J.) SOMAN SINGH v. UTTAM CHAND.

1 Lah 69 : 55 I. C. 924 :

—Arts. 120 and 148—Mortgage—Purchase by mortgagor in contravention of O. 34. C. P. C. (S. 90 or the T. P. Act)—suit by mortgagor for possession—Limitation. See C. P. CODE, O. 34, R. 14.

24 C. W. N. 229.

—ARTS 120 and 131—Perpetual and periodically recurring right—Distinction—Right of mutwalli to yeomiah allowances

A claim that the plaintiff is the mutwalli of a mosque and as such is entitled to all yeomiah allowance received by a rival claimant, is governed by Article 120 of the Lim. Act.

Article 131 does not apply to a perpetual right to receive an annual or a monthly allowance.

The mere fact that sums of money are paid periodically does not make the right a periodically recurring right.

Where the right is always vested in some person to receive periodical payments, and being vested in one person at one time, passes away at another time to somebody else, such a right is a periodically recurring right in the true sense of the term. 4 Cal. 683 foll. 1914 M. W. N. 228 (F. B.) (Aylng and Coutts Trotter, J.J.) GULAM GHOUSE KHAN SAHIB v. JANNI. 39 M. L. J. 492 : (1920) M. W. N. 394: 12 L. W. 600 : 58 I. C. 788.

—Art. 120—Suit for declaration that defendant is not son of a particular person—Limitation—Starting point.

A suit to obtain a declaration that a person set up as the son and heir of a deceased is not the rightful heir must be brought within the time prescribed by art. 120 of the Lim. Act and such period begins to run from the time when, to the knowledge of the plaintiff, the title of son and heir to the deceased is set up. (Mittra, A. J. C.) PRATAPSINGH v. RAJA DATTAJI RAO. 54 I. C. 300.

—Art. 120—Suit for declaration—Limitation—Starting point—Entry in khewat—Effect of.

LIMITATION ACT, ART. 127.

Where a person continues in possession of his property in spite of a contrary entry appearing in the khewat, no question of limitation or adverse possession can arise in a suit filed by him for declaration of his title. (Kanhaiya Lal. J. C.) BHAGWAN BAKHSH SINGH v. SANT PRASAD. 22 O. C. 369: 54 I. C. 317.

—Art. 120—Trustee despot tort—Suit for accounts against—Limitation Act—Art. 120 applicable—Starting point of limitation. See EXECUTORS

24 C. W. N. 752.

—Art. 123—Mahomedan intestate—Suit for share in property—Members of Mahomedan family living as tenants in common

Where the members of a Mahomedan family continue to live as tenants-in-common without dividing the estate of a deceased ancestor, a suit by one of the members to recover his share in the family property need not necessarily be instituted within twelve years of the death of the intestate. Such a suit is not governed by Article 123 of the Indian Limitation Act 1908. (Macleod, C. J., and Fawcett, J.) NURDIN UMRAV.

22 Bom. L. R. 1429.

—Arts. 123 and 144—Suit for share of the property of an intestate—Heirs of Mahomedan holding estate as tenant-in-common.

Article 123 of the Limitation Act 1908 does not apply to the case of Mahomedans who continue to own as tenants-in-common the estate of their deceased father. To such a case the ordinary law applies and time begins to run against one tenant-in-common when the other tenant-in-common does some act the effect of which is either to exclude his co-tenant from the joint property, or deny his rights to share; and Article 144 is applicable. (Macleod, C. J. and Heaton, J.) KALLANGOWDA NAGAN GOWDA PATIL v. BIBISHAYA SHAH MAHOMED KHAN.

22 Bom. L. R. 936 : 58 I. C. 42.

—Art. 125—Suit by daughter for declaration that gift by widowed mother to another daughter is invalid.

A suit by a daughter for declaration that a gift made by her widowed mother of certain land and a house in favour of plaintiff's sister shall not affect the plaintiff's right is governed by article 125 of the Limitation Act. 25 I. C. 463; 5 I. C. 842 toll. (Scott Smith and Abdul Raoof, J.J.) MUSAMMAT AMIR BEGAM v. MUSAMMAT HUSSAIN BIBI. 58 I. C. 333.

—Art. 127—Scope of—Suit by one tenant in common against another—Suit for partition—Among heirs of tenants in common—Limitation—Starting point.

A suit for partition by the heir of one tenant in common against the heir of the other tenant-in-common is governed by Art. 144 and not by Art. 127 of the Lim. Act, where

LIMITATION ACT, ART. 131.

on the death of one of the tenants-in-common his heir enters into exclusive possession of the whole property asserting an absolute and exclusive title in the deceased the possession of the heir is adverse to the surviving tenants-in-common or their heirs. (Wallis, C. J. and Sadasiva Iyer, J.) RAJA KESARA VENKAT-APPAYA v. RAJA NAYANI VENKATARANGA RAO. 43 Mad. 288 : 38 M L J. 149

Art. 131—Perpetual and periodically recurring right—Distinction—Right of mutwalli to yeomiah allowances. See LIM ACT, ART. 120 AND 131. (1920) M W N 394 : 12 L. W 600

Art 132—Enforcement of payment of money charged on immoveable property—Money payable in kind.

The mortgagor took a loan of a certain quantity of paddy and agreed to repay it together with interest thereon at so many *kathas* per *kuri* per yard and further agreed that on default of payment within the time stipulated the mortgagee would be entitled to realize the money—the subject matter of the claim together with costs—by sale of the property which was mortgaged to secure the loan, and if that was insufficient to satisfy the debt by attachment and sale of other properties of the mortgagor.

Held, that a suit brought within 12 years from the due date of payment for enforcement of money charged upon the mortgaged property was within time under Article 132, of the Lim Act: (1915) 24 C. L. J. 348 dist. (N. R. Chatterjee and Panton, JJ.) DINABANDHU MAITI v. BISHNU BEWA.

32 Cal. L. J. 221.

Art. 132—Loan of paddy secured on land—Suit to recover—Limitation. See (1919) Dig. Col. 732 JOGENDRA NATH SINGH v. MOHAN LAL KHAN. See INDRA NARAIN SON.

47 Cal 125 : 58 I. C 995

Art. 132—Paddy Charged on immoveable property—Limitation.

A suit to recover the value of paddy charged upon immoveable property is a suit to enforce payment of money charged upon immoveable property within the meaning of Art. 132 of the Limitation Act. The expression "money charged upon immoveable property" in that Article includes money due for non-performance of an obligation when such money is secured by mortgage of immoveable property. (Mookerjee C. J. Fletcher, Chatterjee, Teunon and Richardson, JJ.) RAMCHAND SUR v. ISWARACHANDRA GIRI. 25 C. W. N. 57 : 32 C. L. J. 278.

Art. 132—Security bond in favour of shebait — Enforcement by successor—Limitation.

The plaintiff as shebait sued the defendant who was tahiildar of the debutter estate for accounts on a security bond executed by the defendant in favour of the former shebait:

LIMITATION ACT, ART. 134.

Held, that the contract entered into between the Defendant and the former shebait did not terminate on the death of the latter but could be sued upon by the present shebait. (Chatterjee and Newbould, JJ.) DASARATHI CHATTERJEE v. ASIT MOHAN GHOSE MAULIK.

24 C W. N. 879.

Art. 132 Suit for mortgage money realised by co-heirs—Limitation.

The plaintiffs, two out of the three daughters of one G. R. who died 11 years before suit sued for possession of 2/3rd of certain immoveable property and mortgage money released by the defendants their uncles, after G. R.'s death. The Court of first instance dismissed the suit but in the Lower Appellate Court decreed the claim holding *inter alia* that the parties are governed by Hindu Law, that G. R. was separate and that the claim for mortgage money realised by the defendants is governed by Art. 132 and thus within time.

Held, that the money realised by the defendants represented the security which the respondents had under the mortgage and did not cease to represent their security by the fact of the appellants having wrongfully received payment from the mortgagors. 41 C. 54 Rei. (Scott Smith and Dundas, JJ.) MUSSAMAT ASO v. HARNAMI.

1. Lah L. J. 60 : 56 I. C. 944.

Art. 134—Alienation of mortgaged property— Possession by stranger—Stranger reconveying property to mortgagee—Redemption—Limitation.

In execution of a decree for money against two mortgagors the right, title and interest of one of them in the property mortgaged were sold at a Court sale and purchased by the mortgagee in 1889. Out of the property sold a field at Sarve was sold about the same time to a stranger and two fields at Bharadi were sold in 1892 to two persons who resold them to the mortgagee in 1898 and 1902. The other mortgagor whose right, title and interest were not put up for sale at the court auction having sued in 1910 to redeem the mortgage:—

Held, that the plaintiff was not entitled to redeem the Sarve field since it was all along in the possession of an outsider having been sold at a court sale.

He was entitled to redeem the rest of the property as also the Bharade fields inasmuch as the two fields having came back into the possession of the mortgagee he must be treated as a mortgagee and not as an innocent transferee without notice. (Macleod, C. J. and Heaton, J.) KALU DEOBA v. RUPCHAND KISHANDAS. 44 Bom. 848 : 22 Bom. L. R. 932 : 58 I. C. 39.

Art. 134—Applicability of—Suit by succeeding trustee to recover possession of trust property mortgaged by predecessors and foreclosed by mortgagee—Mahomedan law—Mutwalli.

LIMITATION ACT, ART. 134.

A suit by a succeeding trustee to recover possession of trust property mortgaged by his predecessor and foreclosed by the mortgagee is governed by Art. 134 of the Lim. Act and is barred if brought more than 12 years from the date of the mortgage, from which time limitation began to run and not from the date when the defendant obtained possession of the property.

Per Shamsul Huda, J. The onus of proving that the suit was within time was on the plaintiff who failed to discharge that onus and show that the mortgagee was not allowed possession and in the view of the case the suit was barred by limitation under Art. 134 of the Limitation Act.

Per Richardson, J. A suit to which Art. 134 applies must be a suit to recover possession. The plaintiff must be out of possession and the defendant in possession. The transfers chiefly contemplated are apparently transfers for value in excess of the limited powers of the trustee or mortgagee. In terms the Article would apply to a transfer within those powers but in such a case the true defence to a suit to recover possession would be title and not limitation, though in some cases limitation might be useful as an alternative defence.

The date of the transfer is the date on which the property or the title was transferred by the transferor to the transferee and where the transfer is effected by a registered instrument that date is the date of the instrument. To construe the date of the transfer as the date on which the transfer is followed by possession is to import into the Article words which are not there.

Where the possession of the trustee is that of a mere manager under a duly constituted trust it is immaterial under the present law whether the transferee takes with or without notice of the trust. Under Art. 134 of the present Limitation Act the transferee without notice and the transferee with notice are on the same footing.

Where the transferee is a mere manager he is not the ostensible owner. Nor has the transferee anything corresponding to the English "legal estate" to set over against the prior equity of the beneficial owner: the legal ownership and the prior equity are generally speaking both in the beneficiary. The element of hardship in the case of a transference without notice is minimised by the system of registration. (*Richardson and Shamsul Huda, JJ.*)

NARAIN DAS v. KAZI ABDUR RAHIM.

47 Cal. 866 : 24 C. W. N. 690 :
58 I. C. 705.

Arts. 134 and 148—Mortgagee Hypothecation by mortgagee as absolute owner—Execution sale—Adverse possession against mortgagor—Taking of adverse possession.

Art. 148 of the Lim. Act is intended to protect the interests of the mortgagor against the

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mortgagee in possession or the person who holds the interest of the mortgagee, including his heirs or assigns, as such. It applies only to suits for redemption instituted against mortgagees or persons claiming under them and does not apply to suits against strangers.

Art. 134 is designed to protect the interests of the person in possession who might have obtained by transfer from the mortgagee larger rights than those which the mortgagee was competent to transfer, for valuable consideration and has remained in unqualified enjoyment of the same for more than 12 years. The transfer, under that article must be a transfer with possession, or followed by possession as a necessary incident or ingredient of it. Art. 134 does not apply to persons who have acquired the mortgagees' rights by virtue of an execution sale.

In 1861 certain property was mortgaged with possession to H. G. In 1863 the equity of redemption was sold to J. J obtained a decree for redemption conditional upon the payment of a certain sum in H.G. But the payment was not made. H. G. remained in possession of the property till 1889 when he hypothecated it to K. describing himself as absolute owner. In 1901 K's heirs obtained a decree for sale on account of the mortgage and in 1902 purchased it at the auction sale sold in execution of the decree. They sold it to the debt by two sale deeds in 1904 and 1905. In 1915 the heirs of J. brought a suit for redemption of the mortgage of 1861. Held, that the article of the Limitation Act which applied to the suit was Art. 144 and not Art. 148 or Art 134 and that the debts and their predecessors in title having been in adverse possession for more than 12 years, the suit must fail. (*Mears, C. J., and Kanhaiya Lal, J.*) RAM PIARI v. BUDH SAIN.

18 A. L. J. 995.

Arts. 134 and 148—Suit for redemption of mortgage—Alienee from mortgage—Limitation.

In 1882 the plaintiff's father mortgaged certain lands with possession. The original mortgagees mortgaged the lands with defendants in 1883. The plaintiff sued to redeem his mortgage in 1916, when the defendants resisted the suit on the ground that his claim against them was barred under Article 134 of the Limitation Act:

Held, that the suit was quite in time, for it was governed by Article 148 and not by Article 134 of the Limitation Act, 1908.

Per Macleod, C. J.:—A suit to recover possession is not the same thing as a suit to redeem, and a mortgagor's right to redeem, the period of Limitation for which is sixty years under Article 148, will not be defeated merely because his mortgagee transfers the mortgage to another person. (*Macleod, C. J.*,

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and Hecatou, J.) TAIKAMIVA PIRSAHEB v. SHIBELISAHEB FAKIRSAHEB.

44 Bom 614 : 22 Bom L. R. 802 : 57 I. C. 568.

—Arts. 134 and 144—Suit by trustee aga'inst Co-trustee for joint possession—Limitation. See (1919) Dig. Col. 744 SHADI v. ABDUR RAHIMAN.

1 Lah. 66 : 1 Lah. L. J. 154.

—Art. 134—Widows possession in lieu of dower—Transfer of right—Possession of transferee if adverse possession.

One B died leaving A and K as his heirs. A died leaving a widow and a minor son. The widow took possession of the whole of his property $\frac{1}{2}$ as her share by inheritance & in lieu of dower. Then she married K and both joined in selling one half of the property left by B. On the construction of the sale deed it was held that the widow sold only her right to remain in possession, so far as the share of which she was in possession in lieu of dower was concerned and that the vendee knew what he was purchasing.

Held, that the possessory right of the widow was property which was inheritable and transferable and the mere fact that there was no transfer of the dower debt did not make the sale in question an invalid sale so as to give the vendee adverse possession over the property as against the other heirs within the meaning of Art. 134 of the Lim. Act. (Ryres and Gokul Prasad, JJ.) ABDULLA v. SHAMSUL HUQ.

18 A. L. J. 969.
58 I. C. 833

—Art. 138—Suit to establish right to offerings of temple—Claim for arrears.

A suit for a declaration that the plff. is entitled to a certain share in the offerings of a temple is a suit to establish a periodically recurring right under Art. 131 of the Lim. Act.

Where a person claims to share in the offerings made to a temple he can invoke Art. 131 and bring a suit at any time within 12 years from the date when he first asserted his right and did not have it recognised even though his right originated at a previous date. The article has nothing whatever to do with a suit to recover arrears. (Stuart, J.) JAGDEO v. MATHURA PRASAD.

22 O. C. 346 :
54 I. C. 540.

—Art. 139—Landlord and Tenant—ejectment—Limitation—Non payment of rent—Effect of.

Mere non payment of rent does not *per se* amount to a determination of the tenancy, or constitute adverse possession on the part of the tenant. In 1880 the ancestor of the debts mortgaged the house in dispute to the grandfather of the plff. The mortgage was with possession but the mortgagor retained possession as a tenant and executed two rent deeds of 1880 and 1883 respectively. The plff. now

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sued for recovery of rent and ejection of debts from the house.

Held, that the suit was governed by art 139 of the Lim. Act and that as the debts had failed to establish that the tenancy was determined more than 12 years before the institution of the suit, the suit was within time. (Shadi Lal, C. J.) DES RAJ v. JAIMAL SINGH.

57 I. C. 269.

—Art. 139—Suit by landlord to recover possession.

A suit to recover khas possession of the land was decreed on compromise by which the defendant was declared to be the tenant of the plaintiff. In a subsequent suit by plff. to recover khas possession of the same land after giving proper notice to quit.

Held, that limitation did not begin to run against the plff. until after the termination of the tenancy by notice to quit, as during the continuance of the tenancy the possession of the debt tenant was tantamount to plff.'s possession. (Chaudhuri and Ghose, JJ.) JOGENDRA CHANDRA KAR v. SYAM SUNDER DAS

57 I. C. 798.

—Arts. 140 and 144—Property devised—Suit for possession from devisee—Limitation.

Where the purchaser of the rights of a devisee sues to obtain possession of the devised property, the period of limitation applicable if the dev see or his trans'eree has once obtained possession is that prescribed by art 144 or the Limitation Act. If the devisee has not obtained possession the suit must be brought within the period prescribed by art. 140. (Mittra, J. C.) MUSSAMMAT GAJIBAI v. NILKANTH.

56 I. C. 929.

—Art. 141—Co-widows—Surrender by one in favour of another—Alienation by Surrenderer—Suit by reversioner—Limitation.

The junior of two co-widows surrendered her entire interest in her husband's estate in favour of the senior. The senior widow subsequently alienated the properties and died in 1902. The junior widow survived the senior widow and died in 1914. In 1916 more than 12 years after the death of the senior widow who made the alienation the reversioner brought a suit to recover possession of the alienated properties.

Held, that the suit was barred by limitation and that time began to run only in 1914 on the death of the junior widow.

Under Art. 141, time begins to run only on the death of all the female co-heirs.

There can be no acceleration of the right of a reversioner without his knowledge and consent by an agreement between the female co-heirs. (Saduswa Aiyar and Napier, JJ.) MUTHIYALA CHENGAPPA v. BURADAGUNTA alias AKULA VENKATASAWMI.

43 Mad. 855 : 39 M. L. J. 567 :
28 M. L. T. 272 : 12 L. W. 656.

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Art. 141 and 144—Suit for possession on declaration or title by plaintiffs as reversionary heir on his mother's death against defendants—Suit when barred—Limitation Act, 141 if applicable—Co-sharers—Adverse possession, what constitutes See (1919) *Dig. Cal.* 747 *GOBINDA CHANDRA BHATTACARJEE v. UPENDRA CHANDRA BHATTACHARJEE*.

47 Cal. 274. 58 I. C. 141.

Arts 142 and 144—Adverse possession—Independent trespassers—No tacking.

Property belonging to V was wrongly sold in execution of a decree; and was put in possession of the auction purchaser on the 22nd April 1893. V applied to set aside the sale and recover possession of the property. The proceedings went on till his death which took place on 20th January 1903. V's sister was put on the record as his heir. The proceedings terminated in B's favour; and B was put in possession of the property on the 14th October 1915, to recover possession of the property from B's representatives—

Held, that the plaintiff was entitled to recover, his suit being within time under Article 144 of the Limitation Act 1908 since B, the latter of two trespassers, could not be allowed to add to the period of her hostile possession the period of possession of a former trespasser, the auction purchaser, from whom she did not derive title in any way. (*MacLeod, C. J. and Fawcett, J. v. RAMCHANDRA v. BALAJI*)

22 Bom. L. R. 1452.

Arts. 142 and 144—Applicability of—Suit for possession of immoveable property—Art. 144 residuary Article.

In a suit to which Art. 142 of the Lim. Act. applies, the plaintiff must prove his possession within twelve years from date of suit, and if he fails to do so, the suit should be dismissed without going into the question of the defendant's title.

In a suit to which Art. 144 applies the plaintiff has only to prove his title and the defendant would then have to prove his allegation of adverse possession.

Art. 144 is a residuary Article to be applied to suits for possession of immoveable property not otherwise expressly provided for. (*Towmey, C. J. and Robinson, J. v. MUTHIA CHETTY v. SEENA THEVAR.*)

12 Bur. L. T. 234.

56 I. C. 951.

Arts. 142 and 144—Co-owners—Suit for declaration of non-interference by other co-owners—Limitation—Onus.

When a co-owner sues another co-owner when the latter has infringed the right of the former in respect of certain water channels, of which both the parties were in joint possession for a declaration that he has the right to irrigate his fields from the water of the same, and the defendant had no right to fill them up, it is not a suit for possession on dispossesson: Art. 142 of the L. m. Act is not applicable, but

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Art. 144 applies 14 Mad. 96. 21 Mad. 153. 31 Cal. 970. 31 Cal. 960; 28 C. L. J. 437; 47 I. C. 626, relied upon.

Where the plaintiffs do not ask for separate exclusive possession, but the debt claims to hold the water of the water channels on the ground of adverse possession, the onus is upon the latter to show that he had adverse possession for more than 12 years before the institution of the suit. (*Sultan Ahmad, J. v. RADHA KANTA LAL v. BAGWAT PRASAD.*) 1 P. L. T. 192 55 I. C. 247.

Art. 142—Dispossession—Discontinuance of possession—What constitutes.

Under Art. 142 of the Limitation Act the Court should find what is the date of dispossesson or discontinuance of possession. Dispossession implies an ouster from possession followed by the possession of another person and hence a finding that the defendant was not in possession for 12 years before suit implies that plaintiff brought his suit within 12 years of his possession 29 Cal. 518 foll. (*Coutts and Das, JJ v. MADAN MOHAN SINGH v. BRIJBEHARI LAL.*) 5 Pat. L. J. 592: 1 P. L. T. 505: 57 I. C. 717.

Art. 142—Dispossession—Meaning of.

'Dispossession' implies the coming in of a person and the driving out of another from possession: 22 C. L. J. 284; 20 C. W. N. 481 Ref (*Mookerjee, C. J. and Fletcher, J. v. PANCHOO KAPALI v. JANESWAR MAJHI.*)

32 C. L. J. 9: 58 I. C. 844.

Art. 142—Dwelling land—Suit for possession—Dispossession or discontinuance of possession—Construction of building—Ownership—Finding of fact.

In a suit for possession of certain dwelling land and for issue of a perpetual injunction to the debt. to remove his *anla* therefrom which he constructed thereon on the ground that the land in suit belonged to the plaintiffs and that the defendant's possession was permissive, it was contended that the onus should have been on the plaintiffs to prove that they had been in possession of the site within twelve years previous to the date of the suit.

Held, that the suit is not one in which the plaintiffs have been dispossessed or have discontinued possession and therefore Art. 142 does not apply.

The suit would apparently have been in time even if Art. 142 had properly been applicable inasmuch as the house and shops were constructed only eight and four years before suit respectively. No doubt the onus lay on the plaintiffs to prove that the debt's possession was permissive but they have discharged it.

The question as to whether the area on which the debt. has built belonged to the plaintiff, is one

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of fact. (*Broadway and Dundas, JJ.*) MIR MAHFUZ ALI v. MUSSUMMAT MAHOMAD ZAMANI BEGAM. 2 Lah L.J. 511.

—**Arts 142 and 144—Ejectment—Strip of unenclosed land—Possession—Presumption—Limitation.**

In a suit in ejectment the plaintiff, where the defendant is in possession, must in addition to proving his title make out that the dispossession took place within 12 years of the suit, (*i. e.*) that he was in possession and was dispossessed within that period. Possession, however, is not necessarily the same thing as user and if the land is of such a nature as to render it unfit for actual enjoyment in the usual modes, for instance, a narrow strip of un-enclosed land adjoining a public lane, it may be presumed that the previous possession of the plaintiff continued till the contrary is proved. This presumption is a presumption of fact. It is by no means conclusive, and whether it should be applied or not must depend upon the facts of each particular case. (*Dawson Miller, C. J. and Mullik, J.*) DR. INDER LALL v. MUSAMMAT RAM SURAT KUAR. 58 I.C. 773.

—**Art. 142—Ejectment suit—Possession within 12 years and dispossession to be proved by plff. See EJECTMENT.**

54 I.C. 181.

—**Arts. 142 and 144—Submersion and reformation—Possession during period of submersion presumed to be with the owner. See BENGAL REGN. XI OF 1825.**

5 P.L.J. 632.

—**Art. 142—Suit for immoveable property—Ouster—Plff. shown to be in actual cultivating possession within 12 years.**

Held, that the suit was not barred by time inasmuch as the plaintiff was shown to be in actual cultivating possession in the settlement record of 1910-11 and this entry has not been rebutted and must be presumed to be correct.

The mere entry by the Patwari in the mutation register that the exchange took place on a certain date does not of itself prove that the exchange did take place on that date. (*Scott-Smith, J.*) SHER SINGH v. KHEM SINGH.

2 Lah. L.J. 230.

—**Art. 142—Suit for possession based on trespass—Onus on plff. to prove dispossession within 12 years.**

When a plff. brings a suit for possession on the allegation that while in possession he was dispossessed by the deft. he must show when exactly he was dispossessed and he must bring the suit within 12 years of the date of dispossession. (*Das, J.*) BHIKAN QASSAB v. MARDAN ALI. 56 I.C. 40.

—**Arts. 142 and 144—Suit for possession—Entry of deft's name in record of rights—Onus.**

In a suit for the recovery of possession where the entry in the Record of Rights is in

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favour of deft, plff must prove his possession within twelve years of the suit. (*Adami, J.*) KISHUN PRASAD SINGH v. SURAJNARAIN PRA-SAD SAHL. 54 I.C. 930.

—**Art. 143—Breach of covenant in lease—Suit for possession—Limitation.**

A lease provided that the lessee was to enjoy the land from generation to generation for purposes of residence without any power of alienation, and in the event of such alienation the lessor would be entitled to khas possession. The lessee sold the land and the lessor sued to recover possession.

Held, that Art. 143 was applicable and the period of limitation was 12 years and began to run from the date of alienation and not from the date when the lessee surrendered possession to the transferee. (*Mookerjee, C. J. and Fletcher, J. J.*) MOTILAL PAL CHOUDHURY v. CHANDRA KUMAR SEN. 24 C.W.N. 1064.

—**Art. 143—Starting point, knowledge of lessor, not essential.**

Under Art. 143 of the Limitation Act, the starting point of limitation is the forfeiture itself; there is nothing in the Article about the knowledge of the lessor. (*Ayling and Krishnan, JJ.*) ZAMORIN OF CALICUT v. UNIKAT KARNAVAN SAMU NAIR. 38 M.L.J. 275 : 27 M.L.T. 111 : 55 I.C. 380.

—**Art. 144—Adverse possession—Lands Attached to office of karnam—Acquisition of, by prescription.**

A person in adverse possession of lands annexed to the office of *karnam* for over the statutory period acquires a prescriptive title to the lands as against the holder of the office and his successors. 42 Cal. 244 dist. (*Abdur Rahim and Ayling, JJ.*) IDARAPALLI DHAN-NUSHKOTIRAYUDU v. VENKATARATHNAM.

38 M.L.J. 320.

—**Art. 144—Adverse possession—Onus—Delivery of Symbolical possession to plff.**

In 1896 plffs instituted a suit for possession of two-thirds of an entire estate claiming to be entitled thereto under a will and obtained a decree on the 17th August 1898. In execution of this decree they obtained symbolical possession of their two-thirds share. On 7th February 1914 plffs. instituted a suit for possession of her two-thirds share.

Held, that symbolical possession having been obtained by plffs. in execution of their decree of 1898 the onus is on the (defendants) appellants to show that they had been in adverse possession for the requisite period. (*Shadi Lal and Broadway, JJ.*) ALI BAKHSH v. GHULAM FATIMA. 2 Lah. L.J. 91.

—**Arts. 144 and 142—Co-owners—Suit by, for declaration of right to channel—Adverse possession—Starting point.**

A suit by one of several co-owners of a water channel for a declaration that he has the right to irrigate his fields from the channel jointly

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with the other co-owners who are interested with him is not a suit for possession or disposition and is governed by Art. 144 of the Lim. Act and by Art. 142.

If in such a suit the deft. claims to hold the water of the channel on the ground of adverse possession the onus is upon him to prove that his possession has been adverse for 12 years before the institution of the suit. (*Sultan Ahmida, J.*) **RADHA KANTA LAL v. BHAGAWATI PRASAD.** 1 Pat. L. T. 192 : 55 I. C. 247.

Art. 144—Co-tenants—Alienee from co-tenant—Possession of, adverse to the rest—knowledge of the others, if essential. See ADVERSE POSSESSION, CO-TENANTS.

11 L. W. 81.

Art. 144—Immoveable property—Right to take water from the well of another.

The right to take water from the well of another is not immoveable property and cannot be lost by 12 years adverse possession. (*Shah and Hayward, JJ.*) **ANANTA MURARAO v. GANU VITHU.** 22 Bom. L. R. 415 : 57 I. C. 143.

Art. 144—Suit for possession—Distant collaterals—Adverse possession—Cause of action.

On 25-12-1897 the widow of one H gifted certain land to her daughter's sons, D. and N. On 21-1-1900 N died and D obtained possession of his share and retained it till his death in 1909. Mutation was then effected in favour of defts. D's first cousins, which was accepted by A the nearest reversioner. A died in 1914 and in 1918 plaintiffs, collaterals in 4th degree of H, the original donor's husband brought the present suit for possession on the ground that the donees' direct line of descendants having failed the lands reverted to plffs.

Held, the suit was not barred by limitation in respect of N's share, plffs. having had no right to sue for possession until the death of A. in 1914. 26 P. R. 1911. F. B. Ret; 133 P. R. 1916 dist. (*Rattigan, C. J.*) **HARNAMAN v. DASONHII.** 1 Lah. 210 : 56 I. C. 733.

Arts. 144 and 127—Tenants-in-Common—Suit for partition—Lim. Act. Art. 127 not applicable but Art. 144. See LIM. ACT. ART. 127. 38 M. L. J. 149.

Art. 145—Suit for recovery of money deposited as security for appointment—Limitation.

Article 145 of the Lim. Act applies to a suit to recover money deposited by the plaintiff as a security for his appointment as Tahsildar under the Court of Wards. (*Walmsley, J.*) **NANDA LAL BOSE v. ASHUTOSH GHOSE.** 55 I. C. 515.

Art. 146 A—Encroachment on public street—Otta on street for more than 30 years—Right of municipality to remove obstruction. See BOM. DT. MUN. ACT. S. 122. . 22 Bom. L. R. 951.

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—Art. 148—Applicability of—Co-mortgagors—Redemption by one—Suit against charge-holder.

A co-mortgagor redeeming the whole of the mortgage does not become a mortgagee of the portion belonging to the other co-owners

26 B. 500 ; 46 C. 211 ; 41 M. 650 ; 40 M. 1040 ; 2 C. L. J. 546 foll.

Art. 148 of the Limitation Act refers only to a suit against the mortgagor and has no application to a suit against a charge-holder. 38 A. 138 foll. (*Wilberforce, J.*) **BASANTA v. DHANNA SINGH.** 55 I. C. 450.

—Art. 148—Mortgage—Purchase by mortgagee of equity of redemption contrary to O. 34, R. 14, C. P. C.—Suit by mortgagor for possession or redemption—Art. 148 not applicable. See LIM. ACT. 120 AND 148. 24 C. W. N. 229.

—Art. 148—Starting point for limitation—Lekha mukhi—Usufructuary mortgage. See (1919) Dig. Cal. 750. **KHANDU LAL v. FAZAL. 1 Lah. 89.**

—Art. 161—Small cause decree—Review—Application—Omission to deposit within time—Application incompetent. See PROV. SM. C. C. ACT, S. 17. 24 C. W. N. 380.

—Art 162, 164, 168 and 189—Ex parte—Decision—Application to set aside—Limitation—Starting point.

Where a plaintiff or appellant seeks to set aside an *ex parte* order limitation runs only from date of the order whereas if a defendant or respondent seeks such relief he can, in cases where he has not had due notice, count limitation from date of his knowledge of the order.

Held, also that the benefit which the law allows only to a defendant or respondent cannot be allowed to an appellant (*Chevis, C. J. and Le Rossignol, JJ.*) **BISSA MAL v. KESAR SINGH.** 1 Lah. 363 : 2 Lah. L. J. 249 : 58 I. C. 789.

—Art. 163—Provisions of mandatory.

The provisions of Art. 163 of Lim. Act are intended to be strictly followed and the Court has no discretion to enlarge the period of 30 days therein prescribed. 35 Ind. Cas. 294 foll. (*Broadway, J.*) **BANO MAL v. BANO MAL.** 55 I. C. 55.

—Art. 164—Applicability of—Ex parte order for payment under S. 150 of the Companies Act.

A payment order made *ex parte* under S. 150 of the Companies Act, 1882 is not a decree and Art. 164 of the Limitation Act has no application to an application for setting it aside. (*Scott Smith and Wilberforce, JJ.*) **HINDUSTAN BANK, LTD v. MEHRAJ DIN.** 1 Lah. 187 :

2 Lah. L. J. 291 : 55 I. C. 829.

LIMITATION ACT, ART. 164.

—Art. 164—Ex parte decree—Application to set aside—Subsequent application treated as a continuation.

The mere fact that the original application to set aside an *ex parte* decree which was made in time was consigned to the record room did not in any way necessitate a fresh application and that a subsequent application must be considered as merely in continuance of the suspended original application. Consequently no question of limitation arose in the case. (*Shadi Lal and Wilberforce, JJ.*) BARKAT ULLAH v. FAZAL-MAULA. 55 I. C. 824.

—Arts. 166 and 181—Application by exonerated defendant to set aside sale in execution, of his properties—Limitation.

An application by a debt who is exonerated by the decree from liability, to set aside a sale in execution of his properties by the plaintiff is governed by Art. 181 and not by Art. 166 of the Lim. Act, 27 M. L J 605 dist.

If an execution sale is a nullity *i.e.*, made without jurisdiction or is void *ab initio*, Art. 166 does not govern an application to set it aside. The proper article applicable is Art. 181. (*Seshagiri Aiyar and Moore, JJ.*) SESAGIRI RAO v. SREENIVASA RAO.

43 Mad. 313 : 38 M. L. J. 62 : (1920) M. W. N. 127 : 56 I. C. 260

—Art. 167—Execution sale—Application to set aside—Limitation—Extension of.
The period prescribed by Art. 166 of the Limitation Act cannot be extended under the provisions of the law and no order of the Court can have the effect of extending it (*Shadi Lal, J.*) GENDA MAL v. MUNSHI RAM.

57 I. C. 224.

—Art. 166—Execution sale—C. P. Code, O. 34, R. 14—Sale in contravention of—Application to set aside—Art. 166 applicable.
See C. P. CODE, O. 34, R. 14.

22 Bom. L. R. 670.

—Arts. 166 and 181—Execution sale—Notice of sale—Proclamation not given to Judgment debtor—Effect—Application to set aside sale—Limitation. See (1919) Dig. Col. 750. THEKKEDATH NEELU NEITHIAR v. SUBRAMANIA MOOTHAN. 11 L. W. 59.

—Art. 166—Execution sale—Setting aside under O. 21, R. 90, C. P. C.—Limitation.

An application to set aside a sale under O. 21, R. 90 of the C. P. Code is governed by Art. 166 of the Limitation Act. (*Sultana Ahmed, J.*) JAGDHAR MISSIR v. DHOORAI KHATAWA.

57 I. C. 404.

—Arts. 166 and 181—Scope of—Execution sale—Application to set aside on the ground that property was not liable to sale—Limitation.

The scope of art. 166 of the Lim. Act. is not limited to applications under O. 21 Rr. 89 to 91 of the C. P. Code. The Article is perfectly

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general in its terms and refers to an application under the Code to set aside a sale in execution of a decree.

An application to set aside a sale in execution of a decree passed against the father of the applicant on the ground that the property sold belongs to the applicant and not to his father is governed by art. 166 and not by art. 181 of the Lim. Act. (*Chitty and Walmsley, JJ.*) SATISH CHANDRA KANUNGEE v. NISHI CHANDRA DUTTA. 54 I. C. 431.

—Art. 180—Execution sale—Confirmation of sale—Subsequent application for setting aside sale—Sale sustained with regard to some items and set aside with regard to others—Application for possession by execution purchaser within three years of the second order, but more than three years of the first confirmation of sale—Application not barred. See LIM ACT S. 9 AND ART. 180

38 M. L. J. 1 (F. B.)

—Art. 181—Applicability of.
Article 181 of the Lim. Act refers to all applications for the making of which the Civil Procedure Code gives authority. (*Scott-Smith and Wilberforce, JJ.*) HINDUSTAN BANK LTD. v. MEHRAJ DIN 1 Lah. 187 : 2 Lah. L. J. 291 : 55 I. C. 820.

—Art. 181—Dismissal for default of application to set aside *ex parte* decree—Restoration—Application—Limitation—Art. 181 applicable. See C. P. CODE, S. 141 AND O. 9, R. 13. 56 I. C. 25.

—Arts. 181 and 182—Dismissal of execution application for no fault of decree-holder—Revival—Limitation.

The dismissal of an application for execution for no fault of the decree holder is a mere direction to the Officers of the Court to remove the application from the pending list, but the decree-holder's right to apply for its revival accrues from day to day and will be barred if no application is made for the purpose before three years have elapsed from the date when such proceedings were closed in fact or struck off. (*Kanhaiya Lal, A. J. C.*) KALKA SINGH v. GURSARAN LAL. 54 I. C. 426.

—Arts. 181 and 182—Execution application—Dismissal of for statistical purposes—Fresh application—Limitation.

An execution application which has not been judicially disposed of but simply removed from the court's file for statistical purposes does not require to be revived. The Court has only to be appraised of in some recognised manner and a subsequent application presented to the Court requesting it to deal with the prior pending application is not one to which either Art. 181 or 182 of the Indian Limitation Act 1908, applies. 31 Mad. 71 ; 36 Mad. 538 foll. (1915) M. W. N. 643. ref. (*Oldfield and Seshagiri Aiyar, JJ.*) SUBRAMANIA PATHAR v. APPU MUDALIAR.

11 L. W. 42 : 55 I. C. 526.

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—Arts 181 and 182—Execution by collector—Application to send the papers back—Step-in-aid.

An application to send the papers back to the Collector is governed by Art. 181 or 182 of the Lim. Act, according as it may be for the continuance of the previous execution proceeding or for taking a step-in-aid of execution and not by art. 163. (*Kanhaiya Lal, A. J. C.*) LAL BASANT SINGH v. LAL SRIPAT SINGH.

55 I. C. 485.

—Art. 181—Execution of decree—Sale set aside—Fresh application—Pendency of appeal—Effect of.

Where a sale in execution of a decree is set aside the decree-holder has three years from the date of the order setting aside the sale to again apply for execution. The fact that the order forms the subject of an appeal is no bar to the making of an application for execution during the pendency of the appeal within the aforesaid period of three years (*Das, J.*) SYED AMJAD HUSSAIN v. SHYAM LAL.

56 I. C. 1004.

—Arts 181 and 186—Execution sale—Application by exonerated defendant to set aside sale of his properties—Lim. Act. Art. 181 applicable See Lim. ACT, ARTS. 166 AND 181.

38 M. L. J. 62.

—Arts. 181 and 166—Execution sale—Setting aside—On the ground that property was not liable to be sold in execution—Lim. Act. Art. 166 applicable See Lim. ACT, ARTS. 166 and 181.

54 I. C. 431.

—Arts. 181 and 182—Mortgage—Decree under S. 38 of the T. P. Act—Application for order absolute—Limitation—C. P. Code, O. 34, Rr. 2 and 5—Effect of.

A mortgage decree was passed on 10—10—1908 and the decree-holder applied on 2—12—1911 for an order absolute for sale. The application was dismissed for default and the decree-holder again applied for an order absolute on 29—4—1914.

Held, that the application of the decree-holder for an order absolute was not barred by Art. 182 of the Lim. Act or by S. 48 C. P. Code.

Per Sadasiva Aiyar, J.—A decree passed under S. 88 of the Transfer of Property Act gave a vested right to the decree-holder to apply in execution for an order absolute. The repeal of the said section by O. 34, C. P. C. could not take away this right.

Per Spencer, J.—If it were necessary owing to the introduction of Act V of 1908 while the suit was pending that the decree-holder should apply for a final decree, the applications of 1911 and 1914 might be treated as applications for a final decree and the second application might be treated as a continuation or revival of the first. (*Sadasiva Aiyar and Spencer, JJ.*) GANAPATHIYA PILLAI v. GOPALA AIYAR.

56 I. C. 563.

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—Arts. 181 and 159—Possession under temporary injunction—Application for restitution—Limitation.

Possession under a temporary injunction is wrongful within Art. 159 of the Lim. Act. The Article is confined to suits and is inapplicable to an application for restitution which is governed by Art. 181. (*Drake Brockman and Pridaux, J. C.*) RADHA v. SAKHU

54 I. C. 664.

—Art 181—Preliminary decree—Affirmance of, on appeal—Application for final decree—Limitation—Starting point.

Where a decree of a lower court is affirmed by the Appellate Court, the lower court's decree is wiped out by being merged in the decree of the Appellate Court, which takes its place to all intents and purposes and both the decrees cannot exist simultaneously.

* Where a preliminary decree in a mortgage suit is affirmed on appeal the right to present an application to make the decree final accrues on the day the appellate decree is passed. (*Batten, A. J. C.*) NILKANTH v. MADHORAO.

54 I. C. 323.

—Art. 182—Execution application—Sale set aside owing to fraud of judgment—debtor—Fresh application—Continuation of prior application.

Where an execution sale is set aside on the ground of the fraud of the judgment-creditor the application in consequence of which the sale was ordered may be deemed to be pending and a subsequent application for execution may be considered as a continuation of that application. (*Maung Kin, J.*) ARUNACHALLAM CHETTY v. MA U THA.

55 I. C. 707.

—Art. 182 (1)—Date of Decree—Meaning of—Decree signed later than Judgment—Effect of—C. P. Code, O 20, R. 7.

The date of decree in Art. 182 (1) of Limitation Act means the date when the judgment was pronounced and not the date when the decree is actually signed by the presiding Officer of the Court, and the time between the date of delivery or judgment and the signing of the decree cannot be deducted in computing the period of Limitation for execution of the decree. (*Coutts and Adami, JJ.*) HIRA LAL SAHU v. JAMUNA PD. SINGH.

5 P. L. J. 490 : 1 P. L. T. 394:

57 I. C. 531.

—Art. 182 (1)—Decree or order—Meaning of—Decree to be in an executable form—Limitation—Starting point.

The language read with the context of Art. 182 (1) Lim. Act shows that it refers only to an order or decree made in such a form as to render it capable, in the circumstances of the particular case of being enforced.

27 All. 334 applied.

Where R sued J. who died pending suit, and E. J.'s brother, was substituted for J. and

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the decree obtained against E on the 27th July 1906 was in the following terms.

"The decretal amount to be realised by sale of the estate left by J in the hands of E. This will not enable the Plff. to make any portion of the estate of J in the hands of any person other than the defendant, liable for the decree," and in the mean time dispute having arisen between J's widow and E as regards the estate left by J, E sued J's widow for recovery of possession of J's estate from the hands of J's widow, and E's possession was decreed by the first court on the 15th August 1908, but on appeal to the High Court by J's widow, the execution was stayed and the High Court reversed the decree of the lower court on 2nd August 1909, but on appeal to the Privy Council, by E, the 1st court's decree was restored on 22nd July 1914 and R then filed his execution petition on 11th December 1914, (the previous execution petitions in 1907, against J's widow, and in 1908 against E's own property having been rejected as being contrary to the terms of the decree of 27th July 1906) and E objected that the execution was barred under Art. 182 (1) of the Lim. Act, but the sub-judge overruled the objection which however was held valid by the High Court, and the decree holder R appealed to the Privy Council.

Held—(1) that the decree, dated 27th July 1906 did not become capable of being enforced till after the decision of the Privy Council in 1914, the mere passing of the decree in E's favour on 15th August 1908, the execution of which was promptly stayed by the Calcutta High Court, did not entitle the decree holder R to execute his decree against E, the estate being in the possession of J's widow.

(2) the decree dated 27th July 1906, could not be construed as a decree against the estate of J, although not in the hands of E.

(3) the decree against E could not be executed without a further application, which could not have been made till E had come into possession of J's estate and the period of limitation for such an application was under Art. 181, 3 years from the time when the right to apply accrued after the Privy Council decision, in 1914. (*Lori Phillimore*) MAHARAJAH SIR. RAMESHWAR SINGH v. HOMESHWAR SINGH BAHADUR.

1 P. L. T. 731 (P. C.)

—**Art. 182 (2)—Decree—Application for execution of against surety—C. P. Code. S. 145. See (1919) Dig. Col. 754. CHOLAPPA v. RAMACHANDRA.**

44 Bom. 34

—**Art. 182 (2)—Execution application—Persons not parties to appellate decree—Starting point of limitation.**

A mortgagee died and his widow as heir brought a suit on foot of the mortgage and obtained a decree. T the mortgagor appealed and, in addition to J the widow also impleaded one N. as a respondent who had obtained a

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decree that he was entitled to succeed to the estate of S in preference to J. N died during the pendency of the appeal and, his legal representatives were not brought on the record. Subsequently, T and J entered into a compromise. W the legal representative of N. now applied to execute the original decree obtained by J.

Held, that it was not open to W to execute the original decree inasmuch as N. through whom W claimed, was not a party either to the original decree or to the appellate decree. The original decree having merged in the appellate decree, was no longer capable of execution.

The order of abatement was not "a final decree or order" within Article 182 (2) of Schedule I to the Limitation Act, and did not give a fresh start of limitation. (*Coutts and Sultan Ahmed, JJ.*) TIKAIT KRISHNA PRASAD SINGH v. RAJA WAJIR NARAIN SINGH.

(1920) Pat. 342 : 58 I C. 977.

—**Art. 182 (2)—Mortgage suit by widow decreed by first court—Suit by reversioner against widow decreed pending appeal by mortgagor—Reversioner made party on appeal—Death of reversioner.**

Where on the death of the original mortgagee, his widow J, instituted the mortgage suit against the mortgagor and obtained a decree in the first Court on the 20th January 1911, but meanwhile one N. brought a title suit against J. claiming to be the preferential heir and succeeded in his claim, and thereupon the mortgagor, in his appeal against the mortgage decree made N a party to the appeal, but on N's death on the 26th June 1915, no substitution was made within six months but an application was made to set aside the abatement which was discharged for non-prosecution on the 7th February 1916, and then a compromise decree was passed between J and the mortgagor on the 10th May 1916 in the Appellate Court, and N's son filed the application for execution of the original mortgage decree on the 20th July 1917:

Held, that the applicant had no right to execute the original decree and secondly, even if he were entitled to execute, the original decree, his application was barred by limitation.

As there was no order of abatement of the appeal in the Appellate Court, the appeal having abated by operation of law, there was no final order within the meaning of Art. 182 (2) Limitation Act, and an order of abatement if made, would not be a final order or decree within Art. 182 (2) of the Limitation Act, 20 A. 124; 82 A. 136; 34 C. 874; 36 A. 284; 36 A. 350 Ref. The applicant was not entitled to count limitation from the date of the appellate decree as he was not a party to the appellate decree and secondly as he was contending that the appellate court decree was not an effective and binding decree on him. (*Coutts and*

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Sultan Ahmed, JJ.) TEK'IT KRISHNA PRASAD SINGH v. RAJA WAZIR NARAIN SINGH.

(1920) Pat 342 : 58 I. C. 977.

—Art. 182 (3)—*Return of appeal for presentation to Court—Decree in redemption suit—Mortgagor if entitled to apply for sale*—C. P. Code O. 34, Rr. 7 and 8

Where an appellant *bona fide* preferred an appeal to a wrong Court and the appeal was returned for presentation to the proper Court, the decree holder is not entitled to the calculation of time for the extension of time for the execution of the decree from the date of such return as the starting point.

An order returning an appeal is not covered by clause (2) of column 3 of Art. 182 of the Limitation Act.

Per Seshagiri Aiyar, J: Quaere.—Whether the mortgagor has a right to apply for sale after a decree in a redemption suit. (*Oldfield and Seshagiri Aiyar, JJ.*) MAHOMED ABDUR KADIR MARAKAYAR v. SAMIPANDIA THEVARU

43 Mad 835 : 39 M. L. J. 431 : 12 L. W. 304 : (1920) M. W. N. 587.

—Art. 182 (5)—*Application by decree holder purchaser for delivery of possession if a step-in aid of execution. See (1919) Dig. Col. 755. ANNADA PRASANNA SEN v. SOMOKUDDI. MIRDHA.* 54 I. C. 839.

—Art. 182 (5)—*Application in accordance with law—Subsequent default of decree-holder—Effect of—C. P. Code, O. 21, R. 22—Application under.*

A valid application in accordance with law cannot be invalidated by any subsequent act of default of the decree-holder, such as the non-payment of process fees.

An application under O 21, R. 22 for execution of a decree with a prayer for substitution of the legal representatives of the deceased judgment-debtor is a step-in-aid though it is eventually dismissed for non payment of process fees. (*Chatterjee and Panton, JJ.*) APTAPUDDIN AHMED v. JOGENDRA NARAIN TEWARI. 31 C. L. J. 389 : 55 I. C. 231.

—Art. 182 (5)—*Execution application—Application by person ex facie entitled to execute the decree—Order of another Court.*

N. obtained a transfer of a decree from the heir of the deceased decree-holder and applied to execute it. He was resisted by G, who claimed to be exclusively entitled to execute the decree as legatee of the decree holder. The executing court held that N was entitled to execute the decree and not G. Thereupon G sued N, and his transfer for a declaration that he was entitled to execute the decree and for an injunction restraining N from executing it. On 14-4-1914 the suit was decreed in favour of G, and N. was restrained by an injunction from executing the decree or otherwise realising the decree amount. On appeal this decision was confirmed. In the

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meantime on 18-6-1914 and 22-10-1914 N applied to execute the decree but the application proved infructuous. On 23-3-1916 G, whose rights had by this time been declared by the Appellate Court, applied to execute the decree and relied on the two intermediate applications by N, as saving limitation.

Held, that the execution applications dated 18-6-1914 and 22-10-1914 by N, were in accordance with law and operated to save limitation under Art. 182 (5) of the Limitation Act.

When the two execution applications in question were made, N, was on the face of the decree the only person competent to execute it and the executing Court not having notice of the result of the litigation between G and N, had no concern with the rights of any body other than the person appearing on the face of the decree as the decree-holders (*Spencer and Seshagiri Aiyar, JJ.*) HARI KRISHNAMURTHI v. SURYANARAYANAMURTHI.

43 Mad 424 : 38 M. L. J. 271 : (1920) M. W. N. 395 : 57 I. C. 753.

—Art. 182 (5)—*Execution of decree—Cross-examination of objector—Not a step in-aid.*

The cross examination of a person who objects to the execution of a decree does not amount to a step-in-aid of execution so as to give a fresh start of limitation.

An order to pay *talbana* for the issue of a notice does not furnish a fresh starting point for limitation where *talbana* is not paid and in consequence notice is not issued. (*Chitty and Newbould, JJ.*) AMRITA LAL MUKHERJEE v. HIRALAL MUKHERJEE. 54 I. C. 643.

—Art. 182 (5)—*Execution of decree—Surety for satisfaction of decree—Application for execution against surety—Step-in-aid.*

An application asking the court to execute the entire decree by the arrest of a person of a surety, who has made himself liable for the satisfaction of the decree, after it was passed, is an application to take a step-in-aid of execution of the decree as against the original judgment debtor, within the meaning of clause (i) of Art. 182 of the Lim. Act. (*Piggot and Gokul Prasad, JJ.*) MAHOMED HAFIZ v. MAHOMED IBRAHIM. 18 A. L. J. 988 : 58 I. C. 794.

—Art 182(5)—*Execution—Intermediate application barred by time—Subsequent application in time—Objection as to limitation cannot be taken on subsequent application. See RES JUDICATA, EXECUTION APPLICATION.*

22 Bom. L. R. 76.

—Art 182 (5)—*Execution—Step-in-aid—Application for issue of notice to judgment Debtor.*

Where an application which *ex facie* is an application for execution prays for the assistance of the Court "by the issue of a notice to

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the defendant to show cause, if any, why the decree should not be executed against him," it is an application to take a step-in-aid of execution sufficient to save limitation under Art. 182 (5) of the Lim Act. (*Chitty and Walmsley, JJ.*) **ABDUL AJIY ABDULLA v. YAKUB ABDUL GANI.** 54 I. C. 433

— — — **Art. 182 (5)—Step-in-aid—Execution application—Amendment of.**

If a decree-holder files a defective application and has to be ordered to amend he cannot gain profit from the amendment on the ground that it is a step-in-aid of execution.

In the absence of an application by the decree-holder moving the Court to make an order directing attachment to issue such order made on the original application for execution does not amount to a step-in-aid of execution. (*Broadway, J.*) **SHIV PARSHAD v. KANHAYA RUCHI SHAH.** 54 I. C. 935.

— — — **Art. 182 (5)—Step-in-aid—Transmission of—Decree—Application for—Subsequent filing of necessary copies—Oral application.**

Where after an application for the transmission of a decree or order thereon the decree-holder who has not filed the necessary copies under O. 21, R. 6, C. P. C. filed them into Court and orally applied again for the transmission of the decree.

Held, that the oral application was not one to take a step in aid of execution and did not give a fresh starting point under Art. 182, Cl. (5) of the Lim Act. (*Olfeld and Eschagiri Aiyar, JJ.*) **RANGACHARIAR v. P. R. SUBRAMANIA CHETTY.** 12 L. W. 9 58 I. C. 536

— — — **Art. 183—Mortgage—Order absolute for sale—Application to enforce more than 12 years after date of order.**

A suit was brought in 1904 for the enforcement of a mortgage security. The usual preliminary decree under S. 88 of the Transfer of Property Act, 1882 was made on the 30th June 1904 and on the 22nd March 1904 the decree holder applied for and obtained an order absolute for sale under the provisions of S. 89 of the same Act. The order was drawn up and signed on the 25th May 1907, but was not otherwise completed and no steps whatever had been taken under it. The present application was made on the 19th May 1919 by the representative of the decree-holder, (who had died in the meantime) asking that the representatives of the parties deceased be substituted on the record and that thereupon the order absolute for sale may be completed and the sale proceeded with.

Held, that a present right to enforce the judgment or order having accrued to the decree-holder on the 22nd March 1907 when the order absolute for sale was pronounced the present application to enforce the said order is barred by Article 183, Sch. 1 of the

LUNACY ACT, S. 37.

Limitation Act, 1903. (*Mookerjee and Fletcher, JJ.*) **APURBA KRISHNA SETT v. RASH BEHARY DUTT.** 47 Cal 746.

LOWER BURMA LAND REV. ACT, (II of 1876) R 20 (3)—Transfer of—Grant of land with sanction of Deputy Commissioner—Contract Act S. 23—Agreement whether for bidden by law—Construction of document—Operative words See (1910) *Dig. Col. 758.* **PO MAUNG v. R. M. C. R. M. CHETTY.** 54 I. C. 422.

LUNACY ACT (XXXV of 1858) S 14—Sale by manager without order of Court—Void.

A sale of a lunatic's property by the manager without the order or knowledge of the Court is void and could not be ratified. (*Abdul Raof and Bevan Petman, JJ.*) **MASHUDDIN v. MATU RAM.** 1 Lah 109 : 55 I. C. 865.

— — — **Ss 37 and 62—Lunatic—High Court—District Court—Temporary removal of lunatic to mafussil.**

Per Teunon, J.—The original jurisdiction of the High Court and of the Supreme Court at Calcutta over infants and lunatics extends and extended to all persons (European and Indian residents in Calcutta and to all British born subjects, throughout the Pres'dency in Bengal. The temporary removal to the mafussil of a lunatic having his home, his place of business, his family and his servants in Calcutta is not sufficient to oust the jurisdiction of the High Court over the lunatic and, therefore, an application under S. 62 of the Lunacy Act in relation to such a lunatic must be made on the original side of the High Court.

Per Beachcroft, J.—Under S. 62 of the Lunacy Act residence of the most temporary character within the local jurisdiction of a District Judge is sufficient to give him jurisdiction to deal with the lunatic is not subject at the same time to the jurisdiction of the High Court.

The situation of the lunatic's property has nothing to do with the matter. It is not a condition that that property must be within the District Judge's jurisdiction.

The jurisdiction of the High Court at Calcutta over lunatics under clause 17 of the present Charter is in the case of natives in India confined to those actually living within its ordinary original civil jurisdiction. While, therefore, a native of India is residing outside that jurisdiction, the Charter does not give the High Court jurisdiction over him even though he may reside in Calcutta for the greater part of the year. The use of the word "inhabitant" in statute 21 Geo. III Ch. 70, S. 17, indicates nothing to the contrary. (*Teunon and Beachcroft, JJ.*) **SIRIMATI ANILBALA CHOWDHURANI v. DHIRENDRA NATH SAHA CHOWDHURY.** 32 C. L. J. 314 : 57 I. C. 768.

LUNACY ACT, S. 62.

—(IV of 1912) S. 62—*Alleged lunacy—Inquisition for ascertaining—Procedure—Preliminaries.*

An inquisition under S. 62 of the Indian Lunacy Act once started must be prosecuted to the very end, and it has all the attributes of an ordinary trial on an issue of fact. Before such an inquisition is ordered or started there ought to be careful and thorough preliminary enquiry and the Judge ought to satisfy himself that there's a real ground for an inquisition.

An application for an inquisition should ordinarily be supported by affidavit or by examination on oath of the applicant and by a medical certificate of some doctor as to the condition of the alleged lunatic. It would also be desirable in many cases that the Judge should seek some personal interview with the alleged lunatic with a view to satisfy himself that there is a real ground for supposing the existence of an abnormal mental condition which might bring the person within the Lunacy Act. (*Piggott and Walsh, JJ.*) *MAHOMMAD YAKUB v. NAZIR AHMAD.*

42 All. 504 : 18 A. L. J. 577.

MADRAS CITY MUNICIPAL ACT, Ss. 262 and 325—License to keep a timber depot if it includes license to erect sheds—License requisites of See (1919) *Dig Col* 759. *NADAMANI NAIDU In re*

38 M. L. J. 84. (1920) M. W. N. 111 : 27 M. L. T. 125 : 54 I. C. 49
21 Cr. L. J. 1.

MADRAS CITY POLICE ACT, S. 76
—*Offence by servant—Liability of licensee*

The doors of an arrack shop belonging to the accused and in charge of his servants were closed after 8 P. M. but a man was kept at the door to open it for customers.

Held, that the shop must be deemed to have been kept open after 8 P. M. within the meaning of the Act.

Held further that there was a breach of the terms of the license and the licensee alone was liable to be proceeded for the breach of the conditions of the license and not the servants, even though the master was not on the premises at the time (*Abdur Rahim and Spencer, JJ.*) *VELAYUDA MUDALI, In re.*

43 Mad. 438 : 39 M. L. J. 85 : 27 M. L. T. 211 : 11 L. W. 413.

MADRAS CIVIL RULES OF PRACTICE, Rr. 179 and 180—Scope of—C. P. Code O. 21, R. 52—Rules *ultra vires*, as being in conflict with C. P. Code O. 21, R. 52. See C. P. Code S. 73 AND O. 21, R. 52.

39 M. L. J. 608.

MADRAS DT. MUNICIPALITIES ACT (IV of 1884) S. 24—Street drains—Site belonging to private person—Drains if vested in the municipality—Adverse possession of drains.

MAD. DT. MUN. ACT. S. 216.

Under S. 24 of the Madras Dt. Municipalities Act drains attached to the street vest in the Municipality even though the sites of the drains may belong to the owners of the shops abutting on the street.

In order that private persons may acquire a right to the drains by adverse possession it is no enough for them to show that they were repairing the drains but they must show that the Municipality was prevented from using the drains as drains. (*Sadasiva Aiyar and Burn, JJ.*) *ARUNACHALA CHETTIAN v. MUNICIPAL COUNCIL OF MAYAVARAM* 39 M. L. J. 222 : (1920) M. W. N. 229 : 11 L. W. 202 : 55 I. C. 493.

—**Ss. 32 and 280—Offence under the Act—Complaint by Chairman delegate—Special authorisation.**

Where the Chairman of a Municipality delegated to a Councillor, under S. 32 of the District Municipalities Act all the duties imposed on the Chairman by the said Act with the exception of signing cheques, and incurring expenditure, and the councillor instituted proceedings by a complaint in respect of an offence under the Act.

Held, that the complaint was legally instituted under S. 280 of the Act, and that there must not be any express authorisation to institute the particular proceeding.

Ayling, J.—The term “chairman” in S. 280 includes “Chairman delegates” where the delegation under S. 32 is wide enough. (*Abdur Rahim and Ayling, JJ.*) *T. G. KRISHNASWAMI NAIDU v. EMPEROR.*

12 L. W. 427 : (1920) M. W. N. 648.

—**Ss. 147 and 269—Amending Acts III of 1897 and V of 1909—Water—Contract for use of prior to Amending Act—No term in contract for payment for excess user for domestic purposes—Change in the Law—Effect of.**

Under S. 147 of the District Municipalities Act as amended in 1909, no agreement is necessary to make the person using water for domestic purposes in excess of the prescribed limits or for non-domestic purposes liable for the water consumed by him. This liability is not in any way affected by the fact that the person prior to the passing of the Amending Act of 1909, entered into a contract with the Municipality for the use of water and was liable under the contract for using water for non-domestic purposes only.

Per Spencer, J.—When a new liability is imposed by newly enacted provisions of law, it has the effect of annulling all contracts made prior to the enactment. (*Sadasiva Aiyar and Spencer, JJ.*) *THE MUNICIPAL COUNCIL OF CONJEVARAM v. VENKATACHARIAR.*

39 M. L. J. 58 : 11 L. W. 574 : (1920) M. W. N. 469 : 57 I. C. 718.

—**Ss. 216 and 222—“Contract” in S. 218—Meaning of—Liability of municipality and rate-payer.**

MAD. DT MUN. ACT, S. 216.

From the year 1888 the plaintiff Railway Company had been paying to the defendant Municipality certain charges for the transport of night soil and urine from the plaintiff railway company's premises to the Municipal depot, five or six miles off. The charges varied and were increased from time to time. The Dt. Municipalities Act was amended in 1897 and the first objection by the railway company to the payment of these charges was made in 1906. Payment however continued to be made until 1902 after which the company paid the fees under protest and brought the present suit to recover the amounts so paid:

Per Curiam :—*Held*, that the suit was maintainable and that the Company was entitled to recover the amounts paid within three years of the suit.

Under Ss. 216 to 221 of the Act, it is the duty of the Municipal Council to remove the rubbish and other offensive matter from outside the occupier's building or land to the Municipal depots, which they are bound under the Act to provide. There is no duty upon the occupier of premises, or rate-payers to have the night soil carried from their premises to the Municipal depot wherever situated and it is illegal for the Municipality to charge any fees for transport from the occupier's premises to the municipal depots.

Sadasiva Aiyar, J :—The contract in S. 218 of the Act is an express contract in writing, signed by the Municipal councillors, as per requirements of S 45 of the Act and an implied contract to pay the charges even assuming that it could be inferred from the conduct of the plaintiff railway company is not enforceable, as it contravenes the express provisions of the Act.

Held further, that the contract referred to in S. 218 relates only to the removal of offensive matter from inside the rate-payers building to the outside, and the fees for such removal can be charged, only after the approval of the Governor in Council has been obtained.

The scheme of Ss. 216 to 221 of the Act considered by Napier, J. (*Sadasiva Aiyar and Napier, J*) THE SOUTH INDIAN RAILWAY COMPANY LTD. v. THE MUNICIPAL COUNCIL OF TRICHINOPOLY. **43 Mad. 905**

12 L. W. 411 : (1920) M. W. N. 618

S. 262 (2)—Levy of professional tax under a high class—Suit for recovery of tax, if maintainable. See (1919) *Dig. Col. 761.* MUNICIPAL CHAIRMAN VIRUDUPATTI v. SARAVANA PILLAI. **27 M. L. T. 272 : 54 I. C. 454**

Ss. 263 and 280—*Sanitary Inspector—Complaint for exceeding time limit in construction of building—conviction if legal—Inspector authorised to prosecute only for deviation from plan.*

A Sanitary Inspector expressly authorised by the Chairman of the Municipal Council to prosecute the petitioner only if the latter had

MAD EST. LAND ACT, S. 3.

deviated from the plan attached to his application for license, preferred a complaint not only for such deviation but also for exceeding the time limited by the license for commencing building operations.

Held, that the Sanitary Inspector was not expressly or impliedly authorised to prefer a complaint about exceeding the time limit and that the conviction of the petitioner for that offence was consequently illegal. (*Sadasiva Aiyar and Odgers, JJ*) KALIAPERUMAL NAIDU IN RE. **11 L. W. 120 : 55 I. C. 599 : 21 Cr. L. J 327.**

MADRAS ESTATES LAND ACT, (I of 1908) Ss. 3, (2) (3), 8, 153 and 189—Inam—Grant or—No presumption that it was of melwaram only—Estate. See (1919) *Dig. Col. 762* UPADRASHTA VENKATA SASTRULU v. DEVI SEETHA RAMUDU. **43 Mad 166.**

—S. 3, (2) (d)—Inam—Grant—Presumption—Grant with ashtabbogam and dasawamyam incidents — Effect of—Right of grantee to the soil—Resumption by Government and issue of ryotwari pattas—Effect of. See INAM. **12 L. W. 576.**

—S 3, (2) (d) (e)—Inam—Agraharam—Grant of a village to person in possession—Village not included in the sanad as being within the ambit of Zemindari—Village if an estate. See (1919) *Dig. Col. 762.* NANDIGAM SUBBAYADU v. KANNAM SAHEB. **54 I. C. 22.**

—Ss. 3, (5) 6 and 8—Darimilla inam—Karnam Service—Grantee in possession in 1908—Abolition of Service—Imposition of rent in 1913—Effect of.

At the time of the passing of the Madras Estates Land Act in 1908 the respondents held possession of certain lands as Karnam service Darimilla inam. The appellants had been let into possession in 1906 and were in possession at the date of the suit. Their ancestors had the occupancy right in these lands at the time of the grant in their favour. In 1913 under certain arrangement with the Zemindar the respondent obtained the right to enjoy the suit land hereditarily with powers of alienation subject to a small annual payment but without any obligation to render service.

Held, that the respondent did not by reason of the grant in 1913 at a favourable quit rent acquire the status of a landholder under S. 3, (5) of the Act, as he was neither a person owning an estate or part thereof nor a person entitled to collect rents of the whole or any portion of the estate by virtue of any transfer from, the owner or his predecessor in title.

Per Spencer and Bakewell, JJ :—(In the Division Bench) that the respondent did not cease to be a ryot by reason of the favourable grant and that S. 6, Expl. and not sec. 8 applied under the circumstances of the case.

MAD. EST. LAND ACT, S. 3.

(*Wallis, C. J. Ayling, Oldfield, Coutts Trotter, and Sesagiri Aiyar, JJ.*) MARINA VERA-SWAMY v. BOVINAPALLI VENKATRAYADU.

39 M. L. J. 225 : 12 L. W. 51 : 57 I. C. 778. (F. B.)

—Ss. 3 (5) and 6—Inam situated in permanently settled estate and consisting of part of village—Owner of such inam if landholder within the meaning of S. 3 (5)—Applicability of Act as between him and his tenants—Post settlement inam grants—Rights of grantee to both warams—Presumption.

The presumption laid down by the Privy Council that a grant to an inamdar is a grant of the proprietary rights in the land granted including the Kudivaram as well as Melvaram interest applied to a post-settlement inam grant.

The Chief Justice: (Sadashiva Aiyar, J. dissenting):—

It was not the intention of the legislature to apply the provisions of the Madras Estates Land Act as between an inamdar and his tenants where the land is situated in a permanently settled estate and consists of any part of a village and the inamdar is the owner of the Kudivaram as well as the Melvaram.

An inamdar who holds under a Zamindar subject to the payment of quit rent to him is not a landholder within the meaning of S. 3 cl. 5 of the Act. 38 M. 33 d'ssented from. (*Sir John Wallis, C. J. and Sadashiva Aiyar, J.*)

SRI GADADHARADUSS BAVAJI MAHANT v. SURYANARAYANA PATNAIK.

38 M. L. J. 342 : (1920) M. W. N. 303 : 12 L. W. 77 : 27 M. L. T. 297 : 56 I. C. 92.

[View of Sadashiva Iyer, J. upheld on letters Patent Appeal.—Ed.]

—Ss. 3 (11) 5 and 61—Rent—Jodi payable by agraharamdar not rent—Interest on arrears not claimable. See INAM, AGRAHAMARAM.

11 L. W. 523.

—S. 3. (11)—Rent—Right of landlord to revert to *waram*—Payment of money rents at varying rates at intervals—Not a bar to the landlord's claim. See MAD. EST. LAND ACT, Ss. 27, 28.

(1920) M. W. N. 15.

—S. 3 (15) and 185—Ryoti land—Conversion to private land—Proof—Quantum—Letting of ryoti land as Kamatam land—Provision in lease for tenant quitting at will of landholder—Change of tenants—Variation of rate of rent—No evidence of direct cultivation—Effect of.

In a suit brought in the Civil Court by Zamindar to eject the defendant from 150 and odd acres of cultivated land claiming them as his private or homefarm land, it appeared that before 1864 the land was under the cultivation of ryots as ryoti land; that in 1864 in consequence of a violent cyclone and the action of the sea, the suit land was flooded and owing

MAD. EST. LAND ACT, S. 5.

to the saline deposits could not be cultivated for sometime; that the land continued to be ryoti till 1873; that from and after 1874 the plaintiff's father and the plaintiff after him, had granted a series of leases which described the suit land as Kamatam and were not for fixed periods and in which the lessees undertook to relinquish the land at the end of their term, the rates of rent varying from time to time and the lessees being changed, that the land had never been cultivated directly by the plaintiff or his predecessors up to the 1st July, 1908, and there was no evidence of intention on their part to undertake such cultivation, that on the date the defendant was in possession under one of the leases referred to above, and that the land was not old waste but held for the purpose of agriculture. Held, that the land remained ryoti on 1—7—1908 as the landlord could not convert it into his private land; that in any view, the facts found did not establish a case of conversion of ryoti land into private land; that the plaintiff had no right to eject the defendant and that the Civil Court had no jurisdiction to entertain the suit.

The test to be applied to see whether land is home farm or Kamatam land is whether the land is in the actual direct cultivation of the landholder, and if he let it on lease, whether he had the ultimate intention of cultivating it himself. 39 Mad. 341, appr.

Per Abdur Rahim, J.—Evidence of custom prevalent in this part of the locality in which the suit land is situated on the part of the landholder treating ryoti land as his private land is under S. 185 of the Estates Land Act merely a piece of evidence which the Court has to consider in determining whether the land in dispute is the private land of the landholder or ryoti land and is not by itself sufficient to determine the character of the land.

Per Burn, J.—Ryoti land does not forfeit its character as such merely because it goes out of cultivation for some years.

A tenant holding land let for pasture only is not a ryot within the definition in S. 3 (15) of the Madras Estates Land Act. The fact that in the lease deed by which such land is let provision is made for a rate of rent to be paid in the rent of a portion of the land being cultivated or that such land is lumped with agricultural land without distinction does not alter the nature of the transaction. (*Abdur Rahim and Burn, JJ.*) SREEMANTHA RAJA YARLAGADDA MALLIKARJUNA PRASADA NAIDU v. SUBBIAH,

39 M. L. J. 277 : 28 M. L. T. 281.

—Ss. 5, 125 and 132—Money decree for rent—Execution in Civil Court—No right to first charge—Landholder ceasing to be such at the time of suit—Effect of.

The first charge for rent is available only when the decree for arrears of rent is executed

MAD. EST. LAND ACT, S: 6.

by the Revenue Court under S. 132 of the Estates Land Act

The power to execute the decree under the provisions of Chapter VI of Mad. Estates Land Act does not go with it to the Civil Court executing the decree.

Pir Sadasiva Aiyar, J.—Where a person ceases to be the proprietor of the village at the time of suing for rent the first charge ceases to exist even if the landholder gets a first charge. In such a case he can enforce it only by a separate suit under O. 34, R. 14 C. P. C. 41 C. 926 fol. (*Sadasiva Aiyar and Spencer, JJ.*) **SREE RAJA BOLLAPRAGADA VENKATA LAKSHMAMMA GURU v. MENDA SEETAYYA**

43 Mad 786 : 39 M. L. J. 30 :
28 M. L. T. 44 : (1920) M. W. N. 294 :
11 L. W. 466 . 57 I. C. 764.

—Ss 6 (1) and 8—Person in wrong-
ful possession at the date of the passing of
the Act—Occupancy Right

A person in wrongful possession of ryoti land in an estate, as for instance, the possession of a tenant holding under one who has no title to the land, on the date of the commencement of the Estates Land Act does not acquire an occupancy right in that land under S. 6 (1) of the Estates Land Act.

The body of S. 6 (1) of the Estates Land Act refers to ryots in possession or to be admitted by the landholder in the future, and the explanation to the section refers to possession of a similar kind and to cases of a similar origin, such as those of holding over and the like 27 M. L. J. 665 dissented. The scope of S. 6 (1) and the explanation thereto considered. (*Abdur Rahim and Oldfield, JJ.*) **YEMANA VENKATACHELLA NAIDU v. ETHIRAJAMMAL.** 39 M. L. J. 597.

—S. 12—Right to use and cut down trees—Right of ryots—Rent varying with the number of trees—Effect of.

Under S. 12 of the Madras Estates Land Act an occupancy ryot is entitled to use, enjoy and cut down trees in his holding; and such right includes the right to appropriate the trees cut down.

Where the land itself on which the trees stand is held on pattah, the fact that the rent payable for the land varies with the number of trees standing on it, does not take the case out of the operation of the Estates Land Act. 1 L. W. 881 d'st.

In respect of the Ramnad Zemindari, there is no valid custom entitling the landholder to claim compensation for palmyra trees cut by the ryots without the permission of the landholder. (*Sadasiva Aiyar and Spencer, JJ.*) **RAJAH OF RAMNAD v. KAMITH ROWTHAN.**

(1920) M. W. N. 603 :
12 L. W. 465.

—S. 12—Trees—Right to—Ryot ad-
mitted after the passing of the Act.

MAD. EST. LAND ACT, S. 40.

Under S. 12 of the Mad. Estates Land Act ryots in occupation at the date of the passing of the Act as well as ryots admitted subsequently are entitled to enjoy the trees on the holding according to custom. (*Wallis, C. J. and Aylring, JJ.*) **VENKOBIA RAO v. KRISHNASWAMI NAICKER.** 39 M. L. J. 493 : 55 I. C. 497.

—S. 24—Enhancement of rent—
Change from money rent to grain or vice versa.

Change from grain to money rent or vice versa may be treated as an enhancement when the circumstances of the case and the evidence adduced admit of that being done (*Oldfield and Sesugiri Aiyar, JJ.*) **PERICHERLA BUTCHIRAJU v. ADDEPALLI VENKATA MANGASEETARAMAYYA** 12 L. W. 86.

—S. 25—Admitted to possession of
ryoti land—Usufructuary mortgagee continuing in possession.

A usufructuary mortgagee of lands in an estate, was, after the discharge of his mortgage, allowed to continue in possession under a kadapa, or lease of the same lands.

Held, that he was not a person admitted to possession of ryoti land, within the meaning of those words in S. 25 of the Act and that he was bound by the terms of the Kadapa and cannot claim to be liable to rent only at the rate prevailing for similar lands with similar advantages in the neighbourhood. (*Abdur Rahim and Oldfield, JJ.*) **SRI RAJANDRAMANIA DEVI GARU v. YELLAPPU RAMU NAIDU.** 39 M. L. J. 565 : 12 L. W. 600.

—Ss. 27, 28 and 15—Rent—Proper rate—Reversion to varam—Right of landlord—Payment of money rents at varying rates—Effect of.

An implied contract to pay money in lieu of varam cannot be inferred from previous payments of money rent for a number of years, if the rates at which money was paid had fluctuated.

Proof that money payments were made at varying rates will be proof to the contrary within the meaning of S. 27 and will rebut the presumption that the rent paid in the previous fasli is the rent payable in the current fasli.

In the absence of proof of a completed agreement to pay rent at a fixed rate, a landlord will be entitled to revert to waram or faisal rates, notwithstanding temporary lapses from the same. (1918) M. W. N. 188 and (1915) M. W. N. 614, followed 27 Mad. 417; 33 Mad. 177 relied on. (*Spencer and Krishnan, JJ.*) **MUTHIAH CHETTIAR v. PERIYAN KONE.** 27 M. L. T. 226 : (1920) M. W. N. 15 : 11 L. W. 311 : 55 I. C. 78.

—S. 40 (3) and (6)—Commutation of rent—Matters to be considered in—Rent payable in—Mode of calculation.

MAD. EST. LAND ACT. S. 45.

In a suit for commutation of rent payable in kind it would be an irregularity if the Courts below have in cases to which the provisions of Clause (3) (a), (b) are applicable, ignored them, and the High Court in such a case ought to set aside the judgment below.

Sub-Cl. 3 is applicable only where grain rent was being paid for a series of years by the tenant and the Courts are called upon to commute such rent.

Where for over thirty years a consolidated payment in money was made to the landlord.

Held, that was not a matter which the Courts in a suit for commutation of rent have to consider under Sub-Cl. (a).

Where the suit village was surrounded on all sides by government villages, but there were villages belonging to the estate within a radius of three miles and the collector did not consider the rates prevailing in those villages.

Held, that under Sub-Cl. (b) what has to be considered is the money rent paid by occupancy ryots of adjoining lands or of lands in an adjoining village and the collector was right in not considering the rates in the villages which did not adjoin the suit village but were at a distance. (*Seshagiri Aiyar and Moore, JJ.*)

MARDALA SAMIGUDU v. PAIDA SRINIVASULU REDDI.

11 L. W. 620 :
57 I. C. 708.

—**Ss. 45 and 136 — Ejectment—Damages—Prior application to Collector if necessary—Court if can fix.**

If a landholder wishes to treat a trespasser as such and to recover *mesne profits* or damages from him he must first apply to the Collector under S. 45 of the Estates Land Act to get the amount of the latter determined and then bring his suit in the Civil Court under S. 163 of the Act. (*Ayling and Odgers, JJ.*) **KOTIKALAPUDI RATTAYYA v. VENKATARAMAYYA APPA RAW.** 39 M. L. J. 571 : 28 M. L. T. 279 : (1920) M. W. N. 702 : 12 L. W. 573.

—**S. 46—Occupancy right—compulsory acquisition—Estate in the hands of receiver.**

An application by a tenant for the compulsory acquisition of occupancy rights in the lands in his possession will not lie when the estate is in the hands of a receiver appointed by Court. The term landholder in Sec. 46 Cl. (5) is applicable only to the owner of the estate and not to every person who is entitled to collect the rents of the Estate. (*Abdur Rahim and Odgers, JJ.*) **SWAMINATHA ODAYAR v. S. SUNDARAM AIYAR** 39 M. L. J. 711 : 28 M. L. T. 276 : (1920) M. W. N. 703 : 12 L. W. 565.

—**S. 51—Landlord and Tenant—Rent—Right of landlord to revert to *waram* rates—Acceptance of varying money rents at intervals—Effect of. See MAD. EST. LAND ACT, Ss. 27, 28 ETC.** (1920) M. W. N. 15.

MAD. EST. LAND ACT. S. 189.

—**Ss. 55 and 146—Suit to obtain patta—Rival transferees from original ryot—Duty of Revenue court to try question of plaintiff's title.**

Plif sued under S. 55 of the Estates Land Act to obtain a patta from the landholder alleging that he was the transferee of the holding from a raiyat who held it previously. Before this suit the landholder acting under S. 146 of the Estates Land Act had recognized another person as the transferee of the holding from the previous raiyat. The court below dismissed the plif's suit on the grounds that the plif not having been recognized by the landholder, the Court could not compel the latter to issue a patta in his favour and that suit was bad for non-joinder of the rival transferees. *Held*, (1) that the Revenue Court was bound to try the issues as to the truth and validity of the plaintiff's favour to direct the landholder to issue a patta; and (2) that even if the rival transferee was a necessary party the Court should have directed his addition under O. 1, R. 10 of the C. P. Code and not dismissed the suit for misjoinder (*Ayling and Krishnan, JJ.*) **RAMANATHAM CHETTY v. ARUNACHELLAM CHETTIAR.**

39 M. L. J. 474.

—**Ss. 118, 119, 124, 131 and 132—Summary sale of ryot's holding for arrears of rent if can be set aside for material irregularity and fraud—C. P. Code. O. 21, R. 90, if applicable—Suit by purchaser declaration of invalidity of order setting aside the sale, maintainable. See (1919) Dig. Col. 767. AGNIMOTRAM JAGANNADHACHARYULU v. SRI RAJAH BOMMADEVARA SATYANARAYANA**

43 Mad. 351 : 11 L. W. 101 : (1920) M. W. N. 145 : 54 I. C. 508
27 M. L. T. 282.

—**Ss. 125 and 132—Rent—First charge—Execution of decree by civil court—Rent does not constitute a first charge. See MAD. EST. LAND ACT, Ss. 5, 125 AND 132.**

39 M. L. J. 30.

—**S. 185—Ryoti land—Conversion into private land—Evidence necessary for. See MAD. EST. LAND ACT, Ss. 3 (15) AND 185.**

39 M. L. J. 277.

—**Ss. 189 (3)—Decision of revenue Court—Subsequent suit in civil court—Effect of.**

A Zamindar sued under S. 163 of the Madras Estates Land Act to eject some tenants from "banjar" lands which they claimed to hold as part of their respective jerayati holdings. It was urged on his behalf that the question whether the defendants were entitled to hold these particular lands as raiyati was decided against them in some prior decisions of the revenue court in certain suits brought by the plaintiff for the enforcement of pattas for a former fasli and so is res judicata under S. 189 clause (3) of the Madras Estates Land Act.

MAD. EST. LAND ACT, S. 205:

Held, that S. 189 (3) of the Madras Estates Land Act did not extend the scope of the doctrine of res judicata beyond what was enacted in S. 11 of the C. P. Code and the prior decision of the revenue court being a decision upon an incidental question as to occupancy rights and not a matter falling within the exclusive jurisdiction of a Revenue Court, is not binding on a Civil Court under S. 189 (3) although it did arise in a suit to enforce acceptance of pattas which was exclusively cognisable by a revenue court. (*Sadasiva Aiyar and Spencer, JJ.*) **SRI RAJAH SOBANADRI APPA RAO v. DATHADU VENKATARAJU.** 43 Mad. 859 : 39 M. L. J. 476 : 28 M. L. T. 359 : (1920) M. W. N. 639. ; 12 L. W. 512.

S. 205—Board of Revenue—Revisional Powers of—Revenue Officer—Collector.

S. 205 of the Madras Estates Land Act, 1908 gives concurrent jurisdiction to the District Collector and the Board of Revenue to revise the orders made by Revenue Officers.

Revenue officer in S. 205 of the Act does not include a District Collector.

The Board of Revenue has no power to revise the order of a District Collector passed in the exercise of his powers of revision under S. 205 of the Act. (*Couchman, J. M.*) *In re SEC. 205 OF THE MADRAS ESTATES LAND ACT, 1908.*

12 L. W. 145.

MAD. HEREDITARY VILLAGE OFFICES ACT (3 of 1895) Ss. 13 and 21—Newly created office—Madras—Proprietary Village Offices Act, S 15 (1)—Amalgamation of existing offices—Jurisdiction of Revenue Courts.

Where a new office of kurnam in a proprietary estate was created in consequence of the grouping of two or more villages and the kurnam appointed to the newly created office by the Sub Divisional Officer sued in the Civil Courts for a declaration that he was the legally appointed kurnam and for an injunction restraining the proprietor of the estate and the person appointed by him as kurnam:

Held, that the office is to be filled on the principles laid down in S. 15 (1) and as the revenue courts have no jurisdiction to decide suits as to claims in respect of such offices, the suit is cognisable by a civil court.

S. 21 of Act 3 of 1895 takes away the jurisdiction of the civil courts only in cases in which jurisdiction was conferred on revenue courts by S. 13 of the same Act. (*Ayling and Coutts Trotter, JJ.*) **TANGATOORI KOTHANDARAMAYYA v. TANGATOORI RAMALINGAYYA.**

12 L. W. 663 : (1920) M. W. N. 644.

(3 of 1895) Ss. 13 and 21—“Succession”—Meaning of—Right to be appointed to newly created office—Suit for declaration that a person is ineligible.

MAD. H. C. RULES (O. S.) R. 247.

Per Bakewell, J.—The words “claim to succeed” in S. 21 of Madras Act (3 of 1895) should not be understood in the strict sense of the acquisition of an interest upon the death of a person but mean the right to be appointed upon a vacancy in office. They include therefore the right to be appointed to a newly created office.

A suit for a declaration that a person is or is not entitled to a village office is not cognizable by the Civil Courts.

Per Odgers, J.—A suit merely for a declaration that a person is entitled to a village office is cognizable by the Civil Courts. (*Bakewell and Odgers, JJ.*) **ALAGIASUNDARAM PILLAY v. MIDNAPORE ZEMINDARY CO, LTD.**

12 L. W. 767 : 54 I. C. 816.

MADRAS HIGH COURT RULES. (APPELLATE SIDE) Rr. 35 and 38—Probate proceedings—Appeal—Pleader’s fee—Scale of. See (1919) Dig. Col. 769. KONDASIDDHA CHETTY v. VENKATAROYA CHETTY.

43 Mad. 282 :

(1920) M. W. N. 155 : 54 I. C. 292.

(ORIGINAL SIDE)—Rr. 247, 162 and 264—Garnishee proceedings—Debts due to judgment-debtor and others—Right of persons entitled to recover.

Debts owing to the judgment-debtor and another are not the proper subjects of garnishee proceedings, still less debts due to the estate of a deceased person of whom the judgment-debtor is merely a co-heir. A garnishee order improperly made may be set aside and a refund ordered at the instance of other parties interested in the debt. The law is the same in England and India.

(1905) 1 Ch. 432; (1894) 11 T. L. R. 36 Rel.

A debt due to M, a deceased Mahomedan, was attached by plaintiffs in execution of a decree obtained by them against the heirs of the deceased on a debt due by him. The defendants obtained a decree on the original side of the High Court against A one of the heirs of M and in execution attached the debt due to M. The co-heirs of A preferred an objection under R. 247 of the Original Side Rules to the attachment by the defendants but the Judge acting under Rule 264 directed the garnishee to pay the money into Court and allowed the defendants to draw it out, without prejudice to the rights of claimants. In a suit by the plaintiffs against the defendants for recovery of the moneys drawn out by the latter, held, that the plaintiffs were entitled to recover.

Per Krishnan, J.—The creditors of M had a prior claim as the debt was due to M and could be taken, by his heir A only subject to the rights of M’s creditors to have their debts paid out of his estate (*Wallis, C. J. and Krishnan, J.*) **HAJI ABDULLA SAHIB v. ALANJI ABDUL LATIFEF SAHIB.** 39 M. L. J. 91 :

28 M. L. T. 34 : 12 L. W. 70 : 57 I. C. 854.

MAD. IRRIGATION CESS ACT, S. 1.

MAD. IRRIGATION CESS ACT
S. 1—Prov. so—Engagement, it includes natural and prescriptive rights—Ownership of river—Right to banks and bed—Forfeiture of an estate—Easement—Rights of third persons affected—Preamble to an Act—A'd to construction. See (1919) *Dig Col* 771. SECRETARY OF STATE FOR INDIA v MAHARAJA OF BOBBILI 18 A. L. J. 1: 24 C. W. N. 416: 22 Bom. L. R. 498. 54 I. C. 154.

MADRAS LAND ENCROACHMENT ACT (III of 1905)—Effect of on riparian rights

The Mad. Land Encroachment Act (III of 1905) does not affect pre-existing rights and does not supersede the rights of riparian proprietors (*Spencer and Krishnan, JJ*) OLAPPAMANNA NUNAKAL NEELAKANTAN v. SECRETARY OF STATE. 12 L. W. 371: 55 I. C. 770.

MAD LAND REVENUE ASSESSMENT ACT (I of 1876) Ss 1 and 6—Acquisition by prescription, if an alienation—Application for separate registry—Aggrieved party—Remedy of.

Acquisitions by prescription are not excluded from the description “alienated by sale or otherwise,” in the preamble of the Madras Land Revenue Assessment Act, 1876.

Notwithstanding the absence of both parties concurrence in the application for separate registration and assessment the aggrieved party's remedy is only by a suit under Sec 6 of the Act. (*Oldfield and Krishnan, JJ*) PUSAKALI PEDU BRAHMAJI v KRISHNAMACHARIAR. 11 L. W. 339: 55 I. C. 703.

MADRAS LOCAL BOARDS ACT, Ss. 16, 144 and 162—Rules under—Suit for declaration of invalidity of election to Taluk Board—Maintainability of—Jurisdiction of Civil Courts—Enactment of new rules.

A person residing within the administration area of a Taluk Board has sufficient interest to entitle him to sue for a declaration of the election of a member to that Board.

The granting of such a declaration however is entirely in the discretion of the Court and the plaintiff is not entitled to the same, as of right.

The rules framed by the Governor-in-Council under the Local Boards Act, dated 6th June, 1917 have the effect of excluding the jurisdiction of Civil Courts to entertain objections to the validity of elections even when those objections were based on the ground that there was no valid electoral register.

Sadasiva Aiyar, J. (Spencer, J. contra) Under Ss. 16 and 144 of the Local Boards Act, the Governor-in-Council has no power to make rules ousting jurisdiction of Civil Courts in the matter of enquiry and validity of elections.

MAD. L. BOARDS ACT, S. 93.

The supercession of old rules by new ones do not have the effect of superseding the old electoral register or of invalidating acts done under the old rules (*Sadasiva Aiyar and Spencer, JJ*) LAKSHMINARASIMHA SOMAYAJIYAR v. RIMALINGAM PILLAI

39 M. L. J. 319. 12 L. W. 202: (1920) M. W. N. 519. 28 M. L. T. 205.

—**Ss 99 and 100—Action under—Tank—filling up—Discretion of taluk board—Interference by Civil Courts when Justified.**

Under sections 99 and 100 of the Madras Local Boards Act 1884, it is for the Taluk Board, to decide upon the evidence whether a certain tank is dangerous or injurious to the health of neighbourhood, and if there were materials before it to come to such a conclusion, it is not for the Civil Court either to enquire into the sufficiency or otherwise of those materials, or to interfere with the conclusion on the ground that the court itself would have come to a different conclusion. 11 Mad. 341, 26 Cal. 811, 22 Bom. 230. Ref.

Though the power conferred on a Taluk Board under section 100 of the Act is a very wide power, it cannot exercise it, in a capricious wanton, arbitrary, or unreasonable manner or in a manner which could not have been in the contemplation of the legislature, or for an ulterior or indirect purpose; and if it do so, the civil court has undoubtedly jurisdiction to restrain the Board from such an abuse of its powers. 22 Bom. 230, 12 Bom. 490, 33 Bom. 334: 2 Blackstone 925; 2 K. B. 166, 128 E. R., 943; A. C. 606, 28 Mad. 520. Referred to

A Board does not exercise its powers under S. 100 of the Act in a reasonable manner, where it orders the owner of a tank, (1) not by itself insanitary but rendered so by the Board's action (in discharging into it, the drainage water of the neighbourhood through the board's own channels) to fill it up at a heavy cost, (2) without considering any alternative cheaper and more practicable method of abating the nuisance such as the putting up of the embankment (3) as a result of a general rule and without considering the particular circumstances of the case.

Per Oldfield J.:—(1) if a public body has exercised its discretion bona fide not influenced by extraneous or irrelevant considerations and not arbitrarily or illegally, Courts cannot interfere, but they have a power to prevent its refusal of its true jurisdiction by the adoption of the extraneous or the rejection of relevant considerations in arriving at its conclusion or deciding a point other than that brought before it. 19 Q. B. D. 533. 2 K. B. 165. Referred to.

(2) (a) It will be presumed that a public body has in reaching its conclusions dealt fairly with the materials available to it and until that presumption is displaced, the court will not attempt an inquiry into the particular ground on which the decision was reached; 1919 A. C. 605. referred to,

MAD. L. BOARDS ACL S. 144.

(b) The presumption will however be displaced by proof that action was taken on a wrong understanding of the law or the question at issue, or by evidence of the existence of matter which the body ought to have reasonably considered but failed to do so. (1910) 2 KB 166, A. C. 381 : considered. (1911) While the application of a pre-ordained resolution to every case coming up before the Board is to be disallowed, it is not improper on the part of the Board to give effect to a policy so long as its adoption does not preclude consideration of the facts of each case. (*Abdur Rahim and Oldfield JJ*) TALUK BOARD BANDIPUR v. SRIMINNI RAJA YARLAGADDI MALLIKARJUNA PRASADA NAIDU BHADUR, ZAMINDAR. 40 M. L. J. 91 : 12 L. W. 585 : (1920) M. W. N. 748

—**Ss. 144 to 147—District Board**
—Lodging money with treasury—Issue of cheque—Treasury if a banker—Power of District Board to issue negotiable instruments.

The Government Treasury, which receives money from the District Board and respects orders issued to it for payment is not a bank and a cheque cannot be issued on it.

Though the Local Boards Act does not expressly authorise the drawing and issuing of negotiable instruments by the Boards, Ss 144-147 of the Act and rule 549 of the Local Fund Code and the Form at page 379 of the code impliedly authorise the Board to make, endorse or accept negotiable instruments. (*Oldfield and Seshagiri Aiyar, JJ*) RANGASWAMY PILLAI v. SANKARALINGAM IYER. 43 Mad. 816 : 39 M. L. J. 377 : (1920) M. W. N. 428 : 12 L. W. 367 : 58 I. C. 893

MADRAS PROPRIETARY ESTATES VILLAGE SERVICE ACT (II of 1894) Ss. 18 (1), add 3—Nomination by proprietor—Validity of — Conditions—Limitation—Starting point—Delegation of power of nomination—Nomination in anticipation of erection of new office—Withdrawal of nomination if permissible.

In the case of the creation of a new office under S. 15, cl. (1) of Madras Act (II of 1894) the starting point for the six weeks within which the proprietor has to submit the report referred to in that clause is the day on which all the requisite steps have been completed under S. 6 of the Act or in other words the day on which the last step was completed.

The power of the choice of a new officer given to the proprietor under S. 15 cannot be delegated by him. But where the choice has been made by the proprietor himself there is nothing to prevent an agent from acting for the proprietor in formally embodying the nomination in the form prescribed for it and signing it for him and submitting it.

A proprietor may submit his nomination in advance in anticipation of a new office being created. Such a submission if received and kept on the file and not rejected by the authorities

MAD. REGULN. (II of 1816) S. 10.

will take effect when the office is created and the time for appointment comes.

Seemle the proprietor may withdraw a nomination made prematurely and substitute a new nominee. Such a power to withdraw may exist even with reference to a nomination made after the creation of the office till the nominee is accepted and appointed by the Divisional Officer.

Where a proprietor duly submitted a nomination to a new office as required by S. 15, cl. (1) and subsequently submitted a fresh nomination referring to the prior nomination and confirming it only because he was made to understand that the prior submission was not properly signed, while in fact, it was held, that the first nomination being otherwise valid the subsequent nomination would not in the circumstances of the case affect its validity. (*Spencer and Krishnan, JJ*) TANGUTUR NARASIMHAM v. SINGARAJU RAMIAH. 38 M. L. J. 126 : (1920) M. W. N. 233 : 54 I. C. 728.

—**(II of 1894) S. 17—Service inam lands—Right of enfranchisement—Land excluded from assets at the time of the sannad—Continuance of the grant— Regulation (29 of 1802).**

Lands which at the time of the granting of the sannad under regulation 29 of 1802 were service inam lands are extended from the assets of the Zamindari and the right of resumption and regrant inhere in the Government.

Lands which at the inception were service inam lands and which at the time of taking an account of the properties in the Zamindari in 1854 were not denied by the persons in possession to be service inam lands must be deemed to be inam lands continued by the Government within the meaning of S. 17, Madras Act II of 1894 and the Government were entitled to enfranchise the inam. (*Seshagiri Aiyar and Moore, JJ*) BASAVARAJU PITCHAYYA v. THE SECRETARY OF STATE FOR INDIA

11 L. W. 186 : 58 I. C. 713.

MADRAS REGULATION (XXV) of 1802—Effect of—Hereditary property in the Zamindar—Confirmation of proprietary rights—Subject to fixed assessment. See HINDU LAW, IMPARTIBLE ESTATE.

38 M. L. J. 149.

—**XXIX of 1802—Service inam lands—Right of enfranchisement—Lands excluded from assets at the time of the sannad—Continuance of the grant. See MADRAS PROP. EST. VILL. SERVICE ACT. S. 17. 11 L. W. 186.**

—**II of (1816) S. 10 — Village magistrate—Power to sentence a person to confinement.**

Under S. 10 of Regulation II of 1816 a village magistrate has power to enforce a sentence of confinement only in the village choultry and nowhere else. Placing a person in confinement in front of the village temple is

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illegal. (*Abdur Rahim, J.*) *In re PONNU SWAMI PILLAI* 39 M. L. J. 709 : 12 L. W. 638 : (1920) M. W. N. 786.

MAD. RENT RECOVERY ACT S. 11—Rates of rent—Contracts paramount to status and usage—Contracts implied from bare payment and acceptance of rent—Consideration for promise to pay necessary. See (1919) *Dig. Col.* 762 RAJA JAGAVEERA RAMA VENKATESWARA ETTAPPA v. ARUMUGAM CHETTY. 43 Mad 174.

MAHOMEDAN LAW—Divorce—Deed of execution of—Nonpayment of consideration

A *khulnama* executed by the husband constitutes a valid pronouncement of divorce even if his intention is not to make over the document to the wife until he has received the consideration agreed to by her. The mere nonpayment of the consideration does not vitiate the deed. (*Scott Smith, J.*) MUSSAMMAT SADDAN v. FAIZ BAKHSH.

1 Lah 402:
2 Lah. L. J. 210 : 55 I. C. 184

—Divorce Grounds for—Ante-nuptial agreement.

An ante-nuptial agreement by a Mahomedan husband not to take another wife in the life time of the first is legal, and the wife is entitled either to divorce her husband under the agreement or to apply to a court for divorce. A mahomedan wife can obtain a decree of divorce against her husband on the ground of habitual cruelty, or failure to perform the duties and obligations which in law result from marriage, or on fulfil engagements voluntarily entered into at the time of marriage: v. 15 Ben. L. R. App 5 followed. (*Robinson, J.*) KHALILAH RAHMAN v. MARIAN BIBI.

13 Bur. L. T. 89.

—Divorce—Talaknamah not made in the presence of kazi or wife—Registration—Effect of—Communication to wife if necessary. See (1919) *Dig. Col.* 777 RAJASAHEB RASUL SAHEB *In re.* 44 Bom. 44 : 54 I. C. 573

Dower—Fixing of—Presumption—Transfer of property in lieu of dower—Not a gift.

It may be presumed in the case of a Mahomedan marriage that dower was fixed but it is open to the husband to increase the amount of the dower subsequent to the marriage.

A transfer in lieu of dower is not a gift. (*Abdur Raouf and Bevan Petman, JJ.*) MUSSAMMAT UMRAO BIBI v. MAHOMED BAKHSH.

2 Lah. L. J. 215 : 55 I. C. 236

Dower relinquishment of—Consideration if essential—Free consent, essential—Oral relinquishment, if valid.

According to Mahomedan Law, the character of the obligation to pay the dower is a debt. The moment the dower is settled, it is enforceable as a debt. The dower becomes the property of the wife by the mere contract and she

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may therefore deal with or dispose of it before taking possession of the same. The woman is entitled to give it up or relinquish it in the continuance of the contract. It is not necessary that such relinquishment to be valid, must take place immediately after the husband's death. She can relinquish it at any time. It can be remitted in favour of the heir after the husband's death. No consideration is needed for such relinquishment. But free assent must be established. As the debt is enforceable under the Contract Act, it can also be released under S. 63 of the said Act.

Quaere: Whether a dower debt could be discharged by verbal relinquishment (*Chaudhuri and Cuming, JJ.*) NURUNNESSA KHANUM v. KHAJE MAHOMED SAKRU.

47 Cal 537 : 24 C. W. N. 335 :
31 C. L. J. 14 : 56 I. C. 8.

—Dower—Suit for Administration

In a suit by a Muhammadan widow against her husband's heirs for a portion of her dower debt, the Court directed that plaintiff should bring into hotchpot all the properties of her husband of which she was in possession and that an account should be taken as in an Administration suit. 19 C. W. N. 101. (*Mullik and Sultan Ahmed JJ.*) AZIZ FATMA v. SVEL SHAT CHIVAT AHMED. (1920) Pat 222.

—Dower—Widow in possession of husband's estate—Lien for unpaid dower—Consent of other heirs if necessary—Widow's right if transferable—Rights of transferee. See (1919) *Dig. Col.* 778, BEEJU BEE v. MOORTUJA SAHIB.

43 Mad. 214 :
11 L. W. 150.

—Gift—Conditions derogating from grant—Effect of—Doctrine of *mush'a*, scope of.

Under the Mahomedan Law where a gift is made subject to a condition which derogates completely from the grant the condition is void and the gift takes effect as if no condition is attached to it.

But a condition in the nature of a trust to maintain the donor during her life does not make the gift inoperative.

A deed of gift giving one half of certain plots of land is not within the mischief of the rule of *mush'a* (*Chaudhuri and Cuming, JJ.*) JAGRIPRAMANIK v. SUBID MOLLA.

54 I. C. 378.

Gift—Delivery of possession.

According to Mahomedan Law, there must be a delivery of possession to validate a gift. Where the donor and the donee or both are present on the premises gifted away an appropriate intention may put the one out as well as the other into possession without any actual physical departure or formal entry. But it does not follow in every case necessarily that where the two are present the possession must be deemed to have been transferred. The question as to whether the donor intended to transfer

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the possession at the time of the gift must be answered with reference to the facts of each particular case. (*Shah and Crump, JJ*) ABDUL MAJID KHAN v. HUSSEINBU.

22 Bom. L. R. 229 : 55 I. C. 952

Gift—Hiba bil-ewaz—Consideration

Absence of.

The incidents of a gift for a consideration are very different from those of a simple gift. If the passing of the consideration be not proved a Hiba-bil-ewaz is not valid as a simple gift without consideration, 17 C. L. J. 173 d.s.t. (*Walmsley and Shamsul Huda, JJ.*) JIDDA JAN BIBI v. SHEIKH BAKTAR

24 C. W. N. 926.

Gift—Resumption of, if permissible

Gift subject to condition of maintenance

An absolute deed of gift imposing an obligation on the donee to maintain the donor but without making it a condition precedent, cannot be resumed by the donor on the failure of the donee to maintain the donor. (*Fletcher and Cuming, JJ.*) ABIRJAN BEWA v. SHEIKH KABIL 54 I. C. 542.

Guardian—Defacto—Power of, to transfer minor's property—Ejectment by the minor.

Under the Mahomedan Law a person who has the charge of the person or property of a minor without being his legal guardian, and who may, therefore, be conveniently called a *de facto* guardian, has no power to convey to another any right or interest in immoveable property which the transferee can enforce against the infant. Nor can such transferee let into possession of the property under an unauthorised transfer resist an action in ejectment on behalf of the infant as a trespasser, (*Chatterjee and Panton, JJ.*) SUNDER KHAN v. MEAJAN CHAPRASHI. 55 I. C. 234.

Guardianship—Mother's right to custody.

Under Mahomedan Law a mother's right to the custody of her children ceases on their completing the seventh year but she still has a right of access to her children. (*Rigg, J.*) HAZARA BIBI v. SULAIMAN HAJI MAHOMED.

13 Bur. L. T. 86.

Guardianship—Mother—Right of Reference to arbitration on behalf of minor

Per Beachcroft, J.—Where the District Judge who takes the place of the Kazi in Mahomedan Law has not appointed the mother as guardian of the properties of minor children, the fact that a Subordinate Judge subsequently finds her fit to act for the minors would not validate an arrangement made by her on behalf of the minors which in its inception was invalid by reason of her not being a legally appointed guardian. (*Teunon and Beachcroft, JJ.*) MOHSENUNNODIN AHMAD v. KHABIRUDDIN AHMED. 47 Cal. 713 : 54 I. C. 945.

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Inheritance Pathans—Non-agriculturists and residents of cities—Onus on party alleging special family custom—Daughter's share.

Pathans, non-agriculturists and residents of cities in the Punjab are governed in matters of inheritance by Mahomedan Law. 36 P. R. 1889; 171 P. W. R. 1913; 32 P. R. 1915; 14 P. R. 1912 foll.

Pathan residents of Ludhiana City owning no land and deriving their subsistence from other pursuits being governed by Mahomedan Law the onus was very heavy on the defendants to prove that a special family custom prevailed, and that no sufficient proof has been given of the existence of such a custom.

The mere fact that the right of females in the family have been to a large extent disregarded is not sufficient to establish that the family in matters of succession and inheritance follows any general or special custom.

The daughter's share is liable to the mortgage charge created by her father. (*Shadi Lal, C. J. and Wilberforce, JJ.*) NATHU v. MURAD BIBI 2 Lah. L. J. 450.

Joint family—Acquisitions by member of family—No presumption as to acquisitions from joint funds—Estoppel.

Held, that the succession of a Mahomedan being an individual succession there is no presumption in the case of a Mahomedan such as exists in the case of a Hindu joint family that property purchased in the name of a member of the family was purchased out of joint undivided property.

Prima facie therefore the property bought in the name of the deceased brother was with his money and the statement in the award established that it was.

Held further, that the plaintiff was estopped by his own proceeding in the arbitration whereby he received his full half of the properties belonging to his father upon the footing of the exclusion of the mother from claiming a share therein through his mother. (*Lord Dunedin.*) MAHOMED WALI KHAN v. MUHAMMAD MOHI-UD-DIN KHAN. 24 C. W. N. 321 : (1920) M. W. N. 189: 11 L. W. 421 : 27 M. L. T. 204: 58 I. C. 843 (P. C.)

Legitimacy—Acknowledgment of sonship—Presumption—Proof of illegitimacy.

Held, that none of the conditions necessary to rebut the presumption of paternity arising from the acknowledgment of legitimacy of sonship was satisfied in this case.

The result of such an acknowledgment is to invest the son with a legitimate status with all the consequences which that imports.

38 A. 627 at p. 661 P. C. Ref.

10 A. 289 Ref.

The law refuses to declare a man a bastard except on the clearest and most positive proof of his illegitimacy, and there must be positive

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evidence that the marriage did not take place before it can be disproved.

Such evidence in this case is lacking and in the absence of such disproof the acknowledgement of legitimacy must be given its full value (*Shadi Lal and Le Rossignol, JJ.*) IBRAHIM ALI KHAN v. MUBARAK BEGAM.

1 Lah. 229 : 2 Lah L J 112 : 56 I C. 923.

—Letters of administration to the wife of deceased Mahomedan.

22 Bom. L R 1117

—Pre-emption—Mokarrari interest—Sale of—Sale of house apart from site.

Under the Muhammadan Law no right of pre-emption arises in respect of the sale of a mokarrari interest.

Where a house is sold apart from its site for occupation, the owner of the adjoining house is entitled to pre-empt the sale on the ground of vicinage. (*Coutts and Sultan Ahmed, JJ.*) SHEIKH MOHAMMAD JAMIL V. KHUB LAL RAUT.

58 I. C. 534.

—Pre-emption—Right to Participants in appurbaus equal share.

Under Mahomedan Law, where two or more persons are equally entitled to pre-empt a property, each one of them is entitled to an equal share in the property pre-empted. (*MacLeod, C. J. and Heaton and Kajiji, J.*) VITHALDAS KAHANDAS SONI v. JAMIETRAM MANEKLAL.

44 Bom. 887 :

22 Bom. L. R. 698 : 58 I. C. 279.

—Pre-emption—Talab-i-muwasibat—Statement of right, if sufficient.

Where a pre-emptor on first hearing of the sale, used the following expression: "I have a right of pre-emption, how will Mangru and Mahngi (the defendants) take it?" Held, that under the Mahomedan Law of pre-emption the words used were not sufficient to constitute a talab-i-muwasibat as they did not amount to a demand to exercise the right of pre-emption. (*Tudball, J.*) MANGRU v. PARROTAM DAS.

18 A. L. J 1037 : 58 I. C. 777.

—Succession—Childless widow—Shiah Law.

According to the Shiah Law of inheritance a childless widow takes no share in her husband's land but is only entitled to one-fourth of the value of the building erected thereon.

The widow has a lien on the building until she is paid her share of the value but she cannot sell to any one the ownership of the building. 21 M. 27 ; 25 C. 9 ; 7 M. L. J. 115 P. C. ; 1 C. W. N. 449 ; 24 I. A. 196 : 7 Sar. P. C. J. 199 followed. (*Clevis, O. C. J.*) SHAUKAT ALI v. ANWAR-UL-HAQ. 55 I. C. 745.

—Succession—Return—Sharers—Residuaries—Kindred.

Where a Mahomedan dies leaving behind him only his widows but no sharers, residu-

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aries and distant kindred, the widow takes one-fourth of his estate as a sharer and the remaining three-fourths by return (*MacLeod, C. J. and Heaton, J.*) MIR ISUB MIR INUS MALDIKIR v. ISUB

22 Bom. L. R 942 : 58 I. C. 48.

—Succession—Right of heir to file a suit for administration without suing for partition

—Letters of administration unnecessary. See ADMINISTRATION.

22 Bom. L. R 1117.

—Sunnis—Dower—Marriage—Concealment of pregnancy at the time—Consummation of marriage—Husband driving away wife on pregnancy coming to his notice without divorcing her—Right of wife to dower.

The plaintiff a Sunni Mahomedan woman, married the defendant who agreed to pay 525 puthis (Rs. 2,625) as prompt dower. The marriage was duly consummated. At the time of her marriage, the plaintiff was pregnant but this fact was not known to the defendant. Within five months of the marriage, the plaintiff gave birth to a fully developed child. The defendant turned the plaintiff out of his house shortly after the child was born, but without divorcing her. The plaintiff having sued to recover her dower from the defendant:

Held, that the plaintiff was entitled to recover the amount of her dower from the defendant, for the concealment of pregnancy at the time of her marriage did not render the marriage invalid.

Per MacLeod, C. J.:—Where concealment of pregnancy is not by itself a ground for cancelling the marriage the husband has his remedy by divorce. (*MacLeod, C. J. and Heaton, J.*) KULSAM BI v. ABDUL KADIR.

22 Bom. L. R. 1142.

—Waqf—Dedication—Substantial gift to religious and charitable purposes—validity.

The Privy Council held that the Wakfnama in question should be upheld as there was a substantial dedication of property to charitable and religious purposes and no legal objection to the dedication had been established. (*Viscount Cave*) SYDED AMATUL FATEMA BIBI v. DEWAN ABDUL ALI SAHEB. 24 C. W. N. 494 : 28 M. L. T. 135 : 12 L. W. 497 : 32 C. L. J. 447. (P. C.)

—Waqf—Dedication substantially to charity.

Where there is a substantial dedication of the corpus and income to charitable uses within the test laid down by the Privy Council in 28 I A 15 and 44 I A 21 the waqf is not invalid as being illusory. (*Richardson and Shamsal Huda JJ.*) NARAIN DAS v. KAZI ABDUR RAHIM. 47 Cal. 866 : 24 C. W. N. 690 : 58 I. C. 705.

—Waqf—Dedication—Validity of—Order of District Judge removing trustee and

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appointing fresh trustee—Mussalman waqf Validating Act.

A waqf was created before the Mussalman waqf Validating Act of 1913 in favour of the family and descendants of the settler without any ultimate substantial trust for charitable purposes. On a petition the District Judge made an order removing the mutwalli of the waqf and appointing in his place one of the beneficiaries under the waqf: *Held*, that the order of the District Judge could not be supported even under Ss. 73 and 77 of the Trusts Act inasmuch as the waqf was not only invalid as such but was also illegal as a trust. The creation of a succession of maintenance allowances from generation to generation in favour of unborn persons apart from a scheme of valid waqf was not recognized by Mahomedan Law. (*Teuon and Newbold, JJ.*) ABDUL FOATIM MAHOMED v. IJJANNES SA KHATUN.

57 I. C. 782

—Waqf—Dedication—Waqf if can cancel—Waqf for exclusive use of a particular sect.

On the construction of two waqfnamas held it was not a condition of the dedication that a mosque should be built the house itself having been constituted as a waqf property in the waqif's lifetime and having been used as a house of prayer by the followers of the sect ever since. It could not therefore be said that the waqf never came into existence or that it was a contingent one, dependent upon the fulfilment of the condition of building a mosque.

According to Mahomedan Law any place which is dedicated for the purpose of prayer may validly be treated as a mosque and it is not necessary that the building should have a minaret.

Held, the fact that the waqf in both waqfnamas expresses a wish that only the *and-i-quran* should perform their prayers in the house could not invalidate the waqf which was made according to the rules of the Mahomedan Law, and the house must be treated as having become the property of God. Where a waqf has been validly made exclusively for the use of a particular sect the waqf is good and the condition attached to it is void (*Abdul Raoof, JJ.*) MAULA BAKSH v. AMIR-UD-DIN.

1 Lah. 317 : 57 I. C. 1000.

—Waqf—Mutwalli—Creator of waqf appointing herself mutwalli—Declaration.

Where a Mahomedan lady covenanted by a deed to spend one-fourth of the property which she took as heir of a deceased person in charity for the spiritual benefit of the deceased and for performing certain religious ceremonies and constituted and declared herself a trustee of the one-fourth for the said purpose: *Held*, that a valid waqf was created by a mere declaration. (*Pratt, J.*) HUSSEINBHAI CASSIM BHAI v. THE ADVOCATE GENERAL OF BOMBAY.

22 Bom. L. R. 846 : 57 I. C. 991.

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—Waqf—Mutwalli—Lease of immoveable property—Sanction of Kazi—Application to Dt. Judge—Power of Court to enquire—C. P. Code, S. 92—Sanction if necessary.

Under the Mahomedan Law a trustee is not entitled to let out immoveable property for more than one year or three years in certain cases, without the sanction of the Kazi. The powers of the Kazi are ordinarily exercised by the District Judge in the Moulvi and the sanction given by the District Judge on an application by the mutwalli may be sufficient authority for the mutwalli for letting out the property. It is not necessary to bring a suit under Sec. 22 C. P. C. under that section for obtaining such sanction. Any application made by the mutwalli will be inquired into by the District Judge before sanctioning a lease as Kazi. (*Chatterjea and Panton, JJ.*) FAKHRUNNESSA BEGUM v. THE DISTRICT JUDGE OF 24 PERGUNNAHS.

47 Cal. 592 :

24 C. W. N. 339 : 56 I. C. 475.

—Waqf—Mutwalli—Position of Manager.

The mutwalli of a waqf estate is not the ostensible owner of the estate but a mere manager and in the case of a public charitable endowment the legal ownership is in the Divine Being or in the Charity created in his name. A transfer by a mutwalli who assumes to deal with the trust property as if he were the true owner in breach of her duty and in fraud of the trust reposed in him is *ultra vires* and may be avoided by timely proceedings properly taken for the purpose. The defect in the transferee's title whether he takes without notice of the trust can only be cured by lapse of time. (*Richardson and Shamsul Huda, JJ.*) NARAIN DAS v. KAZI ABDUR RAHIM.

47 Cal. 866 : 24 C. W. N. 690 :
58 I. C. 705.

—Waqf—Mutwalli—Women—Right to succeed—Sajjadanashin—Appointment of Usages.

A religious office can be held by a woman under the Mahomedan Law, unless there are duties of a religious nature attached to the office which she cannot perform in person or by deputy, and the burden of establishing that a woman is precluded from holding a particular office is on those who plead the exclusion; 41 Mad. 1033. Ref. The doctrine is based on the fundamental distinction between the temporal affairs of a mosque and the spiritual functions connected with it; 5 L. W. 226, 4 Mad. H. C. R. 23 *Quaere*:—Whether the uniformity which characterizes the successive appointments for nearly a century may not improbably indicate that the practice had a lawful origin in the direction given for appointments of successor to the office of *mutwalli* by the original founder, though they can no longer be traced with certainty from the lapse of time.

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A Sajjadanashin maintains the unbroken spiritual line from the original preceptor. The Office of Sajjadanashin can exist only by virtue of the direction of the spiritual founder or by a valid custom. (*Mookerjee, A. C J. and Fletcher J.*) **KASSIM HASSAN v. HAZRA BEGAM.**

32 C. L. J. 151

—Waqf — Validity of — Substantial benefit to donor's family—Suit by person claiming as *mutwalli*—Parties agreed about existence of waqt—court if can question its legality. See (1919) *Dig. Col.* 787 **NAWABZADE KHAJEH ATIKULLA v. NAWAB KHAJEH HUBIULLI.**

24 C. W. N. 306.

—Widow — Rights of — *Bhaoari*.

A Mahomedan widow, who according to custom is only a life tenant of the Bhagdas property which belonged to her husband, cannot make gifts of the estate as if she were in the position of a Hindu widow who is entitled to make alienations to secure spiritual benefit to her husband (*Macleod, C. J. and Heaton, J.*) **AHMED ASMAL MUSE v. BAI BIBI**

44 Bom. 727 :

22 Bom. I. R. 826 : 57 I. C. 553.

—Will — Bequest partly valid and partly invalid and excessive—Apportionment of legacies—*Mole of*.

Under the Mahomedan Law, if a bequest is made to an heir and also to a stranger, the bequest with respect to the heir's portion is void without the consent of the other heirs, while that with respect to the stranger's portion is valid to the extent of one-third of the testator's estate.

A Mahomedan lady executed a will by which she bequeathed her whole estate, one-third to certain heirs and two-thirds to non-heirs; the bequest was without the consent of the other heirs. Held, that the bequest to the heirs did not take effect and that to the non-heirs was valid to the extent of one-third of the estate. (*Banerjee and Tudball JJ.*) **MUHAMMAD JUNAID v. AULIA BIBI.**

42 A.I.R. 497 : 18 A. L. J. 613

—Will Validity of—Assent of heirs—Testator if can make a gift over.

A testator cannot under the Mahomedan Law make a gift over after a vested bequest of an absolute estate. Where a will made by a Mahomedan is assented to by his heirs after his death, the assent merely validates the document which must however be construed according to the ordinary rules of Mahomedan Law. (*Shadi Lal and Broadway, JJ.*) **NASIR ALI SHAH v. SUGHRA BIBI**

1 Lah. 302 :

2 Lah. L. J. 147 : 54 I. C 853

MAJORITY ACT, S. 3—Appointment of guardian—Majority—prolongation of—Release of before minor attained 21 effect of.

Under S. 3 of the Majority Act once a guardian of a minor has been properly appointed by the Court the minor cannot be deemed to have

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attained the age of majority until he has completed the age of 21 years even though the guardian is discharged before he attains age 36 C 768 followed.

Per *Das, J.*—When an issue is raised as to minority an order appointing a guardian is no evidence of minority 17 C 849. (*Dawson Miller, C. J. and Das, J.*) **HARIHAR PRASAD SINGH v. BABU EDUL SINGH.**

5 P. L. J. 460 : 57 I. C. 383.

—S 3—Guardian appointed under G. and W Act—Release of minor from guardianship

The fact that a minor is released from the guardianship of a guardian appointed under the Guardians and Wards Act, has not the effect of reducing the extension of his minority and he does not attain majority till he attains the age of 21 years. (*Halifax, A. J. C.*) **THAKUR BALWANT SINGH v. NARAYAN** **58 I.C 196**

MALABAR COMPENSATION FOR TENANT'S IMPROVEMENTS ACT

S. 5—Landlord and tenant—Rent—Claim for, barred—Right of landlord to set off against improvements.

Under the Malabar Compensation for Tenants Improvement Act. (I of 1900) a landlord is entitled to set off arrears of rent even though barred by limitation against the tenant's claim for improvements :—1917 M. W. N. 275 fol.

A decree for possession in favour of the landlord was reversed on appeal on the technical ground that there was no proper notice to quit. The tenant did not claim immediate restitution from the landlord who had been put in possession under the decree; Held : that the tenant should be deemed to have impliedly surrendered the land to avoid a fresh suit by the landlord for possession and was estopped from claiming profits for the period during which the landlord was in possession before the reversal order by the High Court. (*Oldfield and Seshagiri Aiyar, JJ.*) **PEEDI KAYILAKATH KUNNI v. THAYYIL KUNHAI AMMA.**

57 I. C. 674.

—S. 19—Compensation for improvements—Contract at variance with the Act—Value of improvements, how calculated.

A tenant is entitled to contract himself out of the Malabar Tenant's Improvements Act where the terms of the contract are more favourable to him than the provisions of the Act relating to improvements 32 Mad. 1, dist.

The calculation of the value of improvements according to the Desa Maryada (usage of the land) mentioned in the contract, should be made at the rate prevailing at the time of ejection and not at the time of the creation of the tenancy. (*Sadasiva Aiyar and Spencer, JJ.*) **PALLEELETATHIL KUNKAN NAMBIAR v. RAMAN NAYAR.**

39 M. L. J. 63 :

28 M. L. T. 42 : 11 L. W. 559 :

55 I. C. 940.

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MALABAR LAW—Accretions—Rights of riparian proprietors and Crown—Palghat taluk.

There is no special custom having the force of law in the Palghat taluk by which all river accretions and river beds are vested in the crown (*Spencer and Krishnan, JJ.*) **OLAPPAMANNA NANAKAL NEELAKANTAM v. SECRETARY OF STATE FOR INDIA.** 12 L. W. 371 : 55 I. C 770

Adoption—Appointment of heir—Ananthara avakasham—Natural relations of appointed heir, if entitled to succeed.

Under the customary law of Malabar, where a person is appointed as Ananthara Avaksham (heir) the natural relations of the appointed heir are entitled to succeed to the appointee's properties as attaladakam heir (*Seshagiri Aiyar and Moore, JJ.*) **SEKJARA VARIE v. KESAVAN MUSAD.** (1920) M. W. N. 9 : 54 I. C 389

Custom—Tiyars of South Malabar—Law Governing—Women—Right of residence in paternal house after marriage.

There is no customary law among the Tiyars in South Malabar, by which women after marriage are entitled to a right of residence in the house of their parents against the wishes of those parents, or their sons.

The Tiyars are governed by the ordinary Hindu law of Mitakshara, in the absence of the proof of custom varying the same in any particular. (*Sadasiva Aiyar and Spencer, JJ.*) **THAIKKANDI POKKANCHERI v. ILLIVATHUK-KAL ACHUTHEN.**

39 M. L. J. 427.

Karnavan—Tavazhi property—Alienation of—Attaladakam heir—No steps taken by junior member of tavazhi to question alienation.

Where the karnavan of a tavazhi made certain alienations, which the junior members of the tavazhi took no steps to question either during the lifetime of the karnavan or even after his death, it is not open to the attaladakam heir who succeeded to the tavazhi property on the death of last surviving member of the tavazhi to seek to set aside the alienation. (*Abdur Rahim and Oldfield, JJ.*) **KATAPRATH VATAKKA PURAYIL THAYYIL MAMMAD KARNAVAN v. MAMMAD.**

39 M. L. J. 702 : 12 L. W. 634 : (1920) M. W. N. 768.

Land tenure—Kudima tenure—Perpetual lease—Denial of title—forfeiture.

A kudima tenure will be forfeited if it was granted for future services and the tenant refuses to perform such services. A denial of the landlord's title is tantamount to a refusal to render the services required. (*Oldfield and Seshagiri Aiyar, JJ.*) **KOLINGEETI RANI NAIR v. MARI YAMMA.** 43 Mad 480 : 11 L. W. 513 : 56 I. C. 13

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Land Tenures—Karamkari and Adimavaya tenures—Incidents—Inalienability and forfeitability—Custom of, not prevalent in Malabar. See LAND TENURE, SERVICE TENURE

38 M. L. J. 275.

Tarwad—Karnavan—Arrangement with—Benefit to stranger—Transaction not void on that ground,

Unless it is shown that the tarwad has suffered some detriment by an arrangement entered into by a Karnavan the fact that a stranger to the tarwad has derived some advantage is not sufficient to invalidate it as against the tarwad.

Where under a prior agreement between a Karnavan and P. a stranger to the tarwad and P. were entitled to irrigation from a channel for 111 and 162 days respectively and by a subsequent agreement between the Karnavan, P. and K they became entitled to irrigation from the channel for 162, 54 and 54 days respectively. Held, the second agreement was not prejudicial to the tarwad though K had secured some rights to the channel. (*Salasiva Iyer, and Burn, JJ.*) **VENGANAT RAJA VASUDEVA RAVI VARMA RAJA v. RAMAKUTTI MENON.**

27 M. L. T. 54 : 56 I. C 199.

Tarwad—Karnavan—Melcharth—Grant before expiry of lease—Successor when bound.

In the absence of necessity or benefit to the tarwad a melcharth given by a Karnavan before the expiry of the prior lease will not bind the succeeding Karnavan whether the grantor was or was not alive at the time when the prior lease expired S. A. 774 of 1917 not followed. (*Sadasiva Aiyar and Spencer, JJ.*) **KUNHAMMAD v. KUNHUNNI.**

38 M. L. J. 461.

Tarwad—Karnavan—Right of junior members to redeem.

Except in very special circumstances where the karnavan is proved to be guilty of gross misconduct and collusion it is not competent for the junior members of a tarwad to sue for redemption of a kanom granted by their karnavan. (*Spencer and Bakewell, JJ.*) **OTTA-PARAKKAL THAZHATH SOOPI v. CHARICHAL PALLIKKAL MARYAMMA.**

43 Mad. 393 : 38 M. L. J. 207 : 11 L. W. 200 : 27 M. L. T. 169 : 55 I. C. 760.

MALICIOUS PROSECUTION—Criminal charge—Proof of—Mere reference to plaintiff—No charge preferred—Prosecutions by police.

Where deft. No. 1 wrote a letter to the C.I.D. who had begun investigations against D. alleging criminal charges against D, and not against the plaintiff whose name was however, mentioned as merely introductory and no charge was levelled against him. The C.I.D. on receipt of the letter having discovered other evidence in the course of the investigation

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prosecuted D as well as the Plff. for cheating and the case failed whereupon the Plff. brought the suit for damages for malicious prosecution against the defendant No. 1 and Delt. No. 2 who was alleged to have assisted the former.

Held, that the Plff. had no cause of action as the defendant No. 1 was not the prosecutor and was not responsible for the action taken by the C. I. D. and that the case against Delt. No. 1 having failed no relief could be claimed against Delt. 2.

Per *Dawson Miller, C. J.* :—The Plff. must in a case relating to malicious prosecution establish affirmatively that the delt. was either (a) the actual prosecutor or (b) gave information leading to false criminal charge against the Plff. and in consequence of that the prosecution ensued, the action having been done maliciously or without any reasonable or probable cause. It is thus essential that the delt. should have taken an active part in bringing about the prosecution by preferring some charge of a criminal nature against the Pff. (*Dawson Miller, C. J. and Coutts, JJ.*) *JAGADAMBA PRASAD v. RAGHUNANDAN LAL*.

1 P. L T 422: 57 I C 392

—Cause of action—Information given by defendant—No complaint—Practice—Effect of.

A suit for damages is maintainable against a person who supplied the information on which the prosecution was launched though he may not have himself figured as the complainant in the Criminal Court. 42 Mad. 880 (1911). 26 Mad. 362 not fol. (*Sadasiva Aiyar and Spencer, J.*) *SHANMUGA UDAYAR v. KANDA SAMI ASARI*

12. L. W. 170.

—Damages—Malice—Proof of—Want of reasonable and probable cause.

The defendant, who had purchased a crop on certain land from the land lord, when trying to reap the crop was obstructed by plaintiffs who claimed the crop from a tenant of the land. He prosecuted the plaintiffs for theft of the crop; but the prosecution was unsuccessful. The plaintiffs thereupon sued the defendants for damages for malicious prosecution:

Held, that inasmuch as the defendant had no honest belief in the guilt of the plaintiff but was moved by the disappointment he experienced when he found that he would not be able to reap the fruits of his purchase without a contest, he had no reasonable and probable cause for instituting the prosecution, and was actuated by malice. (*Macleod, C. J. and Fawcett, J.*) *JANNADAS SHIVRAM BARI v. CHUNILAL HAMBIRLAL MARWADI*.

22 Bom. L. R. 1207

—Damages—Prosecutor—Informant to the police—Opinion—Suspicion.

Where the defendant in whose premises burglary was committed gave intimation to the police of the same and the police on suspicion arrested the plaintiff and searched his house

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and found a great number of advertisement articles belonging to the defendant and the defendant declared that they were stolen from his premises and that the police may take such action as they thought advisable, held that the defendant could not be said to have prosecuted the plaintiff or taken part in the conduct of the prosecution so as to render him liable for damages in an action for malicious prosecution.

The defendant's statement that the articles produced before him by the police were stolen articles were only his opinion.

Gaya-Prasad Tewari v. Bhagat Singh (1908) 25 I A 189. *Peria Gounden v. Kuppa Gounden* (1919) 10 L. W. 235 distinguished. (*Sir John Wallis, C. J. and Krishnan, J.*) *M RAJAGOPALA NAICKER v. SPENCER & CO, LTD.* 28 M. L T 298: 12 L. W. 87.

—Essentials of—Burden of proof—reasonable and probable cause, absence of.

To succeed in a suit to recover damages for malicious prosecution the plaintiff must prove among other things, that he was acquitted in the criminal proceedings. (which is *prima facie* proof of malice) that damage was caused to him as a result of the prosecution and that there was absence of reasonable and probable cause on the part of the defendant. (*Mears C. J. and Rafique, JJ.*) *NAZIR HASAN v. BAKHTAWAR*. 56 I. C. 161.

—Prosecution—What is—Dismissal for non-payment of expenses.

A preferred a complaint against B of certain offences. B was summoned into court and appeared to answer the charge. The complainant, however, was dismissed because of the complainant's failure to pay the expenses of the witnesses. B thereupon sued A for damages for malicious prosecution. *Held*, that the facts clearly constituted a "prosecution" and that the suit was maintainable. (*Tudball and Rafique, JJ.*) *AZMAT ALI v. QURBAN AHMAD*.

42 All. 305: 18 A. L. J. 204: 58 I. C. 542.

—Suit for damages against Secretary of State in respect of prosecution by police officer in the performance of duties imposed by legislature—Malice—Liability of Secretary of State for tortious Act. See (1919) Dig. Col. 795.

JAMES SYMONDAS EVANS v. SECRETARY OF STATE FOR INDIA. 2 Lah. L. J. 7: 54 I. C. 950.

MALIKANA—Zemindari Taluk—Alluvial accretion—Right to—Zemindar—Adverse possession,

Plaintiffs were proprietors of a certain zemindari. Defendant was the holder of a Taluk carved out of the zemindari before the Permanent Settlement. The relation of the one to the other had been the subject of long litigation and it was finally settled that the taluk was independent of the zemindari. Defendant

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dant held certain temporarily settled estates as alluvial accretions to his taluk and for more than 12 years continued to pay malikana in respect of these estates to the plaintiffs. When a fresh settlement of the accrued estate was made with the defendant, the Board of Revenue decided that in consequence of the separation of the taluk and its independent status the plaintiffs as zemindars were no longer entitled to the malikana, the estates appearing not to the zemindari but to the taluk. In a declaratory suit brought by the plaintiffs to contest the decision of the Board of Revenue.

Held, that the separation of the taluk from the zemindari altered its legal position and, therefore, the question of the zemindar's right to receive malikana by adverse possession did not arise. The title to the resumed estate followed the title to the taluk and the plaintiffs, as zemindars, ceased to have any shadow or any proprietary right and could no longer claim malikana. (*Richardson and Huda J.J.*)

SRIAMATI RANI HEMANTA KUMARI DEBI v. JAGADINDRA NATH ROY BHADUR.

57 I. C. 614.

MARRIAGE SETTLEMENT—Children's portion—Time of vesting—Daughters—Presumption.

In marriage settlements, and wills of parents there is a presumption of law, subject to any express provision to the contrary, that the settlor or testator as the case may be, intended the portions should vest in the case of daughters, on their attaining majority or marriage, and in the case of sons on their attaining majority whether the children do or not survive the parents. *Swallow v. Bins* 1. K. and J. 417 referred to. (*Twomey, C. J. and Young J.*) *ESTHER E. S. COHEN v. E. I. COHEN.*

13 Bur. L. T. 78

MARTIAL LAW — ORDINANCE (IV of 1919) — Regulation (X of 1804) — Restrictions on the powers of Indian legislature — Right to be tried by the ordinary Courts — Power to take away — Government of India Act, Ss. 65 and 72.

The Martial law (Further Extension Ordinance, 1919 (Ordinance No. IV of 1919) is not confined in its applications to persons taken in the act of committing one of the offences specified in Regulation X of 1804, or to the persons and offences described in Martial Law Ordinance I of 1919, but extends to all offences committed on or after March, 30, 1919.

S. 65 (2) of the Government of India Act, 1915, does not prevent the Indian Government from passing a law which may modify or affect a rule of the constitution or of the Common Law upon the observance of which some person may conceive or allege that his allegiance depends; it only refers to laws which directly affect the allegiance of the subject, as by a transfer or qualification of the allegiance or a modification of the obligation hereby imposed.

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Observations of Phear, J. in 6 Ben. L. R. 392 and 459, at p. 477 appr. In answer to the contention that Ordinance (IV of 1919) contravenes S. 65 (3) of the Government of India Act, 1915 which prevents the Indian Government from empowering any Court other than a High Court to sentence to death any of His Majesty's subjects born in Europe, the Ordinance containing no exception in favour of such subjects.

Held, that the ordinance may properly be described as repugnant to the Act so far as British born subjects are concerned, but that it is void only to the extent of that repugnancy (*i.e.*, in the case of His Majesty's subjects born in Europe. (*Viscount Cave*.) *BUGGA v. EMPEROR.* 1 Lah. 326 : 39 M. L. J. 1 : 24 C. W. N. 650 : 22 Bom. L. R. 609 : 18 A. L. J. 455 : 12 L. W. 296 : 47 I. A. 128 : 56 I. C. 440 : 21 Cr. L. J. 456. (P. C.)

MASTER AND SERVANT—Criminal liability—Breach of terms of license for sale of arrack by servant of licensee—Liability of master. See **MADRAS CITY POLICE ACT**, S. 76.

11 L. W. 413.

—Negligence of servant—Liability of master—Extent of liability. See **RAILWAYS ACT**, S. 62. (1920) M. W. N. 198.

MAXIM—Act of Court—Not to prejudice party.

A person cannot suffer for an act or default of the Court. (*Das, J.*) *DHUNMUN SINGH v. LACHMI LAL.* 57 I. C. 492.

—*Quicquid plantatur solo cedit*—Extent of applicability to India. See **PUNJAB ALIENATION OF LAND ACT**. 54 I. C. 38.

MERGER—Landlord and tenant—Suit for rent.

The doctrine of merger can be applied when the interest in the superior right coalesces with the subordinate right. Plff had the right to collect the entire rent of a fixed rate holding while the defendant had a mortgagee interest in the holding and an entirely separate interest in the proprietary right. *Held*, that the doctrine of merger did not apply and the plaintiff was entitled to collect the entire rent. (*Ferard, S. M. and Harrison, J. M.*) *MAHABIR PRASAD SINGH v. MANKI.* 56 I. C. 677.

MESNE PROFITS—Claim for—Delay in litigation—Claim exceeding—Jurisdiction of trial Court—Transfer to High Court.

Where a person sues for recovery of possession he can in the same suit recover mesne profits which have accrued before the suit and those accruing pending the litigation. The fact that owing to the prosecution of appeal in Higher Courts by the deft. the mesne profits swell up to an amount beyond the limits of the pecuniary jurisdiction of the Court which tried the suit originally thereby necessitating the transfer of the proceedings in the suit to a

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Court of higher jurisdiction does not amount to an interruption so as to make the subsequent proceeding in the Higher Court a different suit. (*Newbould and Shamsul Huda, JJ.*) **BAIKUNTHA NATH KUNDU v MOHANANDA BORAT MODUK.** 24 C W N. 342; 58 I. C. 170

—Liability for —Joint trespassers—Conspiracy.

Where several persons combine and collude in order to dispossess a person, each of them is jointly and severally liable for mesne profits (*Jwala Prasad, J.*) A. T. MEIK v. ISHAN CHANDRA MISRA.

57 I. C 181.

MINOR—Alienation by guardian—Mortgage—Necessity—Proof of—Recital of prior mortgages, effect of.

In a mortgage deed executed by a guardian on behalf of himself and the minor, the consideration was stated to have been credited towards two prior un-registered mortgage deeds, which were not filed nor the existence proved

Held, that the mere recital of the existence of the two mortgages in a subsequent deed does not bind the persons other than the executant, and that it was incumbent to prove that the mortgage was executed for family necessity and for the benefit of the minor on whose behalf the guardian purported to act. 36 All. 187 and 41 Bom. 300 ref. (*Kanhaiya Lal, J. C.*) BABU v. SADA SHENO.

22 O. C. 258

—Alienation by guardian—Suit to set aside—Duty to refund benefit. See SP. REL ACT, S. 41.

54 I. C. 846

—Cheating—Money borrowed by minor as major—Dishonest concealment of facts—Presumption of knowledge of Law—Extension of minority to the age of 21 by appointment of guardian—Whether knowledge of such legal consequence can be presumed against minor accused. Sec. 18 A. L. J. 408.

—Compromise—Appeal pending before Privy Council—Withdrawal—Leave granted on certificate of counsel See PRACTICE, PRIVY COUNCIL.

47 I. A. 88

—Compromise decree—Minor when bound. See C. P. CODE, O. 32, RR. 4 AND 7.

56 I. C. 97

—Contract by guardian—Liability of minor—Rights of creditor—Subrogation.

Where a contract is entered into by a guardian on behalf of a minor in a case in which the minor's estate would have been liable for the obligation incurred by the guardian under the personal law to which the minor is subject, a decree might be passed against the estate of the minor.

Where a guardian borrows money for the necessities of a minor in such circumstances as to give him a right to be re-imbursted from the minor's estate his creditor may in a proper case be subrogated to the guardian's rights. 42.

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M. 183, 26 M 330 Rel. (*Macnair, A. J. C.*) **CHIHOGALAL MEGHRAJ v. KANHAYALAL TARA-CHAND.** 56 I. C 740.

—Contract by guardian for purchase of land—Enforceability of by minor on attaining age—T P. Act S. 55 (1) (d)

It is not within the competence of a guardian of a minor to bind the minor or his estate by a contract for the purchase of immoveable property. The minor in such a case is not bound by the contract and there is no mutuality. Consequently it is not open to the minor, on attaining majority, to enforce specific performance of the contract. 38 C. 232 (P. C) foll. 40 M. 308 (F. B.) 31 M. L. J. 575 and 42 M. 185 36 M. L. J. 29; re, (1912) 23 M. L. J. 610 not foll, (*Spencer and Bakewell, J.J.*) CHODAVARAPU NARAYANA ROW v. VENKATASUBRA Row 38 M. L. J. 77 : 27 M. L. T. 264. (1920) M. W. N. 129 : 55 I. C. 877.

—Contract for sale by guardian—Minor not liable in damages for breach of covenant—Guardian's personal liability. See CONTRACT ACT, S. 11.

11 L. W. 246.

—Decree against—Representation of minor—Defect in.

Where a decree has been made against a minor duly represented by his guardian and the minor attaining his majority seeks to set aside that decree by a separate suit he can succeed only on proof of fraud or collusion on the part of his guardian. If the guardian neglected to support the case of the minor and there is nothing to show that he did so deliberately that circumstance alone would not entitle the minor to avoid the operation of the decree. (*Scott Smith, J.*) IMAM DIN v. PURAN CHAND.

1 Lah. 27 : 55 I. C 833.

—Decree against—when binding—Duty of guardian—Gross negligence of guardian—Burden of proof. See (1919) Dig. Col. 800. BIHARI LAL v. AMIN CHAND.

1 Lah. L. J. 109.

—Estoppel—False representation as to age. See ESTOPPEL.

1 Lah. 389.

—Execution proceedings—Adjustment—Sanction of Court essential—Principle of O. 32, R. 7 C. P. C. applicable. See C. P. CODE O. 32, R. 7.

5 P. L. J. 379.

—Ex parte decree—Negligence of guardian—Sufficient ground for setting aside. See DECREE EX PARTE, SETTING ASIDE.

11 L. W. 289.

—Guardian—Agent appointed by guardian—Suit by minor for account against agent or for particular amount—Not maintainable. See RIGHT OF SUIT.

38 M. L. J. 247.

—Guardian—Personal covenant—Liability of minor.

A guardian cannot bind the estate of a minor by a personal covenant. A hand note executed, by the guardian of a minor cannot bind the

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minor's estate. (*Coutts and Sultan Ahmad, J.J.*) KASHI PRASAD SINGH v. AKLESHWAR PRASAD NARAIN SINGH. **58 I. C. 22**

—Guardian—Power of, to make agreement binding the minor—Limits of—Personal Covenant if binding on minor.

A guardian cannot bind his minor ward by an agreement to make the latter personally liable for future maintenance, although he can bind the estate, if it is subject to a future liability and the covenant be for the benefit of the estate of the minor. A guardian cannot bind the estate of the ward except by an agreement clearly purporting to do so, and that only in certain cases. If persons enter into agreement with the guardian of minors they must, if they wish to bind the estate, take care to see that the agreement expresses such an intention. Unless this is done the estate in the hands of the minor will not be liable. (*Miller, C. J. and Coutts, J.*) RAJ KUMAR JAGANNATH PRASAD SINGH v. MIRZA EKBAL BAHADUR

**5 P. L. J. 239 : 1 P. L. T. 65 :
55 I C 214.**

—Guardian of properties—Agreement of minor's estate in consideration of their standing as surety—Legality of See GUARDIAN ANDWARDS ACT, S 34. **38 M. L. J. 58**

—Guardian—Representation in suit—Person appointed as guardian conditional on furnishing security—Omission to turn'st security—Non-issue of certificate—Effect of—Non-representation of minor. See C. P. CODE O. 32, R. 4. **54 I C 368**

—Mortgage by—Enforceability—Minor representing falsely as being of full age—Mortgagor being aware of his minority estoppel See (1919) Dig. Col. 893. HARNAM SINGH v. NARAINA. **1 Lah. L. J. 122 : 54 I C 876.**

—Promissory note—Execution by—Minor more than 18 years but under 21—Guardian appointed for minor—Note not enforceable against minor—No Estoppel See CONTRACT ACT, S 11 **11 L. W. 596.**

—Representation—Father having adverse interest—Succession on certificate—Revocation of. SUCCESSION CERTIFICATE ACT, S. 18. **18 A. L. J. 314**

MORTGAGE—Chose in action—Mortgagor or—Right to sue on the document. See CHOSE IN ACTION. **11 L. W. 238.**

—Conditional sale—Personal-decree—Covenant.

Where, in a mortgage by conditional sale, there is no personal covenant to pay, the mortgagor is not entitled to sue for a simple money-decree for the mortgage debt. (*Mitra, A. J. C. JETHMAL v. SAROO.* **58 I. C. 30.**

—Consideration—Absence of—Suit by mortgagor for possession.

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In a suit by a mortgages for possession under the terms of a mortgage bond it is not open to the mortgagor to plead want of consideration for the mortgage as a defence. (*Stuart, J. C.*) GOKUL PRASAD v SITALA PRASAD.

56 I. C. 348.

—Construction — Interest — Profits—Rights of mortgagee.

Where under a mortgage the rate of interest which the mortgagee is to receive is fixed and certain he is not entitled to any portion of the usufruct which might be in excess of that rate. The mortgagor is entitled to maintain a suit for accounts to be taken of the profits realized by the mortgagee from the mortgaged property.

It would require very clear words to induce a Court to put upon a mortgage deed such a construction as would entitle the mortgagee to claim interest and such portions of the usufruct as might be in excess of it.

A mortgage provided that the net profits of the mortgaged property, which were estimated at a certain fixed amount, should go towards interest at the stipulated rate due to the mortgagee. If the gross rental fetched by the mortgaged property became deficient afterwards the mortgagor was to pay the deficit. If the revenue assessed on the property has enhanced the mortgagor was to pay the extra revenue, and if by any efforts of the mortgagee the profits derived from the mortgaged property increased, the advantage of that increase would go to the mortgagee. The mortgagor was entitled to redeem the property after the lapse of the fixed period on payment of the principal money secured by the mortgage and such deficient profits or extra revenue as might be due.

Held, in a suit for the redemption of the mortgage the mortgagor was entitled to claim an account of the profits, derived by the mortgagee from the mortgaged property although no provision was made in the deed to cover a case where the profits might increase without any special efforts on the part of the mortgagee. (*Kanhuiya Lal, A. J. C.*) LALA NARAIN DAS v. BAIJ NATH SAHAI.

56 I. C. 692.

—Construction — Occupancy holdings mortgaged—Indemnity clause, not enforceable.

The defendants mortgaged their occupancy holdings to the plaintiffs for seven years and put them in possession. The amount was repayable in instalments from the usufruct. In case the holdings went out of the possession of the mortgagees they were entitled to recover their money by sale of certain groves and a well situate in the village. The mortgagees were dispossessed from the occupancy holdings and sued for sale of the groves and the well.

Held, that the deed embodied one single transaction the main purpose being the mortgage of occupancy holdings, and the right to recover the amount by sale of the groves was

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dependent on the failure of the mortgage of the occupancy holdings and was not enforceable (*Sulaiman and Gokul Prasad, JJ v Tulsiram Ram v. Sat Narin*. 18 A. L. J. 703; 57 I. C. 445)

Construction—Property charged with liability for principal and interest—Provision for redemption on payment of principal—Effect of.

A mortgage-deed stipulated for redemption on payment of the principal mortgage-money but stated that the property was mortgaged for the principal and interest. Held, that the mortgagor could redeem only on payment of the principal sum and the interest due (*Wilberforce J. v. Ghansham Das v. Mubarik*. 56 I. C. 576).

Construction—Right of mortgagee to take possession on default—Waiver—Mortgage—Consideration.

Under the terms of a mortgage the principal and interest were to be paid within a fixed period and on default in payment of interest the balance was to be converted from simple to compound interest. If the total amount due on the deed was not paid by the time fixed, the mortgagee was at liberty either to bring the mortgaged property to sale or to take possession of the property and remain in possession until such time as the mortgage was redeemed or in perpetuity. Default having occurred in the payment of principal and interest the mortgagee accepted certain deeds of further charge in respect of the unpaid arrears of interest.

The mortgagee then sued for possession. Held, that the acceptance of the deeds of further charge by the mortgagee did not amount to a waiver of his remedy as to taking possession of the mortgaged property. The provision for entry into possession was not penal but enforceable.

The question as to whether the full consideration for a mortgage was paid could not be gone into in a suit by the mortgagee for possession of the mortgaged property. Nor can the mortgagor be allowed to redeem the mortgage in such a suit. (*Stuart, J. C. v. Gokul Prasad v. Sitla Prasad*. 56 I. C. 348)

Construction—Sale—Agreement to reconvey—Provision for accounting for profits at the time of demand for reconveyance—Relation of debtor and creditor—mortgage by conditional sale See T. P. Act, S. 58.

18 A. L. J. 478.

Construction—Sale—Bai-bil wafa Ostensible sale with agreement for purchase.

Two documents were executed on the same day and between the same parties. The first purported to be an absolute sale of certain villages. The second was an agreement on behalf of the vendees, the material terms of which were as follows. After a description of

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the property purchased, the agreement continued with a recital that the property had been purchased by the executors for Rs. 6,125 "on this condition that whenever within five years the vendors shall pay to us the amount of consideration mentioned in this document we or our heirs shall have no objection in re-conveying the aforesaid share. If we set up any plea the same shall be invalid and the vendors shall be at liberty to take legal steps and to have the property reconveyed by us . . . They shall also have to pay interest on the whole consideration at the rate of 10 annas per cent. per month out of which the actual produce of the village shall be deducted, and they shall have to pay the balance w. th the consideration money."

Held that the terms of the agreement that interest should be paid on the purchase money and that the profits of the village should be taken into account in order to ascertain the actual sum which the vendors would have to pay to recover the property indicated that the transaction was not merely a sale with a condition for repurchase but a bai-bil-wafa or mortgage by conditional sale.

2 De Gex and J 97 ; 12 All. 387 ; 33 All. 337 ; 38 All. 570 ; Ref. (*Mears, C. J. and Rafiq, J. v. Muhammad Hamid-ud-Din v. Fakir Chand*.

42 A.I. 437.

Construction—Stipulation as to payment of interest—Successful appellant deprived of interest—Purdanashin lady.

Where by a mortgage deed it was stipulated that the mortgagee was to remain in possession and enjoy the rents and profits and "that after the expiry of thirty years at the time of redemption interest shall be paid along with the principal at the rate of 1 per cent. per mensem."

Held, that the mortgage deed did not bind the mortgagor to pay interest from the date of the mortgage and the condition to pay interest only came into force on the expiry of the thirty years.

So interpreted the contract was not one which the executant of the mortgage, a purdanashin lady, could not understand.

The Judicial Committee disallowed interest to the mortgagee from the date of the decree of the Subordinate Judge (which had been reduced by the Judicial Commissioners but on the mortgagee's appeal the Board restored) to the disposal of the appeal by the Privy Council, the case having in its view been hung up by his persistence in asserting an unwarrantable claim of interest from the date of the mortgage. (*Mr. Amcer Ali v. Mohammad Ali Mohammad Khan Babadur v. Qazi Ramzan Ali*. 24 C. W. N. 977 : 23 O. C. 150 : 58 I. C. 891. (P. C.)

Discharge—Assignment of mortgage—No notice to mortgagor—Payment to original mortgagee—Effect of.

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Where after an assignment of a mortgage, the mortgagor after making some enquiries and without notice of the assignment paid money to the mortgagee in full discharge of the sum due and there was no negligence on the part of the mortgagor:

Held, that the payment was binding upon the assignee.

The receipt evidencing the payment does not fall under S. 17 (b) of the Registration Act and that it need not be registered, to enable the Court to admit it in evidence (*Spencer and Krishnan, JJ.*) NEELAMANI PATNAIK MUSSADI v. SUKADEVA BEHARA.

43 M 803 :
12 L. W. 269.

—Equity of redemption—Clog on—Arrangement after the execution of the mortgage—Transfer of property.

The plffs. executed a mortgage to defts. whereby it was provided that if the money was not paid off at the end of twenty years, half the property should be taken by the mortgagor and half by the mortgagee. At the end of twenty years the mortgage money was not paid off, and the defts. remained in possession of the lands mortgaged for four more years. The plffs. then passed a document to the defts. which effected a transfer of half the property to the mortgagee, and brought back into the ownership of the mortgagor the other half free from all encumbrances. Nearly forty-eight years afterwards the plffs. brought a suit to redeem the moiety of the property so retained by the defts. alleging that the arrangement amounted to a clog on the equity of redemption and so was not binding upon them:

Held, dismissing the suit, that the arrangement in question did not amount to a clog on the equity of redemption, for there was nothing to prevent the mortgagor and mortgagee to enter into an arrangement after the mortgage had been executed whereby the mortgage was paid off. (*Macleod, C. J. and Heaton, J.*) SHAN-KARDHONDEV v. YESHWANT.

22 Bom. L. R. 965 : 58 I. C. 384.

—Extinction of — Proprietary rights acquired by mortgagee—Loss of such rights—Revival of mortgage.

Where the proprietary rights acquired by a mortgagee at an auction sale (in execution of a decree obtained by a subsequent mortgagee) were subsequently lost on account of certain proceedings held that the mortgage revived as soon as the proprietary rights acquired by the mortgagee were wiped out. (*Stuart and Kanhaiya Lal, JJ.*) JAI KISHORI v. AFZAL KHANAM.

22 O. C. 349 :
54 I. C. 544.

—Interest — Mortgagee entitled to possession—Omission to take possession—Interest, right to

A mortgagee who is entitled to the possession of the mortgaged property but omits to take any steps to obtain possession under his mortgage, is not entitled to recover damages

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for the period he is out of possession (*Drake-Brockman, J. C.*) BALWANT RAO DOWLAT RAO v. NARHAR GANGARAM.

54 I C 814.

—Interest—Post diem interest—Intention of parties—Damages. See (1919) Dig. Col. 811. GHUMANDI LAL v. KANHAIYA LAL.

1 Lah. L. J. 116.

—Interest—Right to—Delay in litigation on account of mortgagee's conduct—Refusal of interest *pendente lite*. See MORTGAGE, CONSTRUCTION.

24 C. W. N. 977.

—Keeping alive—Payment of charge—Presumption.

The mere fact of a charge having been paid off does not decide the question whether it is extinguished. It depends on the intention of the mortgagee and where it is manifestly to his advantage to keep it alive, equity ought not to destroy it.

The ordinary rule is that a man having a right to act in either of two ways, shall be assumed to have acted according to his interest. 10 Cal. 1035 Rel. (*Coutts and Das, JJ.*) BAJI NATH GOENKA v. DALEEP NARAIN SINGH.

(1920) Pat. 261 : 1 Pat. L. T 582 :
58 I. C. 489.

—Prior and Subsequent—Agreement to share equally money realised—Agreement not registered—If admissible in evidence.

A prior and pu'sine mortgagee both entered into an agreement under which they should as regards rights stand in the same position without claiming prior or subsequent rights and divide and appropriate in equal halves, whatever amount may be realised on the date of realisation and on the realisation of part of the estate by one party the other party sued for his share of the proceeds as per agreement.

Held, that as the present suit related merely to the question of the division of the realised money the agreement need not be registered for the purpose of giving in evidence therein.

Obiter. It may be that the agreement would require to be registered for the purpose of being given in evidence in a suit relating to the regulation of the rights against the mortgaged estate itself. (*Mr. Ameer Ali, JJ.*) T. VYRAVAN CHETTY v. P. SUBRAMANIAN CHETTY.

43 Mad. 660 : 39 M. L. J. 37 :
18 A. L. J. 726 : (1920) M. W. N. 368 :

24 C. W. N. 1053 :

22 Bom. L. R. 1357 : 12 L. W. 143 :
47 I. A. 188 : 56 I. C. 642. (P. C.)

—Prior and subsequent—Mortgage with possession to different persons—Subsequent mortgagee acquiring rights of prior mortgagee—Right of mortgagor to redeem.

In 1867 plff's predecessors in title executed a mortgage with possession of their share in two villages in favour of M. Subsequently they mortgaged the above mentioned share and also six other villages to J. Default being made in payment of interest, J. according to the terms

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of his deed obtained possession of the six villages mortgaged to him but he could not get possession of the share mortgaged with possession to M. Sometime after plif's prodecesor in interest executed a mortgage by conditional sale of the equity of redemption of property mortgaged with M, and J. in favour of N the daughter of M who had succeeded in 1880. Under the terms of this deed N redeemed the mortgage in favour of J, and subsequently N. conveyed to J, all her mortgagee interests under the mortgages of 1867 and 1880.

Held, that the mortgagors could not redeem the first mortgage of 1867 without first redeeming the mortgage in favour of J. On their redeeming that mortgage they would become entitled to possession of the right to redeem the first mortgage. (*Lindsay, J.*) SURAJ BAKHSH SINGH RAJA v. BISHESHAR SINGH

23 O. C. 113 : 57 I. C. 559

—Prior and Subsequent—Sale in execution of decree on prior mortgage—Subsequent suit on puisne mortgagee—Decree.

In a suit by a puisne mortgagee to which the purchaser of the equity of redemption in execution of a decree on the prior mortgage is a party the puisne is entitled to sell the property subject to the prior mortgage. (*Drake-Brockman, J.C.*) GANGADAS v. BHIKAJI. 58 I. C. 295.

—Prior and subsequent—Sale under prior mortgage—Liability to contribute towards puisne mortgage.

Several items of property were comprised in three successive mortgages in favour of the same mortgagee, three items being common to all the mortgages. In execution of decrees on foot of the first two mortgages these three items were sold and purchased by the decree holder the whole of the sale price being absorbed in the decretal amount. *Held*, that these three items having once been sold in part satisfaction of the decrees under prior mortgages could no longer be liable to contribute towards the satisfaction of a decree, obtained on the third mortgage. 19 All 545 foll. (*Tudball and Kanhaiya Lal, JJ.*) BHAGWATI PRASAD v. SHAFAT MUHAMMAD CHAUDHRI.

18 A. L. J. 860 : 58 I. C. 414.

—Prior and Subsequent—Suit by first mortgagee without impleading subsequent mortgages—Decree for sale—Subsequent suit by second mortgagee—First mortgagee only entitled to decree amount. See C. P. CODE, O. 34, RRs. 3 (3) AND 8 (3). 47 I. A. 71.

—Redemption—Clog on—High rate of interest.

It is not open to a plif. in a redemption suit to put forward a case of clog merely upon the ground that a high rate of interest has been stipulated for in the mortgage deed, nor, in the absence of any proof of undue influence or unfair dealing in the stipulation for interest,

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would the plaintiff be entitled to any relief on this head. (*Lindsay, J. C.*) SAHEB BAKSH SINGH v. MAHOMED ALI MAHOMED KHAN.

58 I. C. 115.

—Redemption—Clog—Long period.

The mere fact that a mortgage contains a clause to the effect that the mortgagor shall not be entitled to redeem until the expiry of 50 years from the date of the mortgage, does not amount to a clog on the equity of redemption. (*Lindsay, J. C.*) MAIKU LAL v. GAYADIN.

57 I. C. 603.

—Redemption—Duty of mortgagee to restore status quo-ante—Duty of executing Court

It is the duty of the judgment debtor to restore the *status quo-ante* in execution of a decree for redemption. It is the function of the Court of execution to see that the mortgagee should re-transfer to the mortgagor all the rights which he acquired under the mortgage and should place him in the position in which he was immediately before the execution of the mortgage deed. (*Shadi Lal, C.J.*) MEHMAN SINGH v. NIHAI. 57 I. C. 763.

—Redemption—Limitation—Acknowledgment—Mortgage proved but date unknown—Onus of proving acknowledgment is in time—Presumption.

In a suit for redemption of a mortgage the plaintiff set out and proved all the particulars of the mortgage excepting the date; he alleged but failed to prove that the mortgage was made some time between 1833 and 1839. The defendants denied the fact of the mortgage and also denied that the claim was within limitation. The plaintiff relied mainly on an acknowledgment consisting of an entry in the *wajib-ul arz* of the Settlement of 1863, signed by the predecessors-in-interest of the defendants and enumerating the mortgage in detail, (except as to its date) and mentioning that it was redeemable upon payment in the month of *jeth* of any year. There was no evidence either way as to whether this acknowledgment was within 60 years of the mortgage.

Held, (*Piggott and Walsh, JJ.*) that from the mortgagees' acknowledgment contained in the Settlement record of 1863 no inference could be drawn that the mortgage was at that date subsisting as a mortgage and was not barred by limitation. Before the plaintiff could succeed upon an acknowledgment at all he had to establish that it was made before the expiration of the statutory period of limitation (*Per Banerji, J.*) Where a mortgagee has acknowledged a mortgage, that acknowledgment is *prima facie* evidence until rebutted, that it was a mortgage which subsisted at the time when the acknowledgment was made and was not a mortgage which had become extinct by lapse of time. 11 All, 438 (F.B); 1 All, 117; 17 A,

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L.J.R. 330; 27 Cal. 100f; 38 All. 540; 26 All. 313 Referred to (Banerji, Pigot and Walsh, JJ.) ANUP SINGH v. FATEH CHAND.

42 All. 575 :
18 A.L.J. 789 : 56 I.C. 986.

Redemption — Partial — Failure of consideration — Effect of — Duty of mortgagor to restore possession of properties — Effect of non-delivery of portion of the properties

Where there is only a partial failure of the consideration payable for a mortgage, and loss occasioned in consequence of that failure can only be recovered by a separate suit, and cannot be set off in a suit for redemption.

The duty of a mortgagor to restore at the time of the redemption of the mortgage the mortgaged property to the mortgagor does not arise where possession over that property was not delivered to him at the time of the mortgage or at any time thereafter. (Kanhaiya Lal, J.C.) ANGAD SINGH v. KASHI PRASAD.

54 I.C. 313.

Redemption — Proof of — Unregistered receipt inadmissible — Mortgage put back into possession, effect of.

No particular form of document is required to redeem a mortgage.

An unregistered receipt cannot in itself be used as evidence of redemption of a mortgage, but the Court is entitled to take it into consideration as evidence of the fact that on a particular date a particular sum was paid by the mortgagor to the mortgagee and this coupled with the fact that the mortgagor was put into possession of the property and has continued in possession of it, is good evidence upon which the Court might base its finding that the mortgage has been redeemed. (Rives, J.) CHAUBEY BASDEO v. BEHAKIL

54 I.C. 117.

Subrogation — Auction purchaser — Payment of prior incumbrances — Effect of.

Where property subject to 3 successive mortgages is sold in Court auction the purchaser of the equity of redemption paying off the puisne incumbrance on the property is subrogated to the rights of the puisne incumbrances and is entitled as against third mortgagees to the profits arising from the land and to interest on the 2nd mortgage amount. (Oldfield and Seshagiri Aiyar, JJ.) MALI REDDI AYYAREDDI v. GOPALAKRISHNAYYA 12 L.W. 101 : 58 I.C. 493

Subrogation — Right — Direct payment if necessary to give right — Partial subrogation.

A mortgagee who pays off an earlier mortgage is entitled to be subrogated not only to the rights of that mortgagee but also to the rights of the mortgagee who was paid off by that (intermediate) mortgage amount. In determining whether the right of subrogation

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exists or not what must be taken into account is not the hand that pays the money but the intention of the parties *viz* whether by paying the money the earlier mortgage was intended to be kept alive.

The right to subrogation might be full or partial according to circumstances (Seshagiri Aiyar and Moore, JJ.) CHUNDAN V. O. ABARTHORAMAN KURTI v. ITTIKAPARAMBILATHAN 11 L.W. 215 : (1920) M.W.N. 143 : 55 I.C. 658.

Subrogation — Subsequent encumbrancer paying off prior mortgage.

A subsequent encumbrancer paying off a prior encumbrance with the consideration money of his encumbrance, in pursuance of a stipulation in the mortgage bond that he and not the mortgagor shall pay off the prior encumbrance, can, in the absence of any indication to the contrary be presumed to have wished to make that payment by his own hand with a view to keep the prior encumbrance alive for his own benefit. 9 Cal. 96 expl 10 Cal 1935 appl (Ayling and Coutts Trotter, JJ.) CHIDAMBARA NADAN v. MUNI NAGENDRAYYAN 39 M.L.J. 445 : 12 L.W. 393 : 28 M.L.T. 300 : (1920) M.W.N. 534 : 58 I.C. 813.

Substituted security — Mortgage of undivided share by co-sharer — Subsequent partition — Mortgage property allotted to another — Decree for sale — Partition after decree and before sale.

It is an incident of a mortgage of an undivided share in joint property that the mortgagee cannot follow his security into the hands of a co-sharer of the mortgagor who has obtained the mortgaged share upon partition and the mortgage then is transferred to that portion of the joint property which the mortgagor obtains at the partition.

Where the final decree for partition under which the mortgaged share was allotted to a co-sharer of the mortgagor was passed after a decree for sale of the mortgaged share had been passed in favour of the mortgagee but before the actual auction sale, mortgaged share which had ceased to be the property of the mortgagor could not be sold under the decree, and that decree could not affect the interest obtained by the co-sharer under the partition. If a mortgagee before he obtains a decree for sale is bound to submit to a substitution of the mortgaged property effected by partition, he is equally bound to do the same even after his decree, unless the sale has already taken place before the partition.

Where property has devolved on a third person by operation of law and the decree for sale is not binding on him, the existence of the decree and a sale in pursuance of it cannot convey his rights to the purchaser at the sale

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L. R. 1 I. A. 107 (P.C.): 24 All 483; 20 Cal. 533; 33 Mad. 429; 34 M. 175; 35 Cal. 388; 6 C. L. J. 46 Ref. (*Bancerji and Sulaiman, JJ*)
BHUP SINGH v. CHEDDA SINGH.

**42 A.I. 596 : 18 A. L. J. 807 :
58 I. C. 171.**

—Substitution of security—Land Acquisition proceedings—Redemption.

Where the mortgaged property had been acquired under the Land Acquisition Act held that the mortgage could not be redeemed as the mortgaged property had been destroyed and had ceased to exist. 20 O. C. 256 foll. (*Stuart, J. C.*) **LADLI PRASAD v. NIZAM-UD-DIN KHAN.**

22 O. C. 342 . 54 I. C. 535.

—Suit to enforce—Questions for consideration—Transfer by mortgagor of his interest—Validity of not to be gone into.

In a suit to enforce a mortgage brought against the mortgagor and the vendee of the equity of redemption the question whether the mortgagor had a transferable interest ought not to be gone into. The sole question in such a suit is whether the Court should enforce the security as regards the right, title and interest of the mortgagor. (*Fletcher and Cuming, JJ*) **DUDALI UAYAL v. BELO DEBI.**

54 I. C. 806.

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—Accounts—Usufructuary mortgage—Redemption—Malikhana—Enhancement or reduction of Government revenue—Construction of document. See (1919) Dig. Col. 817 **MAHARAJ SINGH v. LALTA PRASAD.**

57 I. C. 774

—Accounts—Usufructuary mortgage—Rent deduction of though time barred.

A usufructuary mortgage provided that the mortgagee should pay the annual rent to the landlord but he failed to do so and the debt became time barred. The mortgagor sued for redemption and claimed to be entitled to deduct the sums which should have been paid by the mortgagee: Held, that the mortgagor was not entitled to the deduction he claimed and that the mortgagee was entitled to the benefit of the non-payment. (*Das, J.*) **TOKHAN PANDEY v. SIVAKANTA PROSAD SINGH.**

56 I. C. 743

—Extinguishment of debt—Acquisition of share of equity of redemption by mortgagee—Debt proportionately abates but is not totally extinguished See T. P. ACT S. 82.

(1920) **M. W. N. 325.**

—Grove land—Lease by mortgagee with possession—Binding on mortgagee.

A mortgagee of grove land can let out the land for agricultural purposes, and such letting is binding on the mortgagor. Where grove land is so let, the mortgagor cannot set up that it was not held for these purposes. (*Hopkins, J.*) **GAJADHAR v. BENI PRASAD.**

56 I. C. 819.

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—Manager of mortgaged property—Possession on behalf of mortgagor—Mortgagee not liable for default.

A mortgagee, before lending his money, can insist upon the mortgagor appointing a manager in respect of the property mortgaged, in whom the mortgagee has some confidence.

Possession by such manager is possession on behalf of the mortgagor, and the mortgagee is not liable for any default or waste in mismanagement on the part of the manager.

Where the mortgage conferred very wide powers on such manager but there was nothing to suggest that the mortgagor was misled, the mortgage would be enforceable according to its terms. (*Sir John Edge*) **MATILAL DAS v. THE EASTERN MORTGAGE AGENCY CO. LTD.**
28 M. L. T. 351 : (1920) M. W. N. 631 : 47 I. A. 265,

—Mesne profits—Right to—Period prior to passing of final decree in redemption suit.

A mortgagee is not obliged to vacate possession of the mortgaged property until he has received the full mortgage money. A mortgagor cannot therefore sue the mortgagee for mesne profits for a period prior to the passing of a final decree in his favour in a redemption suit filed by him. (*Lindsay, J. C.*) **MANSAB ALI v. SAKHWAT HUSAIN.**

55 I. C. 503.

—Mortgage to tenants in Common—Rights of individual events—Suit by one—Nature of the decree to be passed—Mortgagee—Pardanashin ladies—Test to be applied in determining validity of transaction. See (1919) Dig. Col. 819. **SUNITABALA DEBI v. DHARA SUNDARI DEBI.**

47 Cal. 175 :

**22 Bom. L. R. 1 : 11 L. W. 227 :
24 C. W. N. 297.**

—Right of—Growing crops at the time of redemption—Right of mortgagee to enter land. See (1919) Dig. Col. 820. **MAUNG GAW-YA v. MAUNG TALOK.**

13 Bur. L. T. 127.

—Right to possession—Usufructuary Mortgagee not taking possession—Suit for mortgage money and interest thereon.

In 1910, the defendants mortgaged their land with possession to the plaintiff for a period of one year. It was provided by the deed of the mortgage that the profits should be enjoyed in lieu of interest, that if the mortgage amount was not paid on the due date, the plaintiff was at liberty to sell the property and that the mortgagor was personally liable for the deficit. The plaintiff never went into possession of the property. In 1918, he sued to recover the mortgage amount with interest at 12 per cent. from the date of the mortgage to the date of payment:—

Held, that the plaintiff was only entitled to the mortgage amount and not to any interest.

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since the terms of the deed clearly showed that the mortgaged property was a security only for the amount borrowed and not for interest and it was the fault of the plaintiff himself if he took no steps to recover possession of the mortgaged property (*Macleod, C. J. and Fawcett, J.*) **MANIKCHAND MAGANCHAND GUJAR v. RANGAPPA KONDAPPA KORPE.**

22 Bom. L. R. 1435.

—*Suit for possession by usufructuary mortgagee—Portion of mortgage money not paid—Effect of—Decree—Form of.*

A executed a usufructuary mortgage in favour of B. The full consideration for the mortgage was not paid, a part of it being left with B to pay off other debts due by A. These debts were not paid nor was possession given to B. B sued for possession. Held, that the mortgage was a good mortgage for the amount of consideration actually paid and that B was entitled to possession on payment by him of that portion of the consideration which was left with him. In such a suit the mortgagor had no right to elect whether possession should be delivered or the mortgage should be redeemed, nor could the amount payable on redemption be determined. (*Lyle, A. J. C.*) **GAJADHAR CHAUBEY v. SANT BAKSH SINGH.**

58 I. C 161

MOTOR VEHICLES ACT (VIII OF 1914), S. 8.—Driving without license—Demand by police officer—License at home—Conviction.

Where "upon demand" by a police officer a person driving a motor vehicle could not produce his driving license then and there held, that he was guilty of an offence under S. 8 of the Motor Vehicles, Act, 1914. (*Tubball, J.*) **MIDAN MOHAN NATH RAINA v. EMPEROR.**

18 All. L. J. 933:

58 I. C 148 : 21 Cr. L. J. 724.

MULGENI—Covenant against alienation—Right of re-entry—Breach of Covenant—Forfeiture—No power to relieve against forfeiture. See **LANDLORD AND TENANT, COVENANT**

38 M. L. J. 190.

—Permanent tenant of—Right of landlord to recover rent from sub-tenant. See **LANDLORD AND TENANT.**

22 Bom. L. R. 118.

NATTUKOTTAI CHETTIES — Bankers.

It is a matter of general knowledge recognised in various decisions of the Madras High Court that Nattukottai Chetties are really the Indian bankers of this part of the country. (*Wallis, C. J. and Moors, J.*) **THE OFFICIAL ASSIGNEE OF MADRAS v. RAMASWAMI CHETTIY.**

43 Mad. 747

39 M. L. J. 135 : 12 L. W. 89 :

(1920) M. W. N. 424.

NEGOTIABLE INSTRUMENT — Hundi—Drawee orally accepting Hundi — Liability of.

NEGO. INST. ACT. S. 4.

By mercantile usage at Delhi a drawee who has accepted a Hundi orally is liable on the instrument. (*Shadi Lal and Bevan Petman, JJ.*) **PANNA LAL LACHMAN DAS v. HAR GOPAL KHUBI RAM.**

1 Lah. 80 : 55 I. C 931.

—*Hundi — Estoppel — Indorser not estopped from setting up the invalidity of the instrument against the indorsee*

The indorser of a negotiable instrument is not estopped as against the indorsee from setting up the invalidity of the negotiable instrument, as for instance that the instrument offends against S. 26 of the Paper Currency Act.

The observations in *Arunachellam Chettiar v. Narayanan Chettiar* 42 Madras 470 to the contrary are purely obiter, (*Abdul Rahim and Oldfield, JJ.*) **ALAGAPPA CHETTY v. ALAGAPPA CHETTIAR.**

39 M. L. J. 573.

NEGOTIABLE INSTRUMENTS ACT (XXVI of 1884)—Scope of—Bills—Notes.

The Negotiable Instruments Act deals only with promissory notes and bills of exchange and the distinction between these instruments is, that in a promissory note the executant promises himself to pay, in a bill of exchange he directs another to pay and the person liable is the responsible executant who has signed it and not he who has scribed it for execution by another. (*Stanyon, A. J. C.*) **RADHA KISAN v. HIRA LAL.**

58 I. C. 313.

—*S 1—Instruments in oriental language—Law governing.*

Per Spencer, J.:—The exception to S. 1 of the Negotiable Instruments Act in favour of instruments in an oriental language saves them against the provisions of that Act overriding local usages but does not prevent the application of other Acts to such instruments. A hundi drawn payable to bearer on demand is illegal even though drawn in an oriental language, (*Sadasiva Aiyar and Spencer, JJ.*) **VEERAPPA CHETTY v. MUTHURAMAN CHETTY.**

12 L. W. 12 : 58 I. C. 508.

—*Ss. 4 and 16—Amending Act of 1914—Alternative endorsement—What is Assignment of chose in action.*

A document otherwise conforming to the form of a promissory note was made before 1914 payable to three several payees alternatively. On the back of the document one of the payees made an acknowledgment of payment of money due thereunder and signed it.

Held, that the document was not a promissory note as defined in S. 4 of the Negotiable Instruments Act. The Amending Act validating promissory notes payable to alternate payees has no retrospective operation and cannot validate the suit document executed before the coming into operation of the Amending Act.

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The acknowledgment of receipt of payment is not an endorsement in full or blank as defined in S. 16 of the Negotiable Instruments Act nor can it be construed, in the absence of operative words of transfer as affecting an assignment of an actionable claim under S. 130 of the T. P. Act. (*Spencer and Odgers, JJ.*) *AMPU v. RAMUNNI.*

(1920) M. W. N. 600 :
28 M. L. T. 262

—S. 4—Applicability—Promissory Note payable—Maafat another person. See (1919) *Dig. Col.* 823. *MELA RAM v. BRJ LAL.* 54 I.C. 976.

—Ss. 4 and 80—Promissory note payable “certain”—Manager of Bank—Interest—Promise to pay—Enlargement of time.

A promissory note payable to the manager of a Bank is payable to a “certain person” within S 4 of the Negotiable Instruments Act.

S. 80 being an enabling section is no bar to the recovery of the interest which the debtor subsequently to the execution of the promissory note agrees to pay in consideration of the creditor not pressing his demand immediately. (*Jwala Prasad and Adami, JJ.*) *MAHANT DAMODER DAS v. BENARES BANK LTD.*

5 P. L. J. 536 : 1 Pat. L. T. 691 :
58 I. C. 265.

—Ss. 5 and 4—Hundi—Nature of. Hundis are negotiable instruments written in some oriental language, being sometimes bills of exchange, and at others promissory notes and are subject to local usages are unaffected by the provisions of the Negotiable Instruments Act. In a suit based on a hundi, the first essential is, whether the hundi is a promissory note or a bill of exchange, if it is a promissory note, the provisions of that Act relating to bills of exchange ought to be applied; if it is neither one nor the other, the Act cannot be applied, the case being governed by the general law of contract. (*Stanyon, A. J. C.*) *RADHA KISAN HIRALAL.* 58 I. C. 313.

—S. 8—Pro-note in the name of son—Suit for declaration by father.

Where a Hindu son lends his father's money with the latter's consent and obtains a promote in his own name, he is the “holder” of the note under S. 8, of the Neg. Ins. Act, and the father cannot maintain a suit for a declaration that the pro-note belongs to him.

The presumption is ordinarily that when a man lends money in his own name and a negotiable instrument is executed in his favour, the money lent is his, unless fraud or misrepresentation is alleged. (*Pratt, A. J. C.*) *MA NYI MA v. MA MAUNG YAN SHIN.* 57 I. C. 881.

—Ss. 13 and 46—Promissory note payable to specified person or order—Negotiation.

NEGO INST. ACT. S. 35.

A promissory note payable to a specified person or order is a negotiable instrument and is negotiable by endorsement and delivery but a verbal assignment of such a note is not recognised by law. (*Maung Kin, J.*) T. A. R. A. R. M. CHETTY FIRM v. SOLOMON.

13 Bur. L. T. 37 ; 55 I. C. 718.

—S. 17—Hundi drawn by a firm on its branch—Nature of—Liability under.

A hundi was drawn by a firm at A. on its branch at B to pay a certain sum of money within a prescribed number of days. At B the hundi was indorsed to X, who paid the full value of the instrument. In a suit by X on the hundi:

Held, that the hundi was a promissory note and was governed by the provisions of the Negotiable Instruments Act and that both the drawer and the indorser were liable jointly and severally for half the amount and that the indorser alone was liable for the remainder. (*Stanyon, A. J. C.*) *RADHA KISAN v. HIRALAL.* 58 I. C. 313.

—S. 20—Applicability of—Delivery of signed hundi left blank—Stamp affixed thereto—Attachment of unsigned stamp without authority—Effect of—Estoppel.

The estoppel arising from S. 20 of the Negotiable Instruments Act cannot be applied to the paper or papers which the signature covers. The delivery of a hundi paper signed but left blank cannot be taken to give *prima facie* authority to make thereon a negotiable instrument outside the maximum value covered by the stamp by attaching thereto other unsigned stamps. The delivery of several signed stamps separately does not give *prima facie* authority to stick them together for the purpose of a single instrument. It is only when the signature is across two or more stamp papers pasted together showing thereby that the several stamps have been united with the sanction of the person making the signature, that S. 20 will govern as one transaction an instrument engrossed upon the joined papers. (*Stanyon, A. J. C.*) *GOKULDAS NARAINSUHKDAS v. RADHAKISAN.* 54 I. C. 3.

—S. 28—Promissory note by agent—Undisclosed principal.

Where a promissory note is executed by an agent who does not disclose the name of his principal to the promisee the agent is liable on the promissory note. 17 A. L. J. 405 (P. C.) Referred to. (*Piggott and Karhaiya Lal, JJ.*) *NASIBULLAH v. KUNWAR ANAND SINGH.* 42 All. 642 :

18 A. L. J. 831 : 57 I. C. 45.

—Ss. 35, 45 A. and 81—Loss of Hundi before presentation—Duplicate not obtained—Liability of indorser does not arise until dishonour.

S. 35 of the Negotiable Instruments Act restricts the liability of the indorser to cases

NEGO. INST. ACT, S. 64.

where the negotiable instrument has been dishonoured by the drawee and notice of dishonour has been given to the indorser; in other words, the fact of the bill of exchange having been dishonoured and the intimation thereof to the indorser, are conditions precedent to his being made liable thereunder.

In discharge of a certain liability of his to the plaintiffs, the debt indorsed to them a hundi drawn by T.R. on B.M. The plaintiffs endorsed to R. and R. to N. N lost the hundi. He did not take any steps under S. 45 A of the Negotiable Instruments Act, to obtain a duplicate, and he did not demand payment from the drawee by giving security under S. 81; but he brought a suit against R., and recovered the amount from him. R. then sued the plaintiffs, and reimbursed himself from them. The plaintiffs then sued the debt, for recovery of the amount which they had to pay. Held, that the hundi never having been dishonoured, the contingency of the debt's liability did not arise. (*Piggott and Gokul Prasad, JJ.*) *SANEHI LAL v. ONKAR MAL,* 18 A. L. J. 981.

—S. 64—Hundi—Presentation—Other parties—Meaning of.

Under S. 64 of the Negotiable Instruments Act presentation for payment is necessary in order to charge the acceptor of a hundi.

The words "other parties" in S. 64 of the Negotiable Instruments Act mean parties other than the holder. 21 All. P. 450; 32 Bom. p. 247, not foll. 18 Mad. P. 172, 41 All. p. 40 Ref. (*Daniels, J. C.*) *THE OUDH COMMERCIAL BANK, LIMITED LUCKNOW v GUR DIN.*

23 O. C. 364.**—Ss. 76 and 98—Endorsement of Hundi—Consideration—Presumption—Presentation of Hundi for payment Necessity of.**

When the holder of a Hundi endorses it in favour of another person, there is a presumption unless rebutted by good evidence, that he had received consideration.

The provisions of S. 76 (d) of the Neg. Instr. Act are by way of exception to the general rule that presentation for payment is necessary and the burden is on the person who claims that his case falls within that exception and wished to make the drawer liable in spite of non-presentation to prove that the drawer could not suffer damage on account of non-presentation to the acceptor.

Under S. 76 (b) of the Negotiable Instruments Act the engagement to pay must have been entered into prior to maturity. 33 All. 4 and 26 Mad. 239. Referred to. (*Lyle, J. C.*) *THAKUR DIN v. THE OUDH COMMERCIAL BANK, LTD.*

23 O. C. 91.**57 I. C. 304.****—Ss. 76 and 98 (1)—Presentation—Mere demand if sufficient—Presentation when unnecessary—Dishonour—Omission—Notice.**

In order to comply with the law the holder must exhibit the bill to the person from whom he demands payment and offer to deliver it

NEGO INST. ACT, S. 87.

upon payment. Mere demand of money does not amount to presentment.

No presentment is necessary and the instrument is dishonoured, inasmuch as neither the acceptor nor any other person on his behalf went to the drawee on or before the due date and offered payment.

The rule requiring the holder to give notice of dishonour to the person or persons other than the drawee or acceptor whom he seeks to make liable on the bill rests upon solid ground and does not admit of any departure except in the case enumerated in S. 98;

The plaintiff could not succeed in showing that the drawers could not suffer damage from the failure to give notice, and the suit against the drawers must fail on the ground of want of notice of dishonour.

Waiver of notice with respect to one of the hundis is no bar to a legal objection applying to another bill, viz., the want of notice of dishonour with respect to the hundi upon which the suit was based (*Shadi Lal and Martineau, JJ.*) *RAM SINGH v. GULAB RAI, MEHR CHAND.*

1 Lah. 262:**2 Lah. L. J. 316: 55 I. C. 610.****—Ss. 87, 93 and 98—Hundi—Alteration of period of payment without consent of drawers.**

An alteration in Hundi reducing the period of payment is a material alteration within S. 87 of the Negotiable Instruments Act, and plff. having failed to prove that this was done with the consent of the drawers or in order to carry out the common intention of the original parties, the hundi was thereby rendered void as against them, and plff. could not be allowed to fall back upon the contract as it existed prior to the alteration. (1881) 9 Q. B. D. 555 foll.

The fact that the hundi was not presented for payment on due date did not in this case have the effect of non-suiting the plff. as the Hundi was expressly payable at the Alliance Bank of Simla at Delhi, and neither the acceptor nor any person authorized to pay had attended there during the usual business hours. Presentation was therefore, not necessary under S. 76 (a) of the Act.

The law embodied in S. 93 of the Act requires the holder to give notice of dishonour to the person or persons other than the drawee or acceptor whom he seeks to make liable on a bill. This rule does not admit of any departure except in the cases enumerated in S. 98 and as the plff. in this case had failed to prove the only exemption relied upon by him viz., that the party charged could not suffer damage for want of notice, his suit against the drawers must also fail on the ground of want of notice of dishonour. (*Shadi Lal and Martineau, JJ.*) *RAM SINGH v. GULAB RAI MEHR CHAND.*

1 Lah. 262:**2 Lah. L. J. 316: 55 I. C. 610.**

NEG INST. ACT, S. 98.

S. 98—Onus of proof—Exception to the Rule.

S. 98 of the Neg. Inst. Act contains the exceptions to the general rule requiring notice of dishonour, and it is for the person relying upon any such exception to establish all the requirements thereof. (*Shadi Lal and Martineau, JJ.*) RAM SINGH v. FIRM OF GULAB RAI 1 Lah 262 : 2 Lah L.J. 316 : 55 I.C. 610

S. 105—Time for presentation of bill of exchange—Law or fact

The question of the reasonableness of the time for presenting a bill of exchange for payment is a mixed question of law and fact 31 M. 364, dist. (*Shadi Lal and Dundas, JJ.*) FIRM OF KATASI SINGH-KAHAN SINGH v. DAULAT RAM-KIRPARAM.

1 Lah L.J. 158 : 56 I.C. 936

S. 118—Presumption—Criminal trial—Perjury

In a prosecution for perjury for having falsely stated in a civil suit that certain promissory notes which had been executed by the accused were without consideration, Held, that the rule of law enacted by S. 118 Negotiable Instruments Act and creating a presumption that a promissory note was for consideration would not necessarily apply to a criminal trial, and that it was necessary for the prosecution to prove that the promissory notes were for consideration, and for the accused to prove the contrary, (*Gokul Prasad, J.*) SAKHAWAT HAIDAR v. EMPEROR. 18 A. L.J. 1151.

S. 118—Shah Jog Hundī—Consideration—Onus probandi—Second appeal.

N. M drew upon himself two Shah Jog hundies in favour of M. R., one on 5th November 1914 payable after 31 days, and the other on 9th November 1914, payable after 61 days. On 15th December 1914 N. M brought an action for cancellation of the hundies on the ground that they were without consideration. A week later M. R. brought a counter-action claiming principal and interest on the earlier hundi; the period for payment on the second hundi had not then expired. Both actions were tried together and the first Court held that the onus of proving want of consideration was on N. M., the drawer, and that he had failed to discharge it. On appeal the Additional District Judge, placing apparently the onus of proving consideration on M. R. the drawee held that he had proved consideration on the second hundi but not on the first.

Held, on second appeal that the hundi in dispute is what is called *Shah Jog* hundi (*i.e.* a bill payable to a Shah or banker, which is similar to some extent to a cheque crossed generally, which is payable only to, or through, some banker, and that such a hundi satisfies the requirements of a negotiable instrument.

Under S. 118 of the Negotiable Instruments Act there is a statutory presumption in favour

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of the passing of consideration and that the onus of proving want of consideration was therefore upon the drawer.

In cases of this character in which the question of allocation of onus is the most vital question between the parties, it is the duty of the Court in Second Appeal to rectify a mistake made by the lower Appellate Court in this respect. (*Shadi Lal and Wilberforce, JJ.*) MADHO RAM v. NANDU MAL 1 Lah 429 : 58 I.C. 982.

S. 135—Bills of exchange—Foreign bills—Dishonour—what Constitutes—Notice of dishonour—Acceptance—Drawee's obligation to accept drawer's right to notice—Custom of trade usage—Contract—Effect of war on performance of—Negotiable Instruments Act S. 135—English Bills of Exchange Act 45 and 46 Vic. Ch. 61 Ss 42, 50 (2) and (4)—Law applicable See (1919) Dig. Col. 826 SUKHLALL CHANDANMULL v. THE EASTERN BANK LTD. 58 I.C. 641.

NUISANCE — Injunction — Worship — Disturbance by assembly. See SP. REL. ACT, S. 55. 1 Lah. 140.

OATHS ACT, (X of 1873) Ss 9 and 11—Criminal proceedings before village patil —Special oath not permissible.

Ss. 9 to 11 of the Oaths Act 1873 are not intended to apply to criminal proceedings nor to proceedings before a Village Police Patil under Ss. 14 and 15 of the Village Police Act 1867. (*Shah and Hayward, JJ.*) EMPEROR v. CHIMAN DAMODAR BHATE

22 Bom L.R. 898 : 58 I.C. 147 : 21 Cr. L.J. 723.

S. 13—Omission to administer oath or affirmation—“Effect of—Witness of tender years—Merc irregularity,

Where in a case under S. 304. I.P.C. a girl was examined as a witness without oath or affirmation, the trial Judge being of opinion that she was too young to take oath or give affirmation ;

Held, that on the authority of the Full Bench in 14 Beng L.R. 204 the omission to administer an oath or affirmation even if intentional would be cured by S. 13 of the Oaths Act and the evidence of the child was admissible (*Walmley and Greaves, JJ.*) EMPEROR v. SASHI BHUSAN MAITY. 24 C.W.N. 767 : 32 C.L.J. 31 : 58 I.C. 817.

OCCUPANCY HOLDING—Abandonment of—Evidence of—Non-payment of rent—Effect of. See (1919) Dig. Col. 829 SEPARJAN v. RAMDEB RAI. 24 C.W.N. 717 : 55 I.C. 360.

Execution sale of — When valid—Money decree in favour of landlord—Consent of tenant—Stare decisis.

Whatever might have been the law earlier the occupancy raiyat enjoys under the B. T. Act substantial rights in the land and his in-

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terest cannot be appropriately described as a merely "personal right" or "personal privilege".

Apart from custom or local usage, the transfer for value of an occupancy holding in whole or in part is operative against the raiyat, whether it is made voluntarily or involuntarily.

But such transfer is not effective against his landlord without his consent.

The sole landlord of a raiyat is therefore competent to sell in execution of a money decree against his raiyat, whether his occupancy holding be or be not transferable by custom or usage.

The doctrine of *stare decisis* did not stand in the way of overruling the decision in 24 Cal. 355, which by putting forward for the first time in 1897 the view that an occupancy right cannot be transferred unless both the landlord and tenant consented, was really departing from the law as previously administered for over 60 years, specially as that view had not been uniformly followed since. By setting it aside the Court would not embark on trade or commerce or affect transactions which might have been adjusted, rights which might have been determined, titles which might have been obtained or personal status which might have been acquired but would only be removing what had hitherto been erroneously regarded as a fetter upon the right of the execution creditor to realise his dues by the sale of an occupancy holding. (*Mookerjee, C. J. Fletcher, Chatterjee, Teunon Richardson, Chaddhuri and Shamsul Hudda, JJ.*) CHANDRA BINODE KUNDU v. SHEIKH ALA BUX DEWAN. 24 C. W. N. 818:

31 C. L. J. 510 (F. B.)

Mortgage — Relinquishment of Rights of landlord.

The relinquishment by a tenant of his occupancy holding after a mortgage thereof extinguishes his occupancy rights in such holding. (*Ferrari, S. M. and Harrison, J. M.*) MUSSAMMAT NAUBAT BIBI v. RAGHUBAR KOERI. 57 I. C. 184.

Non-transferable — Mortgage of Purchase by mortgagee in execution of decree — Subsequent purchase in execution of rent decree by co-sharer landlord owing 8 as share — Mortgagee — Purchaser dispossessed — Suit for possession.

An occupancy holding was mortgaged and in execution of the mortgage-decree the decree-holder purchased the same and obtained delivery of possession and mean-while the eight annas co-sharer landlord sued the mortgagor tenant for his share of rent and obtained a decree and in execution of that decree he purchased the holding and dispossessed the mortgagee execution purchaser. Thereupon the latter brought a suit for declaration of his title and recovery of possession.

Held, that in the absence of a finding of transferability the plaintiff was entitled to

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joint possession with the co-sharer landlord with respect to eight annas share of the holding and that the co-sharer landlord should succeed in his claim to possession of the property to the extent of his eight annas share.

Although the co sharer landlord viewed in his character as purchaser in an execution sale of the right title and interest of the tenant is not entitled to raise the question of transferability of an occupancy holding in the character of a co-sharer in the superior interest, he is entitled to raise the question of transferability to the extent of his share, and in the event of the sale of such holding without the consent of the co-sharer landlord the purchaser can be evicted by the co-sharer landlord to the extent of his own share (*Atkinson and Adami, JJ.*) NARPAT SINGH v. DOMI LAL CHOWDHURY. (1920) Pat 200 : 57 I. C. 51.

— Non-transferable — Transfer in favour of heir — Right of landlord to re-enter.

A tenant of a non-transferable occupancy holding purported to transfer the holding in favour of his wife and daughter but remained on the holding and resided at the house erected on a portion thereof down to the date of his death.

Held, that the possession of the widow and daughter, after the death of the tenant was lawful possession as heirs and that the landlord did not acquire a right of re-entry. (*Fletcher and Cuming, JJ.*) GOLAPJAN BIBI v. DIL MAMUD. 54 I. C. 394.

— Transfer of Mortgage to proprietors — Sale to co-proprietor to satisfy mortgage if valid.

Quaeris: whether in the case of a mortgage to the landlords of a raiyati holding, where the holding is not transferable without the landlord's consent, they are bound to permit the mortgagor to transfer the holding to anybody whom he may choose (a co-proprietor) in order to put himself in funds to pay off the mortgage. (*Dawson Miller, C. J. and Coutts, J.*) KAMLA-PRASAD CHOUDHRY v. KUNJI BEHARI MANDER.

5. P. L. J. 344:
1 Pat L. T. 625 : 57 I. C. 11.

— Transfer of — Tenant continuing in possession and paying rent — Ejection.

A tenant of a non-transferable holding after selling his interest therein continued in possession and paid rent to the landlord which the latter accepted even after the transfer of which he had notice.

Held, that the landlord having continued to receive rent from the tenant could not eject him on the ground that he had sold his holding (*Newbold, J.*) RADHIKA MOHUN ROY v. UTTAM PARBAT. 55 I. C. 432.

OPIUM ACT, (I of 1878) Ss. 3 and 9 (d) and (f) — Opium — Morphia — Sale and transport of without license — Infringement of Rules.

OPIUM ACT, S. 4.

Morphia is not included in the term "opium" as defined in Opium Act not being a preparation or admixture of opium or a drug prepared from the poppy.

The sale and transport of morphia (or anti-opium pills containing morphia) without a license is not an offence under the Opium Act and the fact of the petitioner's having infringed the rules regulating the sale and transport of morphia is immaterial if there is no penalty for their infringement. (*Martineau, J.*) *SITA RAM v. EMPEROR.*

1 Lah 443
2 Lah. L.J. 711.

Ss. 4, 9 and R. 43—Selling more than two tolas of opium to one person—Whether punishable under S. 9. See (1919) *Dig. Col. 832. DAULAT RAM v. EMPEROR.*

54 I. C. 884 : 21 Cr. L. J. 180.

S. 9—Sale of morphia by medical practitioner—Offence.

There is a clear distinction between use of such morphia in practice by an approved medical practitioner and sale to his patients and such sale is punishable under S. 9 of the Opium Act (*Chaudhuri, and Newbold, J.*) *JOGESH CHANDRA LAHIRI v. EMPEROR.*

24 C. W. N. 343
56 I. C. 657 : 21 Cr. L. J. 497.

ORDINANCE (II of 1915) Ss (2) and (9)—Serving under war conditions—Meaning of—Court to act under S. 9.

Serving under war conditions, does not necessarily mean serving abroad. The term is defined in the ordinance.

The case was one in which the Court should have acted under S. 6 of the Ordinance.

Held, further that all possible indulgence ought to be extended, if it is true that the plaintiff served in France (*Bevan Petman, JJ.*) *GURBACHAN SINGH v. RALLA RAM.*

2 Lah. L.J. 37 : 56 I. C. 947.

ORISSA TENANCY ACT (II of 1913 S. 31—Transfer of occupancy holding—Landlord, consent not necessary—Fee for registration not payable.

Whenever an occupancy holding in Orissa is transferred, whether the transfer be with or without the consent of the landlord, the transferee must apply for registration of the transfer and is bound to pay a fee for such registration (*Coutts and Das JJ.*) *BALMAKUND KANUNGOE v. MRITUNJOY PAHARAJ.*

5 P. L. J. 357:
1 Pat. L. T. 593 : 57 I. C. 7.

OUDH—Talukdar estate—Imparible estate—Maintenance grant—Liability to pay the revenue—Charge.

In a case in which it was arranged between L, a member of the junior branch of a Hindu family and B the eldest son of a senior branch that B should be recorded the proprietor of the whole taluk so as to keep the estate undivided and L should accept eleven villages in lieu of maintenance B himself having undertaken to

OUDH ESTATES ACT, S. 2.

pay the Government revenue on the eleven villages and B subsequently granted some more villages to his uncles on the conditions of their paying their share of the Government revenue.

Held, that there is no cause of action for L to maintain an action against B for declaration that the revenue payable in respect of the eleven villages granted to L is a charge on the rest of the talukdar's estate. The obligation undertaken by B to pay Government revenue was personal and no charge was created on the estate.

Where there is no allegation that B had not ample property to carry out his undertaking or that any contingency has risen which actually jeopardised the possession of the villages and B did not deny his liability to pay the Government revenue assessed on the plaintiff's villages no action can be maintained against B by L or his descendants. (*Mr. Ameez Ali*) *SUNDER LAL v. RAMJILAL.* 24 C. W. N. 929 : 16 N. L. R. 114 : (1920) M. M. N. 447 : 28 M. L. T. 319 : 47 I. A. 149.

OUDH ESTATES ACT, Ss. 2 and 16

—Transfer, by talukdar of part of taluk—Transferee's title based on will—Absence of registration—Effect of.

The talukdar of Dhangarah whose name was one of those entered in the 4th list prepared under S. 8 of the Oudh Estates Act was the owner of the lands in suit. He died in 1896, leaving a great-grandson, the appellant, and three grandsons (uncles of the appellant) the respondents; and having made a will, dated 30th August, 1892, and registered under S. 13 of the Act, by which he devised the taluk to the appellant, a minor, and appointed the mother of the boy to be his guardian and the first respondent to be manager of the estate his minority. The will also provided that in case the respondents separated from the appellant, they should receive a maintenance in the form of grants of talukdari villages to be selected by the appellant. On the death of the testator the first respondent entered on the management of the estate in accordance with the directions of the will until 1908 when the appellant attained his majority and assumed possession and control of it, the respondents continuing to reside with him. But in 1910 they separated from the appellant, and he made grants to them of villages, of which mutation of names took place in 1911, the villages declared to be held by the several respondents for generation after generation without right of transfer."

In suits brought by the appellant to recover possession of the villages granted to the respondents on the ground that the grants were invalid as not having been made by a registered and attested deed as required by S. 16.

Held, that the respondents' right to maintenance out of the estate was conferred by the will which imposed on the talukdar the

OUDH ESTATES ACT, S. 13.

duty of selecting the villages from which maintenance should be derived. In making this selection the taluqdar imposed no additional burden on the estate, but limited and defined, in accordance with the will, the burden thereby imposed. The selection once made and accepted could not be disturbed either by the taluqdar or the guzara-holders, and no registered and attested deed was required, the provisions of the will followed by the appropriation of villages and delivery of possession vesting in the guzara holders a good and sufficient title. S. 16 of Act was therefore not applicable. (*Viscount Cave v. Lal Jagdish Bahadur Singh*)

42 All. 422 : 24 C. W. N. 529 :
23 O. C. 54 : 58 I. C. 845 :
47 I. A. 116 (P.C.)

S. 13 and 16—Will—Duly registered—Transfer in pursuance of—Validity of

S. 16 of the Oudh Estates Act has no application to a transfer of property made in compliance with the directions contained in a will duly registered under S. 13 of the Act, and such a transfer is not invalid merely because it is not made by means of a registered instrument. (*Viscount Cave v. Lal Jagdish Bahadur Singh v. Mahabir Prasad Singh*).

42 All. 422 : 24 C. W. N. 529 :
23 O. C. 54 : 47 I. A. 116 :
58 I. C. 845 (P. C.)

OUDH LAWS ACT (XVIII of 1876)
—Pre-emption—Price whether entered in good faith—Fancy price.

To determine whether the price entered in sale-deed has been fixed in good faith, the Court is entitled to examine whether there is any very great difference between the price and the market value of the property. If the price entered in the deed greatly exceeds, the market value, that fact would be relevant to the issue of good faith but it would be open to the vendee to show special circumstances which induced him to pay a fancy price for the property. (*Lyle and Ashworth, A. J. C. Narain Prasad v. Durga Singh*).

22 O. C. 335 : 54 I. C. 95.

S. 5—Dower—Fixing of—Means of parents of husband.

Where the husband's means of subsistence is an allowance made to him by his parents the court can take their means into account especially where the mortgage had taken place while the bridegroom was still below the age of majority. (*Lindsay, J. C. Sajjad Husain Khan v. Amir Jahan*). 55 I. C. 441.

S. 5 Provisions of—Mandatory.

The validity or otherwise of the tender of the purchase money in a pre-emption suit must be determined with reference to the terms of S. 5 of the Oudh Laws Act, the terms of which are mandatory and not directory. (*Hasan, A. J. C. Jang & Singh v. Lachhmi Narain*).

23 O. C. 254 : 57 I. C. 488.

OUDH LAWS ACT, S. 10.

—S. 6—Presumption—Denial of title of vendor—Effect of—Sale of Share in litigation—Right of pre-emption—Vendor out of possession.

A previous denial of the title of the vendor by a person does not deprive the latter of a right of pre-emption under the Oudh Laws Act 52 Ind. Cas. 621;

A sale of a share in a law suit does not give rise to a right of pre-emption.

The mere fact that legal proceedings are necessary to obtain possession of the property sold is no ground for holding that the sale does not give rise to a right of pre-emption.

42 I. C. 37 Ret. (*Shirat, J. C. Muntazim Husain v. Ahmad Husain*).

23 O. C. 13 : 55 I. C. 529.

S. 9—Mahal—Taluqdari mahal—Pre-emption.

The word "mahal" in S. 9 of the Oudh Laws Act comprises many villages separately assessed to revenue but carrying a joint liability for revenue extending over all the villages in the taluqdari *mahal*, even though no separate Record of Rights is prepared for the whole *mahal* but only for each of the villages comprising that *mahal*. 32 A. 351 : Ref. (*Lyle and Ashworth, A. J. C. Lal Ragoindra Prasad Sahi v. Abu Jafar*).

22 O. C. 353 : 54 I. C. 371.

S. 10—Mortgage pre-emptor—Failure to give notice, effect of—Costs of redemption suit—Vendee becoming co-sharer—Effect of.

A condition in a sale-deed as to redemption of the mortgage as economically as possible does not affect the nature of the transaction.

If a vendee fails to see that the vendor complies with S. 10 of the Oudh Law's Act and files a redemption suit against the mortgagee of the property who files a simultaneous pre-emption suit, the vendee cannot recover from the pre-emptor mortgagee the costs incurred by him in the redemption suit.

A pre-emptor does not lose his right of pre-emption by reason of the vendee becoming a co-sharer after the date of the sale in question but before the date of the pre-emption suit.

The persons who in S. 9 of the Oudh Laws Act are described in a proleptic or anticipatory sense as having a right of pre-emption are invested with an actual right to pre-empt as soon as a sale to a stranger takes place. In other words up to the date of sale the pre-emptor has merely the right to be preferred which is a potential or imperfect right. That potential right gives place on the happening of the sale to a stranger to an actual or perfect right to be substituted for the vendee and such right cannot be defeated by any act of the vendee after the right has accrued.

A purchaser who purchases property without ascertaining that it has been offered first to a person having a preferential right of purchase is assisting the vendor in evading his obligation

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to give notice under S. 10 of the Oudh Laws Act and he cannot take advantage of his own wrong. (*Lyle and Ashworth, A. J. C.*) LAL RAGOINDRA PRATAB SINGH v. ABU JAFAR.

22 O. C. 353 : 54 I. C. 371.

—**S. 13—Pre-emption—Suit for by mortgagee—Amount payable to vendee—amendment of decree—Determination of market value.**

On a sale of land the vendor left with the purchaser a portion of the sale money to be paid to the mortgagee of the property. The pre-emptor who was the mortgagee, applied under S. 15 of the C. P. C. for amendment of the decree to the effect the defendant vendee was entitled to receive from him only such sums as the latter had paid to the vendor, and the Court amended the decree accordingly.

Held, that the Court was right in applying S. 151 and in amending the decree as prayed for.

In the absence of any special reason for paying a fancy price for property, the fact that such a fancy price has been entered in the sale-deed is in itself evidence of the price being fictitious.

Under S. 13 of the Oudh Laws Act if any single item forming part of the price mentioned in the sale-deed is found to be fictitious, the Court must fix such price as appears to it to be the fair market value of the property sold, (*Lyle, A. J. C.*) SHEIKH ZAHUR AHMED v. MOHAMMAD ALI

54 I. C. 34.

—**Chapter IV—Good faith of plff.—Not relevant.**

Chapter IV of the Oudh Laws Act does not allow any discretion to a Court in a pre-emption suit to go into the question of the good fai h of the plff. in asking for pre-emption. (*Lyle and Ashworth, J.J.*) HANUMAN SINGH v. ADIYA PRASAD.

22 O. C. 323 : 54 I. C. 520.

OUDH RENT ACT, (XXII of 1886) S. 5—Tenant inheriting under proprietary rights—Occupancy rights.

The mere fact that a tenant has inherited under-proprietary rights in a village is no bar to his acquiring occupancy rights in the same village. (*Porter, J. M.*) MOHAN LAL v. ACHHAIBAR SINGH.

57 I. C. 54.

—**S. 37 Expln. I—Trespasser—Lands held by—Holding.**

Land held by a trespasser is not a "holding" or parcel of land held by a tenant and forming the subject of a separate engagement within S. 37 Expln I of the Oudh Rent Act. (*Hopkins S. M. and Porter J. M.*) SANT PATHAK v. PARTAB BAHDUR.

56 I. C. 966.

—**S. 38 (2)—Nazrana levy of, when justifiable—Co-sharer—Liability of, for profit to other Co-sharers.**

The le.y of nazrana is not illegal if the sum so levied and the enhancement taken together

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do not offend the provisions of S. 38 cl. (2), of the Oudh Rent Act

A co-sharer is liable to account for whatever profits he receives on account of the joint land to his co-sharers, whether he receives it in the shape of nazrana or in the shape of rent, (*Kanhaiya Lal, J. C.*) NAROTAM DAS v. NARAIN DAS.

22 O. C. 264.

—**S. 61—Adverse Possession—Tenant claiming to be under proprietor—Ejection—Hostile title.**

In 1892 a notice was served upon B. by the Taluqdar and B., claiming to be an under proprietor and not liable to ejection by notice contested the notice. In 1893 the Rent Court set aside the notice and held that B.'s status was superior to that of an ordinary tenant. In 1905 the Taluqdar filed a suit against B for proprietary possession but his suit was dismissed. In 1910 he obtained a decree against B for arrears of rent, and took steps to have him ejected under S. 61 of the Oudh Rent Act, and obtained an exparte order for possession in 1911. B died and his son brought a suit in the Rent Court under S. 108 of the Oudh Rent Act to contest the ejection, which was dismissed. Thereupon he brought a civil suit to be restored to possession of the holding.

Held, that the order of the Rent Court of 1893 was adverse to the Taluqdar, and as B's possession was not disturbed till after the lapse of more than 18 years from the first certain date on which the Taluqdar had notice of hostile title, the dispossession of B was illegal as at the time when the order of ejection was obtained B had acquired a status of an under-proprietor by adverse possession. In considering the question of adverse possession the nature of the possession set up is to be looked to and that is to be judged by the acts of a person in possession (*Lindsay, J. C.*) RAJA MUHAMMAD MUMTAZ ALI KHAN v. UGRAJ SINGH.

58 I. C. 558.

—**S 108 (10)—Suit for declaration of title—Possession with plaintiff—Suit maintainable.**

A person who is in possession is not bound to sue for a declaration of his title. A declaratory suit by such a person cannot, therefore, be barred by limitation or by S. 108 (10) of the Oudh Rent Act. (*Kanhaiya Lal A. J. C.*) KAMPTA SIROMAN PRASAD SINGH v. NARPAT GIR GOSSAIN,

23 O. C. 25 :

55 I. C. 534.

—**Ch. VII A.—Landlord and Tenant—Enhancement of rent—Remedy.**

If a tenant's rent is favourable, and deliberately so, the landlord's remedy is a suit under Chapter VII of the Oudh Rent Act and not a notice for enhancement of rent. (*Harrison, J. M.*) PARTAB DUBEY v. AJUDHIA ESTATE.

58 I. C. 990

OUUDH SUB-SETTLEMENT ACT.

OUUDH SUB-SETTLEMENT ACT. (XXVI of 1866)—Subordinate proprietor—Position and rights of.

The Oudh Sub-Settlement Act of 1866, which was enacted for the purpose of securing a better determination of certain claims by subordinate proprietors in Oudh, emphasised that the rights of subordinate proprietors which were to be enforced were those which they held on or before the 13th February 1856 and that the settlement was not intended to enlarge the rights which the holders of subordinate tenures possessed. (*Kanhaiya Lal, J. C.*) BHUSHAN v. DEO NARAIN. 54 I. C. 82.

—Sub-settlement—Refusal to grant—Effect of on, under proprietary rights—Adverse Possession.

A Sub-settlement can be granted under the Oudh Sub-settlement Act only in certain circumstances specified in that Act, and the refusal to grant such a sub-settlement not accompanied by an adverse finding as to an under-proprietary right, does not necessarily destroy such under-proprietary right as the claimant might otherwise have possessed.

Held, on the evidence that the defendant was a *birtdar* or under-proprietor, and that, even if the settlement decree did not confer the under-proprietary right claimed by the defendant, it was perfected by adverse possession. (*Kanhaiya Lal A. J. C.*) MUHAMMAD ABUL HASAN KHAN v. RAMNATH MISRA. 55 I. C. 641.

PAPER CURRENCY ACT (II of 1910) S. 26—Hundi drawn payable to bearer—Indorsement—Suit by original holder without cancellation of indorsement—Deposit in the hands of banker.

A Hundee drawn payable to bearer on presentation was endorsed by the plaintiff in favour of one P. Plaintiff got the hundi back and sued the drawer on the hundi without cancelling the indorsements.

Held, that the hundi sued on, being payable to bearer on demand contravened Sec. 26 of the Indian Paper Currency Act and that the suit was bad. 40 Mad. 585; 42 Mad. 470; 6 L. W. 630 foll.

A person honestly in possession of a hundi and suing a drawee alone may deal with the indorsements in any manner he likes provided he does not thereby subject the drawer to a greater liability than he incurred originally. (*Sadasiva Aiyar and Spencer, J.J.*) VEERAPPA CHETTY v. MUTHURAMAN CHETTY. 12 L. W. 12 : 58 I. C. 508.

—S. 26—Scope of the prohibition contained.

Section 26 of the Paper Currency Act prohibits only the making or issuing of promissory notes payable to bearer on demand. It does not prohibit the endorsement in blank of a promissory note although such endorsement has the effect of making the note so endorsed a note payable to bearer on de-

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mand. (*Twomey C. J. and Robinson, J.*) SHAIKH ISMAIL v. S. EZEKIEL. 12 Bur. L. T. 249. : 56 I. C. 930

PARSI MARRIAGE & DIVORCE ACT (XV of 1865) Ss. 3, 6, 8, 9, and 14—Solemnization of marriage—Want of certificate of marriage—Validity of marriage if affected—Entry in register of marriage—Proof.

The certificate required to be given by the Officiating Priest under S. 6 of the Parsi Marriage and Divorce Act is not in itself one of the requisites for a valid marriage amongst the Parsis.

The absence of any entry of such certificate in the marriage register does not affect the validity of the marriage.

Where there is no certificate and no entry in the marriage register any other relevant evidence is admissible in proof of the marriage having taken place. (*Crump, J.*) BAI AWABAI v. KHODI DAD ARDESHER.

22 Bom. L. R. 913 : 58 I. C. 91.

PARTITION — Decree — Effect of on mortgages on property.

A decree for partition between proprietors purports to divide the rights of the persons seeking partition as against the other co-owners or the said property, but does not affect the rights of persons holding a simple mortgage over the same. (*Stuart and Kanhaiya Lal, A. J. C.*) JAI KISHORI v. AFZAL KHANAM.

22 O. C. 349 : 54 I. C. 544.

—Decree—Form of—Decree binding as between Co-defendants.

Where in a suit for partition of a joint property the decree declares the shares of every one of the parties interested in the property, the declaration as to the extent of the shares of the defendants is as binding between the defendants themselves as between the defendants and the plaintiffs. 32 A. 469 foll. (*Lyle and Ashworth, A. J. C.*) GANDHARP SINGH v. NIRMAL SINGH.

22 O. C. 300 : 54 I. C. 325.

—Effect of—Fresh title created.

Where lands are partitioned, the partition creates a fresh title to the lands dealt with. (*Lindsay, J. C.*) HANUMAN SINGH v. RATAN SINGH.

57 I. C. 448.

—Instrument—What is, stamp duty on See STAMP ACT S. 2 (15).

38 M. L. J. 330.

—Partial partition—Property partly in and property out of jurisdiction.

Held, a suit for partition was competent, without bringing the Patiala lands into partition and that the Court, below were not entitled to take into consideration or into account the joint lands in Patiala. 14 Cal. 835 foll. (*Le Rossignol and Broadway, J.J.*) MOTI RAM v. KANHAIYA LAL.

2 Lah. L. J. 514.

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Right to—Continuing right — Res-judicata.

The right to sue for partition is a continuing right and incidental to the ownership of joint property. Therefore so long as the property remains joint, one of the co-owners can bring a fresh suit for partition notwithstanding the dismissal of a previous suit for partition. (*Richardson and Shamsul Huda, JJ.*) JAGA-MOHINI DASI v. SHIBA GOPAL BANERJEE

56 I.C. 610.

Suit — Costs of — Order as to. See Costs.

11 L.W. 5

Suit—Parties—All sharers necessary parties—Omission to implead some—Limitation.

In a suit for partition it is an inflexible rule of law that all interested parties should be joined as plaintiffs or defendants.

On the death of a Mahommedan all his legal heirs become tenants in common of the estate, each of them having a definite share in the property and being entitled to an undivided share in every bisha of land until there is a division by metes and bounds.

Where plaintiff in a suit for partition did not implead some of the heirs, held that the omission was a fatal one which could not be remedied as the claim against the persons had become barred by time (*Lindsay, J.*) MAHOMMED AHMAD v. ANSAR MOHAMMAD.

23 O.C. 62

Suit—Receiver — Right to demand from party in sole occupation.

Where in a partition suit of family property a Receiver is in possession of the estate, but one of the parties is in sole possession of an important item of the property, the Receiver can require payment of rent from that property. (*Turon and Newbould, JJ.*) PULIN BEHARY DE v. SATYA CHARAN DE.

58 I.C. 301.

PARTNERSHIP—Accounts—Refusal of one partner to perform his duties—Mode of taking accounts.

Refusal and neglect on the part of any one partner to perform the duties undertaken by him gives to any other partner the right to apply for dissolution or without legal proceedings the partnership could by agreement between all the partners be dissolved.

Where the rights to obtain dissolution are not exercised the partnership continues.

In the taking of accounts a proper allowance should be made for the fact that the services of certain partners were withheld. (*Lord Buckmaster*) KRISHNAMACHARIAR v. SANKARA SAH,

39 M.L.J. 257 : 28 M.L.T. 265 :
12 L.W. 777 : 57 I.C. 713. (P.C.)

Dissolution—Right of partner guilty of misconduct.

A partner guilty of misconduct is not entitled to sue for dissolution &c. of the partnership or for any other relief and this provision of the Law is the same as in England.

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A partner is guilty of misconduct who either (a) destroys the old account books of the firm (b) makes such interpolations in the account books which make them worthless and unreliable; (c) falsely prepares the balance sheet or (d) tries to deprive his firm of a valuable asset. (*Rattigan, C.J. and Abdul Rauf, J.*) RAM SINGH v. RAM CHAND.

1 Lah. 6 : 9 P.L.R. 1920 :
57 I.C. 185.

Dissolution—Settlement—Sub-partners if bound by—Relations between partners and sub-partners.

In regulating the rights *inter se* between a partner and a sub-partner, the rule of law embodied in S. 31, of the English Partnership Act can be followed in India. A settlement of account between a partner and his co-partner before the dissolution of partnership will be binding on his sub-partner.

Per Wallis, C.J.—When once the partnership is dissolved any such settlement will not be binding on the sub-partner but he will be entitled to ascertain the share of the partner under whom he claims.

Per Sadasiva Aiyar, J.—A settlement of account made by a partner with his co-partner prior to dissolution and up to the date of the dissolution is binding on the sub-partner.

It is for the purposes of winding up the partnership a partner settles an account with his co-partner in a proper manner. On principle such settlement should be held binding on the sub-partner to the extent that it is binding on the partner.

English decisions which imply that a settlement made by a partner after the dissolution of partnership for the purposes of winding it up is in no way binding on the sub-partner ought not to be followed. (*Wallis, C.J. and Sadasiva Aiyar, J.*) CHIDAMBARAM CHETTY v. KARUTHAN CHETTY. 39 M.L.J. 511 : 28 M.L.T. 138 : 12 L.W. 444 : 58 I.C. 80.

Dissolution—Suit by third party against firm—Compromise—Arbitration—Reference by one partner—Award—Other partners if bound—Interest.

Where one partner submits to arbitration a suit to which the other partner is not a party, the award passed on such submission will not bind the other partner at the instance of the third party, who brought the claim against the partnership. 22 All. 135 ; 1 Bom. L.R. 828 foll.

But where one of two partners acting in good faith submits the claim of a third party against the firm to arbitration and has to make payments in accordance with the award passed on the submission, he would in law be entitled to claim contribution from his partner on the basis of that award. 1 L.W. 697 (P.C.) Referred to.

In awarding interest on such a claim for contribution where the parties are Nattukottai Chetties, the usual rate of interest prevail-

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ing among them should be awarded. (*Abdur Rahim and Moorre, JJ.*) VENKATACHALAM CHETTY v. RAMANATHAN CHETTY 39 M. L. J. 269 : (1920) M. W. N. 502 : 12 L. W. 228

—Hindu Joint family—Manager—Partnership with stranger—Right of other members of the family—Death of manager—Partnership dissolved. See HINDU LAW, JOINT FAMILY.

18 A. L. J. 937.

PATNI—Rent—Payment by *darpatnidar* to superior landlord—Deduction from rent payable to *patnidar*.

A *dar-patnidar* who pays the rent due to the superior landlord with a view to save the *patni* from being sold is entitled to deduct the amount so paid from the rent payable to the *patnidar*. (*Das and Adami, JJ.*) MOHAMMAD IRFAN v. KUMAR KALIKA NAND SINGH

58 I. C 495

PATNI REGULATION (8 of 1819)
Ss. 3 and 11—Grant of *patni*—Sub-soil mines—Right of grantees—Construction of grant

A *patni* tenure is heritable and alienable unless there is an express declaration to the contrary in the *patni* lease, and the *patnidar* acquires all the interest of the zemindar in the subject matter of the lease. But it cannot create any right in the sub-soil unless it is expressly granted by the lease. Where the sub-soil rights are not expressly transferred in the *patni* lease the rights in them and in the mineral remained with the zemindar, the *patni* Regulations having been enacted to protect the right of the zemindar by providing for the sale of the property free from encumbrance for the arrear of rent due to him. 12 W. R. 413; 17 W. R. 416; 25 C. L. J. 499; 29 C. L. J. 193, 1 I. A. 178 referred to. (*Jwila Prasad and Adami, JJ.*) RAM LAL KAVIRAJ v. MAHARAJ KUMAR SATYA NIRANJAN C. IAKERVERTY. 1 P. L. T. 474:

5 Pat. L. J. 563 : 57 I. C. 786.

—S. 14—Second sale pending suit to set aside first sale—Purchaser if acquires title if first sale is finally set aside.

A putni Taluk belonging to L was sold under Reg. VIII of 1819 and purchased by S. The sale having been set aside in S. 14 of the Regulation, the Zemindar appealed against this decision and pending the appeal the putni was again sold under Reg. VIII of 1819, S being treated by the Zemindar as the owner of the putni in these proceedings, and was purchased by the plaintiff. The appeal of the Zemindar was subsequently dismissed:

Held, that the proceedings taken by the Zemindar under the Regulation to recover his dues are taken not personally against the *patnidar* but against the tenure which represents the security for rent.

That the fact that the notice of sale gave the name of S as *patnidar* did not nullify the sale, and assuming that this was an irregularity, no

PATENTS & DESIGNS ACT, S. 1.

suit to set aside the second sale having been brought within the period of limitation, the title of the second purchaser became indefeasible.

That the validity of the second sale was no dependent upon the continuance of the first sale. 24 C. W. N. 785 (1920) disappd. (*Mookerjee C. J. and Fletcher, J.*) BEJOY CHAND MAHATAB, v. ASHUTOSH CHUCKERBUTTY

25 C. W. N. 42.

PART PERFORMANCE—*Doctrine of Applicability to India*—Circumstances Justifying its application.

There is nothing in the law of India inconsistent with the doctrine of part performance on which Courts of Equity in England have acted for many years.

The jurisdiction to carry into execution transactions clothed imperfectly in legal forms being purely equitable, Courts of Equity have imposed on themselves certain limits for the exercise of the jurisdiction. Those limits must be clearly recognised and carefully guarded.

The first essential condition for the exercise of the Jurisdiction is that there must be a final engagement between the parties. If the circumstances in the case suggest that the matter still rested in negotiation, there is no room to charge a person on the equities resulting from the acts done in execution of the contract.

The second essential condition is that there are such actings of the parties as must be unequivocally and in their own nature referable to the agreement alleged. If the alleged part performance cannot be connected with the alleged agreement, then there is nothing which the Court has to undo and consequently nothing which has been left undone and which ought to be carried into further execution. (*Das and Adami, JJ.*) DEB LAL JHA v. BALDEO JHA.

1 P. L. T. 354:

(1920) Pat. 337 : 56 I. C. 277.

PATENTS AND DESIGNS ACT (II of 1911) Ss. 1 (2) 2 (3) and 81—Berar—British India—Patent granted in British India if recognised in Berar

A person obtained the exclusive privilege in respect of an invention under the Invention and Designs Act 1888. Under the Patent and Designs Act, 1911, repealing the earlier Act, the privilege was converted into a patent and extended throughout British India. The Act of 1888 was never applied to Berar, but by a notification of the Govt issued under the Act of 1911 Berar was included in the definition of British India. Held that the patent was operative in Berar and its infringement actionable. Though a separate controller of Patents was not expressly appointed for Berar the officer appointed to this office for British India was the controller for Berar. Though the patent was granted on a date anterior to the date of the Notification of the Government of India, that Notification had the effect of making it valid in

PATNA H. C. RULES, Ch. VI.

Berar from the date on which it was granted
(*Mitra, A. J. C.*) **SHEOPRASAD v GOVIND**

54 I.C. 417.

PATNA HIGH COURT RULES Ch VI, R 5—Decree against person alleged but not admitted to be *benamidar*—Appeal by person claiming to be beneficiary, not maintainable. See APPEAL, RIGHT OF.

1 P. L. T. 159.

PENAL CODE (XLV of 1860)—Applicability of—Byelaw—Breach—Abetment—Liability. See CAL. MUN. ACT, Ss. 559 AND 591.

24 C. W. N. 196 : 54 I. C. 781 :

21 Cr. L. J. 173.

S. 34—Acting in concert by several persons—Liability

S. 34 of the Penal Code does not create a distinct offence but lays down a principle of liability, and when two or more persons join actively in an assault on a third person they are directly responsible for the injuries caused to the extent to which they had a common intention to cause those injuries, and what their common intention must be gathered from the circumstances. (*Richardson and Ghose, JJ.*) **FOEZULLAH v. EMPEROR.** 25 C. W. N. 24

S. 34—Acts done by several persons in furtherance of common intention—Ejectment—Act done different.

Section 34, I. P. C., applies only to acts done by several persons with a common intention. It has no application to a case of several persons starting with a common intention to commit an offence where only one of them commits the intended offence. In such a case the rest of the confederates are guilty of abetting the offence committed by one of them.

If the offence committed is different from the offence abetted the abettor is liable for the offence committed if, it was a probable consequence of the abetment and was committed under the influence of the instigation or with the aid and in pursuance of the conspiracy. (*Twomey, C. J. and Maung Kin, J.*) **PO YA v. EMPEROR.**

13 Bur. L. T. 44 : 58 I. C. 525 : 21 Cr. L. J. 797.

Ss. 34, 97 and 300 (2) and 304—Acts done by several persons—Furtherance of common intention—Rights of private defence—Excess of.

When a criminal act or a series of criminal acts is committed by several persons in combination it is necessary to consider first the common intention of all, and secondly the individual intention of each of the accused as disclosed by the circumstances of the case. It cannot be assumed that the common intention of all was to cause death or bodily injury sufficient in the ordinary course of nature to cause death from the bare fact that death has resulted. 1 L. B. R. 233 doubted.

If death results from acts done in excess of the right of private defence, the offender is guilty of culpable homicide not amounting to

PENAL CODE, S. 84.

murder under S. 300 Excep (2). (*Twomey, C. J. and Maung, J.*) **SHWE ON v. EMPEROR**

13 Bur. L. T. 47 : 57 I. C. 918 : 21 Cr. L. J. 678.

S. 40—Municipal Bye-law—Creation of offence—Abatement of, punishable. See CAL. MUN. ACT, S. 559 AND 561.

24 C. W. N. 196

S. 62—Forfeiture of property—Murder due to feelings of revenge.

Where a murder was committed out of revenge and was not a murder committed in the course of a dacoity or which had theft as any part of its object, it was held, that it was not an appropriate case in which a sentence of forfeiture of property should be passed and that such a sentence was an appropriate deterrent in cases where theft formed part of the motive. (*Meare, C. J. Walsh, J.*) **MANNA SINGH v. EMPEROR.**

18 A. L. J. 375 :

56 I. C. 49 : 21 Cr. L. J. 401.

S. 75—Scope of conviction by foreign court if within the section.

The previous conviction of the accused by the court of a Native State could not come within the scope of S. 75, Penal Code (1913) P. R. 17, (Cr.) (*Ryres J.*) **BHANWAR v. EMPEROR.**

42 All. 136 : 18 A. L. J. 58 : 54 I. C. 624 : 21 Cr. L. J. 144.

S. 75—Scope and meaning of—Value of marginal notes. See (1919) *Dig. Col. 847.* **SHEIK CHAMAN v. EMPEROR.**

1 P. L. T. 11 : 54 I. C. 623 : 21 Cr. L. J. 143.

Ss. 76, 499 and 500—Defamation—Privilege

Issues requiring determination in a complaint under Ss. 499 and 500 of the Indian Penal Code, discussed.

Where a defamatory statement was made by a person as a witness in a case, but the person was not bound by law to go into the witness box and make it, S. 76 of the Indian Penal Code did not apply (*Walsh, J.*) **BHAGWAN SINGH v. ARJUN DATT.** 18 A. L. J. 846 : 57 I. C. 84 : 21 Cr. L. J. 564.

S. 79—Arrest under S. 59 Cr. P. C.—Mistake of fact—Non-bailable offence.

When an arrest is made *bona fide* in pursuance of the power contemplated under S. 59 of the Cr. P. Code and the person arresting believes in good faith by reason of a mistake of fact that a non-bailable offence had been committed, S. 79 I. P. C. is a complete answer to the charge. (*Sultan Ahmed, J.*) **RAGHUNATH DASS v. EMPEROR.** 5 P. L. J. 129 : 1 P. L. T. 60 : (1920) Pat. 76. 54 I. C. 997 : 21 Cr. L. J. 213.

S. 84—Insanity—Ground of exemption from liability—Burden of proof.

The onus lies on an accused person to show that he is exempted from criminal responsibility by reason of such unsoundness of

PENAL CODE, S. 84.

mind as made him incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. It is not every form of unsoundness of mind that would exempt a person from Criminal responsibility; it is only unsoundness of mind which materially impairs the cognitive faculties of the mind that can form a ground of such exemption. (*Sanderson, C. J. and Walmsley, J.*)

MANTAJALI v EMPEROR 55 I. C. 477 : 21 Cr. L. J. 317.

—S. 84—Insanity—Exemption from criminal liability—Procedure prescribed by Ss. 464 and 465 Cr. P. Code to be followed before giving effect to plea of insanity. See Cr. P. CODE Ss. 464 AND 465. 18 A. L. J. 53.

—Ss. 97 149—Private defence—Seizure of cattle—Opposition—Act done in excess of such right by one number.

The court below found that the complainant's party had no right to seize the cattle of the accused after the cattle had left the field and that the accused were consequently entitled to the right of private defence of property. But the Court held that the accused exceeded their right of private defence.

Held, that on these findings it cannot be held that all the accused constituted an unlawful assembly. The only person who can be convicted is the one who actually inflicted the mortal wound and thus exceeded his rights of private defence, and no person other than him can be held to be guilty 26 P. R. 1914 Cr. relied on. (*Shadi Lal, J.*) AHMAD v. EMPEROR 1 Lah. L J 245

—Ss. 99, 332 and 333—Arrest of offender—Cr. P. Code S. 46 (3)—Use of more force than is necessary—Right of private defence—Causing grievous hurt to public servant in discharge of duty.

The accused was suspected of smuggling opium and was ordered by an Excise Inspector to stop and the latter fired two shots to frighten him. The accused thereupon turned round and wounded the Excise Inspector with his sword. He was then caught and while a peon was proceeding to disarm him the accused wounded the peon also with his sword.

Held, that the Excise Inspector was entitled to arrest the accused and for that purpose to use all necessary means but that he was not however justified in causing death in effecting arrest under S. 46 (5) Cr. P. Code.

Inasmuch as apprehension of death had been caused to the accused he had a right of private defence against the Inspector which had not been exceeded. But the accused had no sort of justification for assaulting the peon. (*Pratt, J.C.*) NAGANANDA v. EMPEROR.

54 I. C. 577 : 21 Cr. L. J. 97.

—Ss. 100 and 302—Murder—Private defence—Proof of.

The accused accompanied by his two friends and the deceased in company of his two com-

PENAL CODE, S. 147.

panions were going as usual towards a well where the object of their love very often assembled in the night. The deceased actuated by jealousy made an attack on the accused with a lathi and called upon one of his companions to use knife and he and his two companions wounded the accused who then struck the deceased with a dagger in consequence of which the deceased died.

Held, that under the circumstances the accused had good reasons to suppose that unless he used his dagger grievious hurt at least, if not death, would be inflicted upon him and in doing so he did not exceed his right of private defence under S. 100 I. P. C. (*Le-Rossignal and Petman, JJ.*) YUSAF KHAN v. EMPEROR.

2 P. L. R. 1920 :

55 I. C. 607 : 21 Cr. L. J. 335.

—Ss. 107, 108, 109 and 110—Offence under bye-law—Abetment of punishable. See CALCUTTA MUNICIPAL ACT, Ss. 559 and 561.

24 C. W. N. 196.

—S. 107 (1)—Instigation—Meaning of advice does not amount to.

'Instigation' necessarily indicates some active suggestion or support or stimulation to the omission of the act itself which constitutes the offence and advice can become 'instigation' only if it is found that it was meant actively to suggest or stimulate the commission of an offence. Advice *per se* cannot necessarily be instigation under S. 107 (1) I. P. C. and the *cum hoc* based upon the finding that the accused must have advised etc., is wrong. (*Sultan Ahmad, J.*) RAGHUNATH DASS v. EMPEROR.

5 P. L. J. 129 :

1 Pat. L. T. 60 : (1920) Pat. 76 :

54 I. C. 997 : 21 Cr. L. J. 213.

—S. 124-A—Government established by law—Meaning of—Whom does it include. See PRESS ACT, S. 4 (1) (c). 18 A. L. J. 11.

—S. 135—Soldier—Who is. The word "soldier" in S. 135 I. P. C. must be interpreted as in the Explanation to S. 131 of the Code.

The definition of the word "soldier" given in the Indian Articles of War is expressly confined to those Articles and is a very limited one (*Dundas, J.*) SRI NAWAS v. EMPEROR.

56 I. C. 671 : 21 Cr. L. J. 511.

—S. 147—Rioting—Offence—Unlawful assembly—Finding as to, if necessary—Conviction if sustainable.

In the absence of a finding as to the existence of an unlawful assembly a conviction under S. 147 I. P. C. cannot be maintained. (*Adami, J.*) MAHESH DUTT SINGH v. EMPEROR.

1 Pat. L. T. 606 :

(1920) Pat. 127 :

54 I. C. 773 : 21 Cr. L. J. 165.

—Ss. 147 and 379—Unlawful assembly—Common object—Theft—Sentences,

PENAL CODE, S 149.

Where the Court found the common object of an unlawful assembly was to commit theft, but not which of the persons composing the unlawful assembly removed the property stolen, it is illegal to convict them both under S. 147 and S. 379. I. P. C. and to pass separate sentences for each offence. (*Sultan Ahmed, J.*) CHANDRA MOHAN SINGH v. EMPEROR.

1 Pat. L. T. 623 : 56 I. C. 512 :
21 Cr. L. J. 480.

S. 149—Offence under S. 126 of the Railways Act—Conviction under S. 149 I.P.C. if legal.

The word "offence" in S. 149 I. P. C. means only an offence under the Penal Code and does not include an offence under the Railways Act.

Consequently a conviction under Section 126 of the Railways Act, read with S. 149 I. P. C. is illegal. (*Martincau, J.*) INDESSAIN v. EMPEROR. 56 I. C. 210 : 21 Cr. L. J. 418.

S. 173—Service of summons—Prevention of—Refusal to accept summons.

For a conviction under S. 173 I. P. C. it is necessary to prove that the accused prevented the process server from tendering the summons. Mere refusal to accept a summons when tendered does not amount to intentionally preventing service of summons. Both under the C. P. Code and Cr. P. Code service of summons can be effected by tender. (*Pratt, A. J. C.*) ZAPANTIS v. EMPEROR. 57 I. C. 928 : 21 Cr. L. J. 688.

S. 174—Complainant—Failure to attend—Order for prosecution—No order for personal appearance.

In this case the District Magistrate sanctioned the prosecution of the (complainant) petitioner under S. 174 I. P. C. in the following circumstances:—In a case under S. 161, I. P. C. against a Police Inspector, the District Magistrate passed an order on the 12th January adjourning the case on the 17th and warning the complainant that unless he appeared at 10 A. M. on that date his complaint was liable to be dismissed and it was dismissed accordingly. There was no order for his personal appearance on that day, nor would such an order have been justified under the circumstances. Held, that the petitioner did not disobey any legal order and that the order for his prosecution is illegal. (*Wilberforce, J.*) MURAD v. EMPEROR. 2 Lah. L. J. 539.

S. 182—Attempt—Preparation—False report of disappearance of property with ultimate object of incriminating rival.

Except in the case of a few offences of a very special nature the Penal Code does not recognize preparation for committing an offence as punishable unless something is done amounting to an actual attempt,

PENAL CODE, S. 183.

Where a false report was made to the police alleging the disappearance of a bullock, and the case for the prosecution was that the making of the report was the first step in an intended course of action the ultimate object of which was the bringing of a false charge against certain persons Held, that even if that was established the act went no further than preparation for the commission of an offence and that the report not being that of a cognizable offence and not in itself calling for any action by the police, fell short of the conditions justifying a conviction under section 182 Indian Penal Code. (*Piggott, J.*) ALGOO LAL v. EMPEROR. 18 A. L. J. 636 : 57 I. C. 96 : 21 Cr. L. J. 576.

S. 182—False information given to Deputy Superintendent of police—Inquiry—Answer to questions.

The Petitioner sent a letter to the Deputy Inspector-General of Police alleging that the Sub-Inspector and other persons were looting the people and that he was ready to prove it. This was sent on to the Superintendent of Police for recording the petitioner's statement and for necessary action and the Superintendent passed it on to the Deputy for taking statements. The latter recorded the statement of the petitioner, who made allegations as to bribes having been taken by the Sub-Inspector, and mentioned among others a bribe of Rs. 500 taken from one M. S. In respect of this statement the petitioner was convicted by the lower courts of an offence under S. 182 of the Penal Code.

Held, that the statement of the petitioner to the Deputy Superintendent of Police in the departmental enquiry was "information" within the meaning of S. 182 of the Penal Code, notwithstanding that it was made in answer to question, 10 B. 124 Dist. 227 P. L. R. 1914 foll. 31 M. 506 Dist. 26 67 M. 640 ref.

Held, also, that as the Deputy Superintendent of Police was competent to make an enquiry into the Petitioner's allegations against the Sub-Inspector, and the Petitioner knew that his allegations were likely to lead the Deputy Superintendent to make such an inquiry, which would be calculated to cause annoyance to the Sub-Inspector, his conviction under S. 182 was justified 4 Mad. 241 distgd. (*Martincau, J.*) PANNA LAL v. EMPEROR.

1 Lah. 410 : 58, I. C. 819.

S. 183—Warrant signed by peshkar—Legality of—C. P. C. O. 21, R. 24—Resistance.

A warrant for attachment of the applicant's property was signed by the Peshkar of an Assistant Collector. The applicants removed the property before it was actually attached. Held, that the Peshkar not being an officer authorised to sign such warrants the property could not be attached and by removing the

PENAL CODE, S. 186.

property before attachment the accused did not commit any offence. (*Walsh, J.*) KARAMA-TULLAH v. EMPEROR.

18 A. L. J. 284 : 55 I. C. 852 :
21 Cr. L. J. 372

—S 186—Convictions under—Resistance to attachment—Writ of demand after date of return.

Even if O 32, R. 3 does not directly apply to execution proceedings the principle underlying Or. 32, R. 3 must be held to apply to such proceedings and therefore a writ of attachment issued against a minor without a guardian *ad litem* is an illegal one. 29 M. 829. 26 B 109 Rel.

Where the returnable date fixed in the writ of attachment was the 2nd April but the attachment was sought to be made on the 8th of April, the execution of the writ was absolutely illegal and the conviction under S. 186 I. P. C. was bad. 2 P. L. J. 487, 27 All. 258. 5 All. 318 (1883) Ref. (*Sultan Ahmed, J.*) TANNAKLAL MANDAR v. EMPEROR.

1920 Pat 285 : 1 Pat L. T. 564.

—S. 186—Warrant addressed to Nazir—Delegation of duty—Resistance to it if an offence,

It is improper for a *nazir* to depute one of his assistants to execute a warrant for the delivery of possession which is directed to him personally. But the assistant is sufficiently clothed with authority to execute the warrant and any person offering resistance or obstruction to its execution is guilty of an offence under S 186 Penal Code. (*Adami, J.*) DOMAN MAHTO v. EMPEROR.

54 I. C. 977 : 21 Cr. L. J. 193.

—S. 187—Offence under—Search under S. 103 Cr. P. Code—Refusal to assist.

A person who was called upon by a Salt Inspector to assist in a search held under S. 103 of the Code of Criminal Procedure, refused to do so. He was thereupon charged with an offence under S. 187 I. P. C. and convicted.

Held, that the conviction was right, 26 M. 419 distinguished. (*Seshagiri Aiyyar and Phillips, JJ.*) IPPILI MAGATHA *In re.*

38 M. L. J. 27 : 11 L. W. 58 :
(1920) M. W. N. 110 : 54 I. C. 241 :
21 Cr. L. J. 33.

—S 188—Cr. P. Code S. 518—Orders passed under—Temporary order.

Orders passed under S. 518 Cr. P. Code of 1872 being intended to provide for cases where a speedy remedy was desirable do not have more than a temporary operation. Where an order had been passed by the District Magistrate of Bareilly on 7th February, 1873 presumably under the said section prohibiting religious processions with music in any but certain

PENAL CODE, S 192.

specified thoroughfares in Bareilly city. *Held*, that a person could not now be convicted under S. 188 of the Penal Code for disobedience of that order 5 Cal. 7 (F. B) 10 All. 115; 2 Mad. 140 Ref. (*Walsh, J.*) RAM DAS v. EMPEROR.

18 A. L. J. 857.

—S. 188—Order directing prosecution for offence—Essentials of offence—Duty of Magistrate—Cr. P. Code, S 144—Order under.

A Magistrate should not sanction a prosecution under S. 188 I. P. C. unless he thinks that all the elements necessary for a conviction are present. 14 C. W. N. 234 foll. A Magistrate ought not to make an order under S. 476 of the Cr. P. Code, sanctioning prosecution for an offence under S. 188 I. P. C. for dissolution of an order made by the Magistrate under S. 144 of the Cr. P. Code without coming to a finding whether the disobedience of the order caused or tended to cause a riot or an affray on a breach of the peace. (*N. R. Chatierjee and Cumming, JJ.*) KUMUD NATH CHUCKER-BUTTY v. AJOO PRAMANIK.

57 I C 915 . 21 Cr. L. J. 675.

—S 191—Perjury—Conviction for—Falsity of statement—Degree of proof required See (1919) Dig. Col. 852. MAHOMED ISMAIL KHAN v. EMPEROR.

54 I. C. 60 : 21 Cr. L. J. 12.

—Ss 192 and 193—Execution proceedings, if Judicial proceedings—Pending proceedings—Sanction to prosecute.

Execution proceedings are judicial proceedings for the purpose of S. 192 and 193 of the Indian Penal Code

It is not essential for the purpose of these sections that the judicial proceeding in which the person intends to use the false evidence must be pending at the date of fabrication.

Sanction under S. 195 (1) (b) of the Criminal Procedure Code is not necessary in the absence of any proceeding, pending or disposed of, in which or in relation to which the offence under S. 193 of the Indian Penal Code is said to have been committed. (*Shah and Crump, JJ.*) IN RE GOVIND PANDURANG.

22 Bom. L. R. 1239.

—Ss. 192 and 193—Fabrication of false evidence—Rent note—Fabrication by tenant—Admissibility in evidence.

It is not essential for the purpose of S. 192 of the Indian Penal Code that there should be any judicial proceeding pending at the time of the fabrication. It is enough that there is a reasonable prospect of such a proceeding having regard to the circumstances of the case and that the document in question is intended to be used in such a proceeding.

The accused who was in possession of the complainant's house as a yearly tenant, about the time the tenancy came to an end, prepared another rent-note for a period of four years

PENAL CODE, S 193.

and had it registered, without complainant's knowledge:—

Held, that the accused had committed an offence under S. 193 of the Indian Penal Code, inasmuch as the rent note, which contained an admission against the interest of the accused, could be admitted in evidence on his behalf (*Shah and Crump, JJ.*) EMPEROR v. RAJARAM BHAVANISHANKAR.

22 Bom. L. R. 1229

—**S. 193—Perjury—Deposition not read out to the deponent—Secondary evidence.**

The petitioner was accused of having made a false statement on oath in the Court of a Munsif. The Munsif stated in evidence in the present trial that this statement was not read out to the witness. The question before this Court was whether secondary evidence could be admitted to prove the making of the statement.

Held, that secondary evidence cannot be admitted in the trial of the petitioner for perjury to prove the making of the statement in the Munsif's Court.

6 Cal. 762 12 Cal. W. N. 845 (847) 28 Mad. 308 (310) 42 Mad. 561 followed,

23 Cal. W. N. 661 and (28 P. R. (Cr.) 1918 distinguished.

25 P. R. (Cr.) 1890 not followed. (*Chevis. A. C. J.*) IMAM DIN v. NIAMAT ULLAH.

1 Lah. 361 : 58 I. C. 880.

—**S. 193—Perjury—conflicting statements—Conviction not justifiable unless statements are totally irreconcilable. See CR P. CODE, S. 195 (1) (6).** 5 P. L. J. 23.

—**S. 193—Perjury—Recital in judgment if can take the place of deposition.**

It is the duty of the prosecution to prove conclusively that the statement made by the accused was necessarily a false statement, before a conviction can be sustained under S. 193, I. P. C.

The recital in a judgment of a statement made by a witness cannot take the place of a record of the deposition of the witness. Nor can such recital be accepted as evidence under S. 80. of the Evidence Act and it, therefore cannot form the basis of a prosecution under S. 193 I. P. C. (*Jwala Prasad, J.*) NIRGUN MAHTON v. EMPEROR. 56 I. C. 660.

21 Cr. L. J. 500

—**S. 203—Giving false information—False statement during police examination.**

S. 203, I. P. C only applies to information volunteered by the informant and not to a false statement made in the course of an examination by a Police Officer. (*Pratt, A. J. C.*) EMPEROR v. NGA PO LWIN.

57 I. C. 940 : 21 Cr. L. J. 700.

—**S. 211—“Criminal Proceeding”**
Meaning of—Complaint under S. 1 of the Workman's Breach of Contract Act—Withdrawal of, before passing of order under S. 2.

A complaint under S. 1 of the Breach of Contract Act (XIII of 1895) which is withdrawn

PENAL CODE, S. 300.

before any order is made by the Magistrate under S. 2, of the Act either for a refund of the advance paid or for specific performance of the contract is not a ‘criminal proceeding’ within S. 211, I. P. C. (*Aylng and Coutts Trotter, J.J.*) HUSSAINA BEARI v. EMPEROR.

43 Mad. 443.

—**Ss. 224 and 225 B—Escape from jail—Failure to furnish security for good behaviour—Section applicable**

The conviction of a person who escapes from jail in which he was confined, under S. 123, of the Cr. P. Code, for having failed to furnish security to be of good behaviour, should be under S. 225 B and not under S. 224, I. P. C. (*Piggott, J.*) MOOLI v. EMPEROR.

18 A. L. J. 1039 : 58 I. C. 831.

—**S. 292—Offence under—Essentials of—“Trespass,” Meaning of**

The gist of an offence under S. 292, I. P. C. is trespass, and before a person can be convicted under that section it must be proved that there was a trespass by him with the intention and in the place mentioned in the section.

The term “trespass” is used in its legal sense and means an unjustifiable intrusion upon property in possession of another person. (*Das, J.*) JHARI SINGH v. EMPEROR.

56 I. C. 235 : 21 Cr. L. J. 443.

—**S. 300 Exception (1)—Grave and sudden provocation ground of mitigation.**

The appellant K was charged under S. 302, Indian Penal Code with the offence of murdering his wife and one M. He was found guilty and sentenced to death. The deceased M and N had been intimate for some time. K accused her of being intimate with M, deceased and kept warning her. On the night in question the appellant found the *Charpyo* of his wife unoccupied. His children alone were found there crying. Naturally suspicions were directed towards M and the appellant at once proceeded to the *Khola* where he found them together. He at first caught M and having finished him he proceeded to deal with his wife (who had escaped while the appellant was grappling with deceased M) whom he dragged from her bed and killed her.

Held, that whether the accused saw M and N actually committing adultery or whether he simply found them together in the *Khola* there cannot be the least doubt that grave and sudden provocation must have been caused.

8 P. R. 1890; and 8 P. R. 1899 Cr. followed.

The rule contained in S. 300 exception (1) does not contemplate that in order to entitle an accused to earn the mitigation provided for, the act must immediately follow the provocation.

The appellant continued to be under the influence of provocation until he had killed N and the case comes under S. 300 Exc (1) I. P. C. and sentence reduced to five years

PENAL CODE, S. 300.

rigorous imprisonment (*Scott Smith and Abdul Raouf, JJ.*) KADIR BUKHARI v. EMPEROR.

2 Lah. L. J. 406.

—**Ss. 300, (4) 307—Grave and sudden provocation—Acting in concert by accused.**

The plea of grave and sudden provocation does not avail a person who, merely because his relatives are abused, arms himself with and attacks a defenceless man inflicting severe injuries. The conviction of such a person under S. 307 I. P. C. is not valid.

Where a person commits an assault upon another and a third person joins in committing the assault, it is a fair inference that the two were in concert, (*Knox, J.*) ABDUL KARIM v. EMPEROR.

58 I. C. 158:

21 Cr. L. J. 734

—**S. 302—Evilence—Weight due to serious offence.**

It is safer to follow the established rule that “the fouler the crime was, the clearer and the plainer the proof ought to be”.

Justice never requires the sacrifice of a victim and an erroneous sentence may “produce incalculable and irreparable mischief and destroy all integrity of tribunals and introduce a drain of social evils as the inevitable result”.

Where the only reliable circumstantial evidence against the accused was that he had motive for the crime and that he was seen running near the place of occurrence at or about the time of murder.

Held, that the accused could not be convicted under S. 402 I. P. C. upon this single circumstance, which stood by itself uncorroborated, and from which a mere suspicion was raised (*Jwala Prasad and Sultan Ahmed, JJ.*)

RAGHUNANDAN KOERI v. EMPEROR.

1 Pat. L. T. 684

—**Ss. 302 and 369—Kidnapping and murder—Distinct offences.**

Where the offence of kidnapping was in fact part of the transaction which led to the murder a separate conviction and sentence could not be maintained. (*Rattigan, C. J. and Martineau, J.*) DAULATRAM v. EMPEROR.

2 Lah. L. J. 653.

—**Ss. 302, 320 and 325—Murder—Culpable homicide—Grievous hurt—Not adequate motive for murder—Intention to cause death—Hurt resulting in death**

Where no adequate motive for the murder was proved a perusal of medical evidence showed that although there were two confused wounds on the head, a bruise on the fore-head and a bruise on the neck there was not fracture of any bones of the skull, nor apparently any injury caused to the brain. Nor was there any fracture of any bone of the body. From the medical evidence it appeared that it was merely intended to give deceased a severe beating. The medical witness was of opinion that death probably resulted from direct violence. He said

PENAL CODE, S. 302.

that none of the injuries taken alone could be termed mortal but that taking all the injuries into consideration, it might be inferred that they had caused death.

Held, that the accused cannot be held to have intended to cause the death.

The hurts caused having actually resulted in death amounted collectively to grievous hurt, having regard to the definition in S. 320 I. P. C.

The accused caused grievous hurt and either he intended to cause or knew that he was likely to cause grievous hurt when he gave the deceased such a severe beating and he committed an offence under S. 325 I. P. C. (*Scott-Smith and Wilberforce, JJ.*) NAJA v. EMPEROR.

1 Lah. L. J. 247.

—**Ss 302 and 390—Murder—Datura poison—Robbery—Intention to cause death.**

In a case of murder by Datura poisoning, it is to be determined with what object it is administered. Its use may be merely in order to facilitate the commission of robbery. It does not *per se* and necessarily import contemplation of the victim's death as a means towards, or as incidental to the main end of that offence.

The point is to be decided with regard to the circumstances of each particular case and the best indication of the intention of the offender can be gathered from the amount of Datura which he administers; if a very large quantity of Datura is administered the offender shall be presumed to intend to cause death of the victim for the successful termination of his crime. Cr 28, P. R. 1881 and 31, All. 148, ref. (*Shadi Lal and Wilberforce, J. J.*) KESAR DIN v. EMPEROR.

4 P. L. R 1920.

—**S. 302—Murder—Exception—Belief in witchcraft—No base motive—Sentencing power of court to commute sentence of death,—Cr P. Code, S. 365.**

Where the accused murdered the deceased knowing full well the nature of the act, but under the belief that by so doing he was helping in the recovery of his wife and children whose illness he attributed to the deceased, whom he believed to be a witch.

Held, that the accused was guilty of an offence under S. 302, I. P. C.

Mc Naughten's case (1843) 4 St. Tr. (N. S.) 847. 10 C. and F. 203, dist.

Per Das and Sultan Ahmed, JJ.—The policy of the law is as regards most offences to fix the maximum penalty leaving to the discretion of the Courts to award such punishment as would suit the circumstances of each case. The exercise of this discretion is always a matter of prudence and not of law.

Under S. 365 (5) of the Cr. P. Code this discretion of the Court is not curtailed but if the Court decides to inflict the lesser sentence prescribed under S. 302 I. P. C. reasons must be given why sentence of death is not passed,

PENAL CODE, S. 302.

Consequently where the facts proved established that the accused was not actuated by any baser 'motive,' but he committed the offence of murder in the honest, though unfounded belief that by so doing he was saving the life of and alleviating the sufferings of others the sentence of transportation instead of death sentence was the proper punishment.

6 W. R. Cr. 82 followed, 10 Bom. 512; 23 Cal. 604; 12 Mad. 459; 22 Cal. 817; 8 C. W. N. 218 Ref.

The fact that the accused's mind was liable to derangement was also a point to be considered in commuting the sentence of death.

Per *Mullick, J.* *contra*.—The object of punishment is not revenge but protection of society and the fact that the prisoner may have considered it a meritorious act to rid the village of the deceased ought not to have any influence upon the sentence. The plea of low intellect and unbalanced mind is not a good ground for mitigation of sentence.

Obiter. If the prisoner was, in fact labouring under a delusion and killed the deceased thinking that he was killing a dog, he would no doubt be entitled to an acquittal. (*Mullick and Das, JJ.*) MATO HO v. EMPEROR.

1 P. L. T. 282;
57 I. C. 171 : 21 Cr. L. J. 603.

—**Ss. 302 and 304—Murder—Wife's adultery—Provocation grave but not sudden—Sentence.**

The accused suspected his wife and made preparations to catch her with her paramour. A person whom he had asked to be on the watch called him outside his house and pointed to the spot where she and her paramour were together. Thereupon the accused returned to his house, took a heavy wooden pole and going to the place caught the couple in the act and dealt the paramour a blow on the head which killed him on the spot.

Held, that the action of the accused showed premeditation and deliberate intent, that the provocation though very grave was not sudden and that the offence committed was one under S. 302 of the Penal Code; but in consideration of the nature of the provocation the sentence was reduced from death to transportation for life, with a recommendation for still further reduction by the Local Government. (*Tudball and Sulaiman, JJ.*) GOSHAIN v. EMPEROR. 18 A. L. J. 851 : 57 I. C. 175 : 21 Cr. L. J. 607

—**Ss. 303 and 335—Grievous hurt Intention—Knowledge.**

The accused having found that a young man had approached his kept mistress for the purpose of having sexual intercourse with her, thought that he would be justified in teaching him a good lesson by giving him a good thrashing. He accordingly sent for the brother of the young man and in the presence of the villagers gave him a good beating by kicks and blows, which resulted in his death. The

PENAL CODE, S. 317.

deceased was of a weak constitution and had an enlarged spleen and it appeared that when the villagers told the accused that he was about to kill the young man by his kicks and blows, he observed that the deceased was merely pretending and gave him some more strokes with a cane.

Held, that in the circumstances of the case it was doubtful whether the accused had either intended or knew it to be likely that he would cause grievous hurt and as the case seemed on the border line between Ss. 323 and 325 of the Penal Code, the accused might be given the benefit of the doubt and should not be convicted of an offence under S. 323 of I. P. C. (*N. R. Chatterjee and Cumming, JJ.*) EMPEROR v. SABERALI SARKAR. 57 I. C. 826 : 21 Cr. L. J. 666.

—**Ss. 304 and 325—Fracture—Gangrene—Conviction in the alternative—Grievous hurt—Culpable homicide.**

Where in a scuffle the accused struck three *lathi* blows which fractured his bones and caused gangrene resulting in death but it was found that the accused did not intend to cause death. *Held* that the accused was not guilty of murder but was guilty of manslaughter (*Pigott and Walsh, JJ.*) RAMA SINGH v. EMPEROR. 42 All. 302 : 18 A. L. J. 224 : 58 I. C. 463 : 21 Cr. L. J. 783.

—**S. 304—Offence under—Free fight—Fatal blow—Identity of assailant unknown.**

Two parties armed with *lathis* indulged in a fight, and one of the contesting parties received injuries from the effects of which he died. It was uncertain which of the several persons composing the opposite side struck the fatal blow. *Held* these persons are guilty of an offence under S. 304 I. P. C. (*Sulaiman and Ryees, JJ.*) EMPEROR v. JHAMMAN. 58 I. C. 942.

—**Ss. 304, 305 and 325—Unpremeditated attack by two persons—Death—Offence.**

Two persons on receiving provocation delivered an unpremeditated attack on the deceased but it was not known who struck the fatal blow :

Held, that both were guilty of an offence under S. 325 I. P. C. (*Le Rossignol, J.*) RAMZIN v. EMPEROR. 5 P. L. R. 1920 : 54 I. C. 51 : 21 Cr. L. J. 3.

—**S. 317—Abandonment of child—Essentials of offence—Duty of prosecution—Benefit of doubt.**

In order to secure a conviction under S. 317 I. P. C. it is incumbent on the prosecution to prove, beyond all reasonable doubt, that the accused had exposed or left a child under the age of twelve years in some place with the intention of wholly abandoning it. That section will not apply to a case of mere neglect or temporary abandonment. If in any particular case there is a reasonable doubt as to the intention,

PENAL CODE, S. 323.

with which the child was left, the accused is entitled to the benefit of the doubt. (*Stanyon, A. J. C.*) MUSS GITABAI v. EMPEROR.

55 I.C. 205 : 21 Cr. L.J. 253.

—**Ss. 323 and 325**—Hurt—Blow with a stick—Intervention of woman with a child—Death of child—Offence See (1919) Dig Col. 861, CHATTUR NATHA v. EMPEROR.

54 I.C. 485 : 21 Cr. L.J. 85

S. 361 explanation I—Lawful guardian—Right to custody—Removing minor from custody—Nearest male relative—Rights of.

The mere fact that a person happens to be the nearest male relative of a Hindu minor girl does not give him the absolute right to the custody of the girl. If therefore he takes her away without the consent of the person in whose custody she was, he is guilty of an offence under Section 361, Indian Penal Code. Only the civil law guardian of a minor could raise the technical-plea that the legal relations of ward and guardian did not exist between the minor and the person from whose custody she was taken away. (*Piggot and Datal, J.J.*) EMPEROR v. SITLA PRASAD. 42 All 146 :

18 A.L.J. 64 : 54 I.C. 402 :
21 Cr. L.J. 50.

—**S. 366—Married woman—abduction—Carrying off by force—Elopement—Evidence of—Elements of offence.**

Four persons were convicted of having abducted a married woman of 20 or 25 years of age, and sentenced under S. 366, I.P.C., to five years rigorous imprisonment each. It was doubtful whether she left of her own accord. On the other hand, there was some suspicious circumstances which lent colour to the theory that it was a case of elopement.

Held, that the evidence for the prosecution as to the girl having been taken away against her will is weak, and it would be unsafe to sustain the conviction upon such evidence.

Held, also, that one of the accused claimed the girl as his fiancee and it may be that she was not satisfied with her husband and agreed to run away with him.

Held, further, that the prosecution had failed to establish an essential ingredient of the offence of abduction. (*Shadi Lal, C.J.*) LAKHU v. EMPEROR. 2 Lah. L.J. 536.

—**S. 372—Minor girl—Gejje ceremony—Performance of, if on offence.**

The Performance of a Gejje ceremony on a minor girl does not amount to her disposal within the meaning of S. 372 of the Penal Code, 1860. (*Shah and Hayward, J.J.*) EMPEROR v. PARMESHWARI SUBBI.

22 Bom. L.R. 894 :
58 I.C. 145 : 21 Cr. L.J. 721

—**S. 373—Buying, hiring or obtaining possession of minor for prostitution—Possession need not be obtained from third person.**

PENAL CODE, S. 396.

It is not requisite for the purpose of S. 373 of the Indian Penal Code 1860, that the possession of the minor should be obtained from a third person. It is enough if it is established that the accused in fact obtained possession of the minor with the intent that the minor shall be used for the purpose of prostitution. (*Shah and Crump, J.J.*) EMPEROR v. SHAMSUNDERBAL.

22 Bom. L.R. 1234.

—**S 379—Theft—Bona fide claim—Complicated question of title.**

A clear question of *bona fide* title having been raised in the case, the case was outside the cognisance of the Criminal Court.

Prima facie the auction purchaser is entitled to obtain possession of all the lands comprised in the writ of the Court, free from any incumbrance created by the Judgment-debtor and every attempt should be made by a criminal court to maintain the auction-purchaser in possession of the property unless a clear right to possession is established in any other person. (*Jwala Prasad, J.*) BHIM BAHDUR SINGH v. EMPEROR.

1 P. L.T. 121 : 55 I.C. 854 :
21 Cr. L.J. 374.

—**Ss. 379 and 380, 23 and 24—Theft—Essentials of offence—Bona fide investigation—claim of right.**

To constitute the offence of theft the prosecution must establish (a) that there was dishonest intention to take property (b) that the property, was moveable property (c) that it was taken out of the possession of another, (d) that it was taken without the consent of that other, and (e) that there was removal of the property in order to accomplish the taking of it.

In prosecutions for theft; whenever there is an assertion of a claim of right it is the duty of the Court to enquire into the question whether that claim is a *bona fide* claim or is a mere pretence. If, when that claim is actually put forward the Court fails to decide the question whether the claim is a *bona fide* claim or a mere pretence the conviction cannot be sustained. (*Das, J.*) AJODHYA NATH PARMI v. EMPEROR. 54 I.C. 992 :
21 Cr. L.J. 208.

—**Ss 395 and 397—Dacoity—Torture—Sentence—Leniency.**

A person found guilty of the offence of dacoity with torture ought not, in the matter of sentence, to be treated with any consideration of leniency. (*Mears, C. J. and Rafique, J.J.*) EMPEROR v. SUNDAR. 56 I.C. 771 :
21 Cr. L.J. 515.

—**Ss. 396 and 460—Dacoity with murder—Charge against seven persons—Acquittal of five—Offence.**

Seven persons were tried for an offence under S. 396, I.P.C. The two appellants N. and F. were convicted the remaining five accused being acquitted. The conviction of N. was set aside by the High Court as being not

PENAL CODE, S. 396.

sustainable on the evidence against him F was however found as one of the persons concerned. It was not satisfactorily proved that as many as five persons were concerned in the crime nor was it clear that the deceased's assailants were guilty of murder. His death was the result of blows given on the right side which caused the rupture of liver and the fracture of four ribs. The culprits left the house taking the jewellery which the inmates were wearing and probably alarmed at death, decamped sooner than they would otherwise have done.

Held, that it had not been made out that F. intended to kill the deceased or to cause him such injury as he knew to be likely to cause death.

The offence committed by F. was one falling under S. 460 I. P. C. (*Scott-Smith and Martineau, JJ.*) NUR DAD v. EMPEROR.

1 Lah L.J. 252

S. 396—Offence under—Accused sent to prison for not being able to furnish security.

The fact that the accused was sent to jail for being unable to furnish security under S. 110 Cr. P. C. is irrelevant in a proceeding against him under S. 396 I. P. C.

A presumption under S. 114 Evidence Act will not alone justify fixing a person with more than knowledge that the goods were obtained by dacoity. (*Walmsley and Shamsul Huda, JJ.*) ASIMUDDIN SARDAR v. EMPEROR.

32 C. L. J. 89

S. 401—Offence under—Essentials of belonging to gang associated for habitually committing theft—Evidence—Sufficiency of

The gist of the offence under S. 401 is association for the purpose of habitually committing theft or robbery and habit is to be proved by the aggregate of acts.

An order under S 110 of the Criminal Procedure Code against the accused, and detention in jail for failure to furnish security thereunder, do not bar their subsequent trial and conviction under S. 401 of the Penal Code.

Evidence of previous conviction of theft and of being bound down under S. 110 Cr. P. C is not admissible on a subsequent trial of the accused under S. 401 I. P. C. to prove either the commission of such offence or bad character.

. 27 Cal. 139; 16 C. W. N. 69; followed.

Quare. Whether a previous conviction may be used for the purpose of proving only association.

Evidence of the commission of several thefts, of meeting together at different places before and after the commission of thefts and burglaries in bazaars, boats and houses, of being seen on various occasions carrying away stolen articles or found in company under circumstances suggesting complicity in thefts and burglaries, and evidence of systematic thefts of cattle by individual accused are held sufficient to support a conviction under S. 401. I. P. C.

PENAL CODE, S. 406.

Shamsul Huda and Duval, JJ.) KASEM ALI v. EMPEROR. 47 Cal 154: 31 C. L. J. 192 : 55 I. C. 994: 21 Or. L. J. 386.

S. 403—Offence under—When complete.

The offence under S. 403 I. P. C. is complete the moment the accused receives or retains the money with a dishonest motive of appropriating it or converting it into his own use, and the failure to return it to the complainant's master at Patna city was not an essential ingredient for the offence of misappropriation. (*Jwala Prasad, J.*) GOWKARAN LAL v. SARJU SAW.

1 P. L. T. 200: 56 I. C. 775 : 21 Cr. L. J. 519.

Ss. 403 and 406—Partnership—Complaint by one partner against another if maintainable.

A criminal action against a co-partner by a partner under S. 403 or S. 406 I. P. C is maintainable provided the other ingredients justifying the prosecution are present. (*Sultan Ahmad, J.*) BHUDARMULL MARWARI v. RAMCHANDER MARWARI.

1 P. L. T. 197: 55 I. C. 674 : 21 Cr. L. J. 388.

Ss. 405 and 408—Breach of trust by partner civil and criminal liability—Function of criminal court.

A matter which is *ex-facie* a civil dispute should not be entertained by the Criminal Court unless the prosecution is able to prove clearly and beyond doubt that the accused acted dishonestly and with a view to enrich himself clandestinely at the expense of those with whom he was working and with whom he was bound by a fiduciary relationship. (*Seshagiri Aiyar and Moore, JJ.* KODRATH-ALWAR CHETTY *In re.* 11 L. W. 144: 55 I. C. 469. 21 Cr. L. J. 309.

Ss. 405 and 408—Criminal misappropriation or breach of trust — Clerk authorized to receive monies.

Where a clerk in the service of an estate is authorized to receive money on its behalf and to pay them into the estate treasury, money so received by him is not his money for which he has merely to account to the estate but is actually the estate money over which he is entrusted with dominion only. If he misappropriates the same, he commits criminal breach of trust, punishable under S. 408 of the Penal Code. The offence is not one merely falling under S. 403. 9 Cal. L. J. 237: foll. 12 Mad. 49 expl. (*Krishnan, J.*) PINDIPROLU VENKATA SUBBA RAO v. EMPEROR.

12 L. W. 295 : (1920) M. W. N. 518:

58 I. C. 824.

S. 406—Criminal breach of trust—Agent entitled to adjust collections towards remuneration+Retention of money.

The accused was employed as agent for collection of taxes by the Union Committee,

PENAL CODE, S. 406.

He was to take 10 percent of the collection as remuneration and to hand over the balance to his master or to pay the money into the treasury, no period being fixed for the latter purpose. He was convicted on a charge under S. 406 I. P. C. for having failed to account for a certain sum of money collected by him.

Held, that as the accused was entitled to deduct his remuneration from the collections and as no period was fixed for payment into the treasury a charge of criminal breach of trust could only be maintained after an adjustment of accounts. The mere fact that he retained the sums collected not being conclusive proof of criminal breach of trust the conviction was therefore not maintainable. (*Sultan Ahmed, J. v. NURUL HASSAN v. EMPEROR.* 56 I. C. 669 : 21 Cr. L. J. 509

—S. 406—Criminal breach of trust—Offence what constitutes—Conversion or disposal of property. See Cr. P. Code, Ss. 179 and 181 (2).

54 I. C. 677.

—S. 408—Criminal breach of trust—Charge too vague—Misappropriation of definite sums to be proved—Cr. P. Code, S. 222 (1) and (2).

Where a charge of Criminal breach of trust is made against a general agent of a trader with general authority to expend money, the cases must be rare in which it is sufficient to charge a net balance as having been misappropriated

S. 222 (2) is merely a particular illustration governed by Cl. (1) which the Legislature has enacted so as to make a case free from doubt which might otherwise give rise to serious doubts, 33 All. 36 dist.

It is not permissible to allege a net balance and convict on proof of an offence in regard to some more or less indefinite portion of the amount.

Use of the Criminal Courts to recover a Civil claim condemned Grant of "compensation" out of the fine in such cases disapproved (*Walsh, J. v. MOHAN SINGH v. EMPEROR.*

42 All. 522 : 18 A. L. J. 633.

—S. 409—Criminal breach of trust—Non-payment of money to person other than master.

The accused who was a Sub-Post Master was asked to make payments for some cash certificate. The value of each certificate was Rs. 8-2-6 and this amount was paid by the Government for payment to the certificate holders. The accused paid them Rs. 7-3-6 each and himself appropriated the balance. *Held*, that the accused was guilty of criminal breach of trust within S. 409, I. P. C. 10 Bom. 256 not foll. (*Knox, J. v. SITA RAM v. EMPEROR.*

42 All. 204 : 18 A. L. J. 93 : 55 I. C. 476 : 21 Cr. L. J. 316.

—S. 411—Receiving Stolen property—Duty to account for recent possession—Trial by jury—Explanation of accused.

PENAL CODE, S. 411.

Where recent possession of stolen property by the prisoner is established, and he offers an explanation which the jury thinks may be reasonably true, though they are not convinced that is true, the prisoner is entitled to an acquittal because the Crown in such a case has not discharged the onus of proof that rested upon it.

In a case under Section 411, I. P. C., in charging a jury it should be pointed out that the stolen goods referred to must be possession soon after the theft or that the stolen goods must have been recently stolen. (*Sanderson C. J. and Walmsley, J. v. HATHEM MONDAL v. EMPEROR.* 24 C. W. N. 619 : 31 C. L. J. 310 : 56 I. C. 849 : 21 Cr. L. J. 545.

—S. 411—Receiving stolen property—Evidence necessary to prove offence.

Where a person is charged with receiving or being in possession of property alleged to have been stolen, an important factor is the value of the property and as to this the Court should insist on having direct evidence as the accused is entitled to have some sworn testimony of value which he can cross-examine. (*Walsh, J. v. MAHBOOB v. EMPEROR.*

56 I. C. 856 : 21 Cr. L. J. 552.

—S. 411—Receiving stolen property—House-occupied by several Persons—Conviction.

Where stolen property is found in a house occupied by several persons, it is not enough to show that the property was found in the house to convict a member of the family who might have had nothing to do with bringing or keeping it there. (*Kanhaiya Lal, J. v. BASHIR AHMAD KHAN v. EMPEROR.*

22 O. C. 256 : 54 I. C. 248 : 21 Cr. L. J. 40.

—S. 411—Stolen property—House in possession of manager of joint Hindu family—Liability—Joint trial.

The manager of a joint Hindu family is *prima facie* responsible for the illegal possession of stolen articles found in his house unless the presumption is rebutted upon the particular facts and circumstances of the case (1919) 4 P. L. J. 525 distinguished.

Where the possession of different stolen properties found with different accused persons is under the joint control of all of them, or is due to concert or collusion amongst them, a joint trial of all of them is not illegal. 33 Cal. 1256 followed. (*Jwala Prasad, J. v. MUSAI KAMAT v. EMPEROR.*

1 P. L. T. 431 : 58 I. C. 341 : 21 Cr. L. J. 757.

—S. 411—Theft of cereals—Identification—Conviction—Nature of evidence—Exclusive possession.

To maintain a conviction under S. 411 I. P. C. where the stolen property consists of cereals the fact that cereals found in the house of a

PENAL CODE, S. 415.

person residing in the same village correspond with the alleged stolen cereals is not sufficient to establish the identity of the stolen cereals with those found. It must be shown that the cereals stolen were peculiar, the like of which could not be in the possession of any other villager. Moreover the exclusive and conscious possession of the stolen articles must be brought home to the accused. (*Sultan Ahmad, J.*) *SHEIK SHARAFAT v. EMPEROR.*

1 Pat. L. T. 727 :
21 Cr. L. J. 673 : 57 I. C. 913

S. 415—Dishonest concealment of facts—Presumption of knowledge of law—money borrowed by minor as major—Extension of minority by appointment of guardian—Whether knowledge can be presumed.

A minor in respect of whom a certificate of guardianship had been granted to his mother borrowed while he was between the ages of 18 and 21 two sums of money from a person who was not aware that a guardian had been appointed. He was prosecuted on a charge of cheating. The Magistrate found that he had cheated the creditor by dishonestly concealing from him the fact that his mother had been appointed guardian and that he had not yet attained the age of 21; and also that he had borrowed the money without intending to repay it, *held*, no revision lay; that it could not be presumed against the accused that he knew what would be the legal consequences of the certificate of guardianship obtained by his mother in enlarging the period of his minority and the conviction was upheld on the ground that it was established that he had borrowed the money dishonestly not intending to repay it. (*Piggot, J.*) *SADA RAM EMPEROR.*

18 A. L. J. 408 :
58 I. C. 253 : 21 Cr. L. J. 749

S. 420—Cheating contract illegal—Offence.

The mere fact that a transaction does not amount to a legal contract because its object is unlawful and opposed to public policy, is no warrant for holding that no criminal offence can be committed in the course of the transaction. Where the accused represented a woman of the Rajput caste to be a kubi and complainant, who wanted a wife, was induced to pay a sum of money to the accused for her and marry her.

Held, that the accused were guilty of the offence of cheating under S. 420 I. P. C. (*Batten O. J. C.*) *LOCAL GOVERNMENT v. JEAMSINGH.*

58 I. C. 820.

S. 420—Cheating—Facts essential to constitute offence.

To sustain a conviction of cheating under S. 420 I. P. C. the prosecution must prove that the person cheated was dishonestly induced to do something which he would not have done unless he had been deceived and that the act done was likely to cause damage

PENAL CODE, S. 426.

to that person in property and the damage must be proved by evidence as much as any other part of the offence. (*Knox, J.*) *HANUMAN v. EMPEROR.* 57 I. C. 103 : 21 Cr. L. J. 583.

Ss. 420 and 477—Cheating—Fraudulent Cancellation of document—Criminal Court if can enquire See (1919) Dig. Col. 869. *HIRA LAL GHOSE v. MA KHAN LAL DAW.*

54 I. C. 64.

S. 420—Offence under—Delivery of property to be induced by accused's cheating and not by the representations of a third person.

For a conviction under S. 420 I. P. C it was necessary for the prosecution to prove that there had been not only an act of cheating on the part of the accused but also by that very act of cheating the person cheated was induced to deliver property. If property is delivered owing to the effective inducement of a third person's assurance there is no offence under the section. (*Knox, J.*) *MATA PRASAD v. EMPEROR.* 18 A. L. J. 371 : 55 I. C. 730 : 21 Cr. L. J. 362.

S. 424—Mischief—Trees—Landlord and Tenant—Bona fide claim.

When a *bona fide* claim of title is raised, founded or unfounded, the accused is entitled to acquittal but whether the claim is raised *bona fide* or not is a question of fact and has to be determined in the circumstances of each case, and no case can be a true authority for another.

The finding as to "dishonest" or "fraudulent" removal can be implied from the judgment read as a whole, there being no charm in the use of the particular words. (*Jwala Prasad, J.*) *PANCHI MANDAR v. EMPEROR.*

1 Pat. L. T. 318 :
57 I. C. 273 : 21 Cr. L. J. 609.

Ss. 425 and 430—Diversion of water—Cutting open bund not belonging to complainant—Bona fides—Mischief.

The case for the complainant was that the accused had cut open a bund and caused a diminution of water supply to her fields. The bund was not proved to belong to the complainant. There was evidence that the accused had been in the habit of obtaining a permit for diverting the water like this in previous years and that he did the act anticipating the permit he had again applied for;

Held, the action of the accused did not amount to mischief under Ss. 425 and 430 I. P. C. (*Seshagiri Aiyar and Moore, JJ*) *KULLAPPA NACKER v. PALANIAMMAL.*

27 M. L. T. 214 : 11 I. W. 148 :
(1920) M. W. N. 131 : 54 I. C. 617 :
21 Cr. L. J. 137.

S. 426—Mischief—Bona fide assertion of right—Wrongful loss.

Where a tenant in the *bona fide* assertion of a customary right, without intending to cause

PENAL CODE. S. 441.

wrongful loss cuts down an ancient tree standing on his holding, he cannot be convicted of the offence of mischief under S. 426 I. P. C. (*Piggott, J.*) **PITAM SINGH v. EMPEROR.**

58 I. C 828

S. 441—Criminal trespass—Proof of intention.

An unlawful entry upon property does not amount to criminal trespass unless one of the intents mentioned in S. 441 I. P. C. is made out by the prosecution or found by the Magistrate. (*Drake-Brockman, J. C.*) **PIRBAN v. BAJI.** **54 I. C 620 : 21 Cr. L. J 140.**

Ss. 447, 457 and 511—Criminal trespass—House Trespass—Attempt.

To constitute the offence of house trespass it is necessary that an entry should have been effected into the house or building. Mounting the roof of a house with intent to enter the house is not house trespass nor even attempt to commit house trespass but merely a preparation for the offence of house trespass and is punishable as criminal trespass under S. 447 I. P. C. (*Duckworth, J.*) **BATWA KHAN v. EMPEROR.** **12 Bur. L. T 222.**

S 447—Offence under—Exposure of goods for sale on public road

The exposure of goods for sale on a public road belonging to a District Board, the collection of the tolls leviable on which is leased to another, is not an offence under S. 447 I. P. C (*Knox, J.*) **BAREF LAL v. EMPEROR.**

55 I C 721 : 21 Cr L J 353.

Ss. 456 and 457—Charge—Conviction under S 457—Appellate Court, whether can convict under S 456.

Where the accused was tried and convicted for an offence of lurking house-trespass under S. 457 I. P. C but the Appellate Court having found that the object was not to commit theft, but to insult or annoy a woman convicted him under S. 456 I. P. C.

Held, that the conviction by the Appellate Court for an offence under S. 456 I. P. C. for which he was not tried, was illegal. (*Das, J.*) **RAGHU SINGH v. EMPEROR.**

1 P. L. T. 221:

56 I. C 592 : 21 Cr. L. J. 498.

Ss. 465 and 471—Forgery—Dishonest intention—Forging receipt for obtaining a certificate of solvency to secure contract.

A declared insolvent wishing to obtain some contract work was asked to produce an order to the effect that he was solvent. In order to obtain the necessary certificate of solvency he produced before the Official Receiver a forged receipt showing that he had paid up a certain debt which the creditor had written off as a bad debt.

Held, that the intention of the accused was by means of deceit to obtain a wrong if gain for himself, so that he had acted dishonestly and was rightly convicted under Ss. 465, 471 I.

PENAL CODE. S. 498.

P. C. (Gokul Prasad, J.) ABDUL GHAFOOR v. EMPEROR. **18 A. L. J. 1137.**

S. 477 (a)—Replacing stamps on documents by used up stamps, if offence under. See (1919) *Dig Col 874. EMPEROR v. BIBHU, DANANDA CHAKRAVARTHI.*

54. I. C. 892 : 21 Cr. L. J. 188.

S. 494—Bigamy—Trial Court not having jurisdiction—Transfer of case to proper Court.

Accused No. 2 was charged with bigamy under S. 494 I. P. C and accused No. with abetment of that offence. The Second marriage took place in a village in the Bahraich district which was outside the jurisdiction of the Assistant Sessions Judge of Kheri to which Court the case was committed for trial. The Assistant Sessions Judges referred the case under S. 215 Cr. P. C. to the Judicial Commissioner for transfer of the case to Bahraich district.

Held, that the proper order in the case was to set aside the proceedings of the Courts on Kheri as being without jurisdiction..

An offence under S. 494 I. P. C is cognizable only after a complaint has been made by an aggrieved party and the Court would quash the conviction leaving it to the complainant if he thinks fit to go and prosecute his case in the proper Court (*Lindsay, J.*) **EMPEROR v. SHEO DAYAL.** **23. O C 87: 57 I. C. 459 : 21 Cr. L J. 635.**

S 494—A Hindu lady becoming convert to Islam faith and marrying a mussalman husband—Offence.

The accused, wife of the complainant changed her religion and became a Mussalman, and a month latter married a Mussalman.

Held, that the mere fact of her conversion to Islam did not dissolve the accused's marriage with complainant which could only be dissolved by a decree of a Court. Consequently she was guilty of an offence under S. 494 I. P. C. 18 Cal 264 foll.

4 Bom. 330 49 P. R. 1907 5 P. R. (Cr.) 1919 32 P. R. (Cr.) 1870 refd. to.

The accused's ignorance of the law could be taken into account in extenuation of the punishment. (*Abdoel Raof, J.*) **MUSSUMAT NANDI v. EMPEROR.** **1 Lah. 440.**

S. 498—Detention—Meaning of—Woman living of her own free will—Refusal to go back to husband. No offence.

Where the facts found were that the woman was living with the accused of her own free will and had no desire to return to the husband that when the husband went to the accused's house and claimed her, she deliberately turned her back on him and walked into the house and that the accused did not then make her over to the husband, it was held, that the accused could not be convicted under S. 449 I. P. C. of detain-

PENAL CODE, S. 498.

ing her. (*Piggott, J.*) LACHMAN CHAMAR v. EMPEROR. 18 A. L. J. 311 : 56 I. C. 209 : 21 Cr. L. J. 417.

—**S. 498—Enticing away a married woman—Connivance of husband.**

A conviction under S. 498 I. P. C is not bad merely because the husband connived at the taking away or concealing of the wife. (*Das, J.*) GANESH RAM v. GYAN CHAND

54 I. C. 619 : 21 Cr. L. J. 139.

—**S. 498—Essentials of offence.**

To sustain a conviction under S. 498 I. P. C. it must be proved that the woman had been enticed or taken away from her husband's house and that she was detained for the purpose of illicit intercourse. The mere fact that she was seen outside the accused's house is not sufficient. (*Banerji, J.*) DEONANDAN v. EMPEROR.

55 I. C. 863 : 21 Cr. L. J. 383

—**S. 498—Evidence of marriage—Mere statement of complainant whether sufficient—Strict proof necessary.**

Where in the case of a conviction under S. 498 of the Indian Penal Code there was no better evidence of marriage between the complainant and the woman than the mere statement of the complainant that he was married to her it was held, that the conviction could not be sustained. 20 All. 166 referred to. (*Knox, J.*) BUDDHU v. EMPEROR.

42 All. 401 : 18 A. L. J. 411 .
55 I. C. 786 : 21 Cr. L. J. 368.

—**S. 499—Defamation—Imputation intended harm to reputation—Actual harm if necessary.**

To complete the offence of defamation as defined by S. 499 of the Indian Penal Code, there must be an imputation with reference to a person intending to harm or knowing or having reason to believe such imputation will harm the reputation of the person against whom the imputation is made. It is not an essential part of the offence that harm should be caused to the reputation of the person against whom the imputation was made. 17 Bom. L. R. 82 diss. (*Shah and Crump, JJ.*) EMPEROR v. PIMENTO.

22 Bom. L. R. 1224

—**S. 499—Defamation—Privilege—Absolute privilege—Party to judicial proceedings—Statements filed in Court—Civil and criminal proceedings.**

In this country, questions of Civil liability for damages for defamation and questions of liability to criminal prosecution do not, for purposes of adjudication stand on the same basis.

If a party to judicial proceedings is prosecuted for defamation in respect of a statement

PENAL CODE, S. 504.

ment therein on oath or otherwise his liability must be determined by reference to the provisions of S. 499, I. P. C. Under the Letters Patent the question must be solved by the application of the provisions of the Indian Penal Code and not otherwise; the Court cannot engraft thereupon exceptions derived from the Common Law of England or based on grounds of public policy. Consequently a person in such a position is entitled only to the benefit of the qualified privilege mentioned in S. 492, I. P. C.

If a party to a judicial proceeding is sued in a Civil Court for damages for defamation in respect of a statement made therein on oath or otherwise, his liability in the absence of statutory rules applicable to the subject must be determined with reference to principles of justice equity and good conscience.

There is a large preponderance of judicial opinion in favour of the view that the principles of justice, equity and good conscience applicable in such circumstances should be identical with the corresponding relevant rules of the Common Law of England. A small minority favours the view that the principles of justice, equity and good conscience should be identical with the rules embodied in the Indian Penal Code.

In order to take a case out of the primary rule enunciated in S. 499, of the Penal Code and to bring it within either exception 8 or 9, good faith on the part of the person who makes or publishes the imputation must be established (*Mookerji, C. J. Fletcher, Richardson, Walmsley and Buckland, JJ.*) SATIS CHANDRA CHAKRAVARTI v. RAM DAYAL DE.

24 C. W. N. 982 : 32 C. L. J. 94.

—**S. 504—Essentials of offence under—Intentional insult—Liability of breach of the public peace—Rude or insolent behaviour.**

Under S. 504 I. P. C. it is necessary that the insult should have been intentionally caused, and thereby provocation given with the intention or knowledge that such provocation was likely to cause the person provoked to break the public peace or to commit any other offence.

Where the accused a furniture-dealer was alleged to have insulted a lady customer by not getting up, when told by her to do so from the chair on which he was sitting in his shop and by refusing to give her some furniture which her husband had on the previous day asked him to supply on hire. Held, that although his conduct might have been very discourteous, rude and insolent, yet that could not be sufficient within S. 504 to constitute the intentional insult, or to establish the intention or knowledge, required for a conviction under that section (*Banerji, J.*) RAHIM BAKSH v. EMPEROR.

18 A. L. J. 515 : 56 I. C. 435 :
21 Cr. L. J. 451.

PENSIONS ACT, S. 4.

PENSIONS ACT, (XXIII of 1871)
S. 4—Certificate from Collector—suit for Share—Sardeshmukhi Haq—suit against Secretary of State.

A suit against the Secretary of State for India in Council to recover a share in the Sardeshmukhi Haq cannot lie in the absence of a certificate under S. 4 of the Pensions Act 1871.

S. 4 of the Pensions Act 1871, so far as it deals with pensions and grants of land revenue, is *ultra vires*, since an action would not lie against the East India Company on a grant of Land Revenue as the grant was in exercise of their sovereign rights. (*Macleod C. J. and Fawcett, J.*) **MADHAVARAO MORESHWAR v. SECRETARY OF STATE FOR INDIA.**

22 Bom L. R. 1176

S 4—Land tenure—Grant of a village—Decision of inam Commissioner—Grant of soil—Collector's certificate.

Where the grant of a village is continued by the Inam Commissioner as Inam, excluding the ancient Hakdars and Inamadars, in the grantees family so long as their male descendants are alive the grant conveys to the grantees not merely the revenues of the village but the lands also.

The claims to such a grant can be entertained by the Civil Court in the absence of a certificate from the Collector under S. 6 of the Pensions Act. (*Macleod, C. J. and Heaton, J.*) **SAYDANMIA v. HASSANMIYA.**

22 Bom. L. R. 959 : 58 I. C. 331.

Ss 5 and 6—Muafi rights—Suits for declaration.

A suit against Government for a declaration that the plaintiff is entitled to muafi rights in a certain mahal is barred by Ss 5 and 6 of the Pensions Act. (*Ameer Ali, J.*) **HAKIM SHAM SUNDAR LAL v. THE SECRETARY OF STATE FOR INDIA.**

12 L. W. 311 : 57 I. C. 156 (P C.)

S 11—Grants for past services if a "pension"—Grants of money and of revenue

Every grant made for past services is not a "pension" in the words of S. 11 of the Pensions Act irrespective of its nature. 20 M. L. J. 88 foll.

The pensions Act 1871 draws a distinction between pensions and grants of money and land-revenue. 30 Mad. 153 : 4 Bom. 432 foll. (*Olifield and Seshagiri Aiyar, JJ.*) **JOGIRDAR RAMA RAO v. KOTIPPI THIMMA REDDI.**

11 L. W. 398 : 54 I. C. 331.

PLEADER—Admission—Criminal trial—Defence.

In a case of murder, it is better not to take admissions from the Counsel for the defence at all—Every fact ought to be strictly proved on the record (*Knox and Walsh, JJ.*) **SHOB NARAIN SINGH v. EMPEROR**

58 I. C. 457 : 21 Cr. L. J. 777.

PLEADER AND CLIENT.

Counsel—Professional work—Intervention of solicitor essential—Professional etiquette.

The usage and etiquette of the profession require that in all but some exceptional cases, Counsel should not undertake any professional work as regards which the relation of Counsel and client can arise except on the instructions of a solicitor. There is no statutory rule of law to prevent a litigant from the instructing Counsel directly or to prevent Counsel so instructed from appearing on behalf of a litigant but Judges of the highest eminence emphasized the importance of strict adherence to the long-established professional usage in this matter. In the Calcutta High Court departure from this practice has been allowed only in the case of appeals from the *moiussil*.

There must be a real and not merely a formal compliance with requirements of professional usage in this respect, which is "expedient in the interest of suitors and for the satisfactory administration of justice." Consequently, communications should pass between Counsel and attorney and not between the Counsel and the lay client without the intervention of the attorney otherwise, the salutary principle that the attorney stands between client and his counsel in all legal proceedings might in substance be abrogated by means of personal communication between Counsel and client. (*Mookerjee and Fletcher, JJ.*) **JACOB & Co. v. RASH BEHARY GHOSE.**

31 C. L. J. 313 : 57 I. C. 22.

Misconduct—Court—Disobedience to laws—Passive Resistance—Satyagraha Pledge signing of—Unprofessional Conduct. See LETTERS PATENT (BOM) CL. 10.

22 Bom. L. R. 13.

Misconduct—Criticism of administration of criminal Justice in a district newspaper—Proceedings under S. 14 of the Legal Practitioners' Act not justifiable. See LEG. PRAC. ACT (XVII OF 1879) Ss. 13 (b) AND 14.

11 L. W. 122.

Misconduct—Trade—Vakil not to embark upon, without permission of High Court—Entering into trade, meaning of. See (1919) Dig. Col. 878. IN THE MATTER OF TIKA RAM.

42 All. 125.

PLEADER AND CLIENT—Authority to compromise—if includes authority to withdraw.

Power to withdraw a suit unconditionally must be given specifically and cannot be implied from the general words authorising a vakil to compromise. (*Seshagiri Aiyar, J.*) **RAMASWAMY PILLAI v. BADRA NAYAKKAN.**

38 M. L. J. 322 : 27 M. L. T. 99 :

11 L. W. 225 : 55 I. C. 267.

PLEADER AND CLIENT.

—Authority of pleader—Vakalutnamah—Pleader not accepting if entitled to act—Authority to withdraw or give up claim—Agreement to be bound by special oath

One of the plaintiffs in a suit for recovery of money died and her heirs were substituted in her place. On behalf of the original plaintiffs, three pleaders A, B, and C were engaged. The substituted plaintiffs presented a second Vakalutnamah on which only two junior pleaders B and C made a formal endorsement of acceptance though it contained the name of A also.

Held, that as senior pleader of the three A was entrusted with the management of the case on behalf of all the plaintiffs.

The two Vakalutnamahs were similar in terms and authorized the pleaders amongst other things to withdraw the suit or to give up the claim of the plaintiffs to cite and examine witnesses or to refuse to examine the same and provided that all acts done by the pleaders for the benefit of their clients would be accepted by the parties as their own acts.

Held, that the powers given to the pleader were very wide and when the Vakalutnamah authorized him even to withdraw the suit or to give up the claim of the plaintiffs the authority given and the words used were comprehensive enough to include also the step taken by the pleader in placing one of the defendants on special oath and agreeing that his clients should be bound by the answers given by the witness on such oath. (*Tunnon and Beashcroft, JJ.*)

MEHERJAN BIBI v. SYED KAURKUDDIN HAFIZ

24 C. W. N. 385 : 57 I. C. 149

PLEADINGS—Alternative case—Right to set up—Inconsistent pleas—Proof of *Sce (1919) Dig Col. 878. THE OFFICIAL ASSIGNEE OF THE CALCUTTA HIGH COURT v. VIDYASUNDARI DASI.*

54 I. C. 700

—Alternative claim—New case—Distinction between—Court not to give relief on the strength of a case not set up in pleadings

Ordinarily a plaintiff must be limited to the case which he puts forward in his plaint, though he may put forward an alternative case in his plaint in the commencement, so that the defendant may know if he has more than one case to meet and may not be taken by surprise.

It is not open to a Court to make out a new case for the plaintiff which the defendant has had no opportunity to meet. (*Shadi Lal and Wif. v. J. J. MAHOMED SHAH v. FATTA.*

15 P. L. R. 1920 : 2 Lah. L. J. 56 : 54 I. C. 43.

—Appeal—Presented out of time—Duty of Court to determine whether delay should be excused—Decision not to be postponed to final hearing. See LIM ACT, Ss. 5 AND 3.

54 I. C. 36

—Change of case—Plaint based on specific allegation—Decree on different allegation when proper.

PLEADINGS.

Where a plaintiff comes to trial with a specific allegation on which he asks the Court to adjudicate in his favour it is not open to the Court to arrive at a finding in his favour contrary to the allegation set up. (*Fletcher and Duval, JJ.*)

BADARUDDIN v. HERAJTULLA,

54 I. C. 797.

—Change of case—Suit on easement—Decree on footing of natural right when can be given.

A plaintiff claiming a right based upon easement and failing to establish the exercise of the right for the statutory period, cannot succeed upon his natural right. It is not open to the Court to make out a case not set up in the plaint and grant relief.

Plaintiff sued for a declaration of right by easement to two mohas for draining of rain water from his lands but he failed to establish the exercise of the right for the statutory period. The Appellate Court, however, gave him a decree, holding that he was entitled to the natural flow of the water through the mohas.

Held, that the decree could not be maintained. The plaintiff having failed to establish the easement asserted by him it was not open to the Appellate Court to change the claim into one for the flow of natural water. The plaintiff could not succeed upon his natural right to drain off water from higher to lower lands in the absence of evidence that the water flowed in the usual course of nature and in undefined channels, and to succeed upon his natural right, the plaintiff must have specifically pleaded such right. (*Sultan Ahmed, J.*)

MANDER v. FAKIR MANDER.

56 I. C. 970.

—Change of case—Suit for redemption—Defence of Sham transaction—Finding that mortgage was intended to be a sale.

In a suit for redemption defendant set up that the transaction was a sham not intended to have any legal effect, but was, for the purpose of defeating a threatened claim to pre-emption, drawn up in order to make a transaction of a sale already completed.

Held, a finding that the transaction was intended to take effect as a sale cannot be sustained, as such finding, in effect, sets up a case not advanced by the defendant. (*Lindsay, J. C.*)

SAHEB BAKSH SINGH v. MAHOMED ALI MAHOMED.

58 I. C. 115.

—Change of case—Suit as vendee—Relief on the ground of mortgage.

Where in a suit for possession as a vendee it is found that the plaintiff is entitled to possession not as a vendee but as a mortgagee, the defendant can repudiate the mortgage by paying the mortgage money, and a separate suit for redemption is not necessary. (*Stuart and Kanhaiya Lal, A. J. C.*)

BISRAM SINGH v. SANWAL SINGH.

23 O. C. 238 :

57 I. C. 541

PLEADINGS.

Change of case—Variation between pleadings and proof.

A party who in the trial Court fails to establish the case which he set up, is not entitled to advance a new case in appeal nor is he entitled to a remand to enable him to establish his claim on the new case set up (*Newbould, J.C.*) DURGA CHARAN BISWAS v. KAILASH CHANDRA DAS. 54 I.C. 645.

Confession and avoidance—Plea of what constitutes.

A defence of confession and avoidance can be said to have been raised only when the defendant completely admits the basis of the plaintiff's claim but seeks to avoid the effect of that admission by pleading, for example in the case of a suit on a contract, performance, fraud, release, limitation or otherwise. (*Drake Brockman, J.C.*) EKOJI KUNBI v. AKAJI KUNBI 54 I.C. 131.

Costs — Partition suit—Order as to costs. See Costs. 11 L.W. 5.

Maintenance suit against heirs—Issue as between co-heirs inter se—Plaintiff's claim not affected—Decree against estate.

A Hindu mother sued for maintenance against the two widows of her son. One of the widows set up a posthumous son whose paternity was denied by the other and he was thereupon added as a party. Held, that it was unnecessary to decide this question of paternity and that the proper decree to pass was one directing the amount allowed as maintenance to be payable by any one or more of the defendants who was in possession of the estate, out of, and in proportion to, the part thereof in his or her possession. (*Tudball and Sulaiman, J.J.*) SARSUTI TEWARIN v. NANDAN TEWARIN. 18 A.L.J. 828.

New case—Claim based on easement—Decree on natural light not to be granted. See EASEMENT. 57 I.C. 504.

New case—Court not to set up.

The Court is not entitled to set up a case for plaintiff which not only he did not set up but which he through his Counsel definitely repudiated. (*Shadi Lal and Broadway, J.J.*) ANANT RAM v. BHARAT NATIONAL BANK LTD. 2 Lah. L.J. 609 : 56 I.C. 638.

New case—Not to be set up by court. The determination in a cause must be founded upon a case set up in the pleadings or involved in or consistent with the pleadings.

A party cannot be allowed to succeed on a claim which it does not set up but which is put forward for it by the Court. (*Pratt, A.J. C.*) HAJI CHIT v. HAJI KYAW. 57 I.C. 873

PLEADING AND PROOF—Variation between—Object of the rule against.

Every variance between pleading and proof is not fatal; the Court must carefully consider whether the objection is one of form or sub-

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stance having in view the purpose which the rule that allegation and proof must correspond is intended to serve *viz.*, first to appraise the defendant distinctly and specifically of the case he is called upon to answer, so that he may properly make a defence and not be taken by surprise; and, secondly to preserve an accurate record of the cause of action as a protection against a second proceeding founded upon the same allegations. (*Mookerjee and Panton, J.J.*) KUMAR SATISH KANTA RAI v. SATISH CHANDRA CHATTOPADHYAYA.

24 C.W.N. 662 : 55 I.C. 689.

POLICE ACT. (V of 1861) S. 9—Failure to return to duty—Punishment awarded—Accused called upon to join—Refusal to obey—Second offence—Distinct. See (1919) Dig. Col. 881. EMPEROR v. NARUL HASAN.

42 All. 22.

S. 29—Order by Police Superintendent regulating duties of subordinates—Disobedience to.

An order by a Superintendent of Police regulating the duties of mounted Police under command is a lawful order under S. 29 of the Police Act and a disobedience of such order renders the guilty person liable to conviction (*Adami, J.*) MOHAMED YUSUF v. EMPEROR. 56 I.C. 497 : 21 Cr. L.J. 465.

POSSESSORY TITLE—Good against all but true owner.

Whether possession originated lawfully or not, the person in possession is entitled to the property and the trees thereon as against all the world except the true owner. (*Broadway, J.*) SIDHU v. DHANNA. 2 Lah. L.J. 271.

Suit on—Proprietary interest—Grant of sannad from government—Dispossession C.P. Code (1882) S. 325 A.

If a person holding a full proprietary interest under a grant of a sannad from the Government has disposed of that property, a suit for repossession of the property so granted will not lie, notwithstanding any previous infirmity in his title, (*Lord Shaw*) GANPAT v. LALAMIYA. 16 N.L.R. 59 : 12 L.W. 574 : 56 I.C. 673 (P.C.)

Valid against all except owner—Heritability of.

A person in possession of property without more has a good title against the whole world except the true owner. The possessory title is also descendible to his heirs who are entitled to continue in possession (*Lindsay, J.*) BAZMIR KHAN v. RUSTAM KHAN. 54 I.C. 398.

PRACTICE—Adjournment—Discretion of Court.

Where a case has been definitely fixed for hearing and witnesses have been called and expense incurred, and if owing to the default of one of the parties the Court has no power to hear the case, the court has a discretion to adjourn or dismiss it, but apart from an express provision of law, is not bound to grant

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an adjournment. (*Dawson Miller, C. J. and Mullick, J.*) MAHARAJA SIR RAMESHWAR SINGH v. HARIHAR. 5 P. L. J. 390:

1 Pat. L. T. 666 : 57 I. C. 250.

—Appeal—Connected suits—Appeal filed in one suit—Conflicting finding—Power of Appellate Court to consider whole case. See APPEAL. 56 I. C. 282.

—Appeal—Evidence—Objection to admissibility on the ground of want of registration. See REGISTRATION ACT, S. 17 (1) (b). 57 I. C. 58

—Appeal—New case—Defence under S. 41 of Evidence Act.

A plea that S. 41 of the Evidence Act operates to bar a suit can be taken for the first time in appeal. (*Halifax, A. J. C.*) NARAYAN v. HARDATTARAI 57 I. C. 612.

—Appeal—New plea—Limitation.

A Court of appeal is bound to entertain a new ground of limitation, only when the point appears on the face of the record, to be supported by the evidence provided in the Court of first instance: 39 Cal. 941 Rel. (*Astosh Mookerjee and Fletcher, JJ.*) BHUSAN CHANDRA PAL v. NARENDRAD NATH KOER. 32 C. L. J. 236.

—Appeal—New question of law—When can be raised.

Although the objection that the suit was barred by S. 66 C. P. C. had not been raised in the Court below and was not referred to in the grounds of appeal, the question being one of law it was allowed to be argued in appeal on the understanding that effect would be given to any defence that respondent might have set up had the matter been agitated in the Court below (*Shadi Lal and Broadway, JJ.*) ABDUL HAMID v. MUHAMMAD SHARIFF. 2 Lah. L. J. 353.

—Appellate Court—Findings of fact—Interference with when justified. See APPELLATE COURT. 24 C. W. N. 800.

—Appellate Court—New point—Interpretation of statute—Point allowed to be raised. See APPELLATE COURT. (1920) Pat. 193.

—Appellate Court—New point when allowed. See APPELLATE COURT.

31 C. L. J. 259.

—Contempt — Official — Assignee — Disobedience to verbal order—Procedure. See PRES. TOWNS INS. ACT, S. 33. 47 Cal. 56.

—Costs—Appeal as to, incompetent when no question of principle involved. See APPEAL. 47 Cal. 67.

—Costs—Appellate Court not to interfere except on matters of principle. See C. P. CODE S. 35. 24 C. W. N. 352.

—Costs — Intervenor — Discretion of court.

In an administration suit one S. S. was allowed to prove an alleged claim against the

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estate of the deceased and the Receiver of the estate was given liberty to contest it. Subsequently on the application of one P. C. he was given liberty at his own risk, as to costs to oppose the claim of S. S. against the estate.

Held, that P. C.'s intervention did not change the character of the proceeding or alter the scope of the suit and as he voluntarily came into it as a prudent measure not of immediate protection but of possible personal benefit hereafter, it would be clearly unjust to make the claimant S. S. pay an additional bill of costs of the intervenor. (*In Re Walts*) 22 Ch. D, 5 *In Re Schwabacher* (1907) 1 Ch 719 foll. (*Mookerjee C. J. and Fletcher, JJ.*) SOUREND RAMOHAN SINHA v. MURARILAL SINHA. 24 C. W. N. 888.

—Cost—Probate proceedings.

Where an application for probate is opposed and the applicant is put to expense, the Court has power to award costs to the applicant as in a suit. (*Coutts and Das, JJ.*) J. CHAUDHURY SADHO CHARN SINGH v. MUSSAMMAT GANGESHWAR KOER. 57 I. C. 739.

—Cross-examination — Suit against several defts.—Same supporting plff.—Procedure.

The usual practice in cases where some of the defendants support the plaintiff's case and the others oppose it is to order that those who support the plaintiff's case should cross examine the plff's witness first, if they desire to do so and to call their evidence and address the Court before the defendants who oppose the plaintiff's case do so. 32 Bom. 599 appr. (*Miller, C. J. and Mullick, J.*) MOTIRAM MARWARI v. LALIT MOHAN GHOSH. 5 P. L. J. 545:

1 Pat. L. T. 676 : 58 I. C. 238.

—Discovery—Affidavit of document—Attorney-non disclosure, if amounts to breach of duty—Documents subsequently discovered.

It is the duty of an attorney to be extremely careful in ascertaining from his client, who has to make an affidavit of documents what documents are in his possession. It is further his duty, the moment he finds that there are other documents, which have not been disclosed, at the very earliest moment to bring those documents to the notice of his opponent and give him an opportunity of inspecting them.

Though in this case the attorney was wrong in not disclosing the documents subsequently when they came to his knowledge his conduct was not such as to justify any further investigation by a special bench. (*Greaves, J.*) In THE MATTER OF AN ATTORNEY.

25 C. W. N. 99.

—Fees off Expert witness—Costs.

An expert witness who has conducted elaborate and technical experiments and investigations ought to be allowed special expert's fees as part of the costs in the case. (*Robinson J.*)

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BURMA RAILWAYS COMPANY, LIMITED v.
RANGOON MUNICIPAL COMMITTEE.

13 Bur L. T. 62

—High Court—Case heard by a bench—
Rehearing by another bench.

A case heard by one bench can be re-heard by another bench (*i. e.*, a bench composed of different Judges of the Court of the Judicial Commissioner). (*Lyle and Ashworth, A. J. C.*) BALDEO DAS v. THE BOMBAY MERCANTILE BANK. 54 I. C. 364

—High Court—Original side—Decision of single judge—Weight due to.

A judge on the original side is ordinarily bound to consider with respect the decision of another Judge on the Original Side produced before him but that if he is convinced that the decision is erroneous, he is not under any obligation to follow it against his own judgment. (*Mookerjee, A. J. and Fletcher, J. J.*) VIRJIBUN DASS MOOLJI v. BISSESSWAR LAL HAR GOVIND. 24 C. W. N. 1032

—High Court (Cal)—Original side—Sale in execution of mortgage decree—Provisions of O 21, R 89 C P C. not applicable
See C. P. CODE O. 21, R. 89.

24 C. W. N. 536

—High Court (Pat.)—Single Judge—duty to follow decisions of Bench.

A Judge sitting singly is bound to follow a ruling of the Division Bench, and if he has any doubt about its correctness, he ought to send the case to a larger bench. (*Jwala Prasad, J.*) EMPEROR v. HEMAN GOPE. 1 P. L. T. 349.

58 I. C. 459 : 21 Cr. L. J. 779.

—Judge—Competency of to try case in which he was counsel for one of the parties.

The practice which induces Judges voluntarily to decline to hear cases with which they were connected as Counsel before their elevation to the Bench, is but an evolution of the elementary maxim that no man should be a judge in his own suit and preside in a case in which he is not wholly free, disinterested, impartial and independent. But this principle has no application when objection is taken to Judge trying a cause on the ground that he had, before his appointment, acted as counsel in other matters for one of the parties.

The fact that a Judge was prior to elevation to the Bench engaged in the particular cause, is no disqualification, though according to custom sanctioned by long usage, a Judge would refuse to adjudicate upon a case if he had been engaged as Counsel therein or in a matter intimately connected therewith.

It is no objection to a Judge trying a case that before his appointment he was Counsel in other matters for one of the parties. (*Mookerjee and Fletcher, J. J.*) JACOB & CO. v. RASH BEHARI GHOSE. 31 C. L. J. 313 :

57 I. C. 22.

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—New plea on appeal—Adverse possession.

A plaintiff can succeed on a title by adverse possession pleaded even for the first time in the Court of appeal provided such a case arises on the facts stated in the plaint and the defendant is not taken by surprise 14 Cal. 592. (*Mookerjee, A. J. C. and Fletcher, J. J.*) KASSIM HASSEN v. HAZRA BEGUM. 32 Cal. L. J. 151.

—Originating summons—Lease—Covenant not to assign—Breach—Determination of. See CAL. HIGH COURT RULES AND ORDERS.

24 C. W. N. 1007.

—Pleader's fee—Certificate—Allahabad High Court Rules (Subordinate courts)—Ch. 221, R (7).

In view of Explanation to Rule, 1 Cl. (1) of Chapter XXI of the Rules for Civil (Subordinate) Courts certificates of fees must be tendered to the officer of the Court on or before the day first fixed for the hearing of the case, whether in fact on that day the case is reached or adjourned. (*Mears C. J. and Pigott, J. J.*) RAM NATH v. HUB NATH. 42 All 542 : 18 A. L. J. 638 : 57 I. C. 203.

—Pleader's fee—Injunction suit—Mode of calculation—Punjab Chief Court rules and orders Vol. III Rr. 3 and 4. See (1919) Dig. Col. 887. GURDIT SINGH v. ISHARDRS.

54 I. C. 905.

—Precedents—Single Bench rulings as precedent.

Single Bench rulings of the High Court, if not dissented from or overruled are as much binding on the Subordinate Courts of the province as decisions of Division Benches. (*Rattigan, C. J.*) SHER KKAN v. MUZAFFAR KHAN. 1 Lah. 25 : 55 I. C. 944.

—Precedents—Value of.

A case is only an authority for what it actually decided. It cannot be quoted for the proposition that may seem to follow logically from it. 1901 A.C. 495, at p. 506, foll. (*Kotval, A. J. C.*) SETH KISAN LAL v. NATHU. 16 N. L. R. 131 : 56 I. C. 44.

—Privy Council—Compromise of litigation—Minor parties—Withdrawal of appeal—Formalities.

On an application to withdraw an appeal to which certain minors were parties, it was stated by counsel at the bar before the Judicial Committee that the compromise was for the benefit of the minor parties thereto, and the opinion of counsel who appeared in India for the minors was also to the same effect. Thereupon the Committee advised that leave should be granted to withdraw the appeal upon the proposed terms. (*Lord Shaw*) SAKIN BAL v. SHIRNI BAL. 38 M. L. J. 431 : 11 L. W. 486 : (1920) M. W. N. 311 : 18 A. L. J. 499 : 22 Bom. L. R. 552 : 55 I. C. 943 : 47 I. A. 88 (P. C.).

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—*Prizy Council—Concurrent findings of fact—Burden of proof.*

On the questions whether the wakfnama was obtained by fraud and undue influence and the executant, a purdanashin lady, understood the document.

Held, that the onus of proof having been properly placed, there were concurrent findings on issues of fact which it was impossible for the Appellants to displace. (*Viscount Cave*) **SYED AMATUL FATEMA BIBI v. DEWAN ABDUL ALIM SAHIB.** 24 C. W. N. 494 : 28 M. L. T. 135 : 12 L. W. 497 : 32 C. L. J. 447. (P. C)

—*Procedure—Appellate Court—Lower Court admitting inadmissible evidence. See B. T. ACT, S. 103, A.* **1 P. L. T. 224.**

—*Procedure—Testamentary suit—High court—Consent terms relating to matters not falling within the testamentary jurisdiction of the court—Jurisdiction of court to deal with such terms.*

Where in a testamentary suit, consent terms are proposed some of which fall within the testamentary jurisdiction and others do not, the decree may properly embody all the terms in a schedule for reference but its operative part should be confined to such terms as are within its jurisdiction; and the Testamentary Court should leave the parties to take separate proceedings under the ordinary original civil jurisdiction to enforce the remaining terms if necessary. (*Martin, J.*) **BAI MONGHI-BAI v. BAI RAMBALAXMI.**

22 Bom. L. R. 1286.

—*Receiver appointment of—Joint family property. See C. P. CODE, O. 41, R. 1.*

22 Bom. L. R. 217.

—*Receiver, suit against—Without leave of Court—Application for leave after filing of suit—Jurisdiction. See REVENUE.*

22 Bom. L. R. 319.

—*Second Appeal—New case not to be set up.*

In a suit for an injunction against certain tenants improperly using the land.

Held, that the tenants after having failed to establish their plea of permanent tenancy could not in second appeal, ask for the scope of the suit to be enlarged and a fresh enquiry started for the purpose of determining whether pecuniary compensation to the plaintiffs would be sufficient. (*Chaudhuri and Walmsley, JJ.*) **ISWARCHANDRA SAHA v. SASHINATH DAR CHAUDHURY.** 55 I. C. 951.

—*Stare decisis—Applicability of the rule.*

The doctrine that the authority of long-established decided cases is to be maintained, is not of universal application. It has no application where the decision does not embarrass trade or commerce nor affects transactions which may have been adjusted, rights which

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might have been determined, titles which may have been obtained or personal status which may have been acquired : 22 Mad. 398 Ret.

Great importance is to be attached to old authorities on the strength of which many transactions may have been adjusted and rights determined. But where they are plainly wrong and specially where the subsequent course of judicial decisions has disclosed weakness in the reasoning on which they were based, and practical injustice in the consequences that must flow from them, it is the duty of the court of ultimate appeal to overrule them, if it has not lost the right to do so by itself expressly affirming them : (1908) App. Cas 1. (*Mookerjee, O. C. J. Fletcher, N. R. Chatterjee, Teunon, Richardson, Chaudhuri and Huda, JJ.*) **CHANDRA BENODE KUNDU v. ALA BUK.**

24 C. W. N. 818 : 31 C. L. J. 510. (F. B.)

—*Subordinate Courts—Rulings of Chief Courts.*

Subordinate Courts in the Madras Presidency should confine themselves to the rulings of their High Courts and not act on the strength of the rulings of the Chief Court. (*Oldfield, J.*) **ADEPU REDI v. RAMAYYA.**

12 L. W. 227.

—*Suit for accounts—Commissioner and court—Functions of—Reopening of settled accounts, a matter for the Court and not for the commissioner. See ACCOUNTS, SUIT*

I Lah. L. J. 220.

—*Trial—Statement of judge as to incidents in—Effect of.*

The statement of the Judge trying a case as to what happened before him is conclusive on questions of fact. (*Beachcroft, J.*) **AMJAD v. HASRAT.**

55 I. C. 628.

PRE-EMPTION—Co-sharer—Patti—Imperfect partition—Mahomedan Law.

A plaintiff claiming to pre-empt under the Mahomedan Law as a co-sharer, must prove that he is one of the class of co-sharers within the meaning of that law.

In the case of an imperfect partition of a village where there is complete separation of all rights, the owner of a *patti* in that village cannot be regarded as a co-sharer in another patti and consequently he has no right to pre-empt. (*Tudball and Rafique, JJ.*) **MATHURA PRASAD v. HARDEO BAKSH SINGH.**

56 I. C. 174.

—*Custom—Applicability of, to Hindus in Ahmedabad.*

The custom of pre-emption applies to Hindus in Ahmedabad. (*Macleod, C. J. and Heaton, J.*) **MOTILAL DAYABHAI v. HARI LAL MAGANLAL.**

44 Bom. 696 :

22 Bom. L. R. 806 : 57 I. C. 590.

—*Custom—Kurabatdar karibi—Seven or eight degrees removed—Effect of.*

A relation seven or eight degrees removed is not a near relation, and does not come within the definition of karabatdar karibi. If a custom

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exists for a karabatdar karibi to preempt, a relation seven or eight degrees removed is not entitled to that right. (*Tudball and Rafique, JJ.*) **GANGAMAL v. RAM SARUP MAL.**

58 I. C. 87.

—Custom — Proof of—*Wajib-ul-arz*—Entry in—Recording wishes of co-sharers.

Where an entry in a wajib-ul-arz dealing with pre-emption records the wishes of the co-sharers as to what should happen in the future such entry is not binding on the members of the co-parcenary body as a village custom nor is such entry proof of the existence of the custom of pre-emption: (*Tudball and Rafique, JJ.*) **MAHRAJ SINGH a. PITAMBER SINGH.**

54 I. C. 768.

—Decree amount—Deduction of costs and deposit of balance, if enough.

A pre-emptor directed to pay into court a specific sum of money is entitled to deduct the amount of the costs awarded, from the sum he is directed to pay into Court (*Lindsay, J.*) **RAM LAGAN PANDE v. MAHOMED ISHAQ KHAN.**

42 All. 181 : 18 A. L. J. 162 :
54 I. C. 395.

—Decree—Time fixed for payment—Appeal—Payment not made—Appellant not entitled to hearing on merits.

Where by a pre-emption decree plff is directed to pay the pre-emption price within a specified time but without doing so he prefers an appeal against the amount fixed, the fact that he had not complied with the terms of the decree as to payment is no ground for dismissing the appeal without going into the merits. (*Tudball and Rafique, JJ.*) **JHANDI LAL v. SHIAM LAL**

54 I. C. 756.

—Estoppel—Acquiescence—Knowledge of sale—Proof if essential. See ESTOPPEL.

22 O. C. 323.

—Good faith—Pre-emptor not in a position to buy.

An inference that the plaintiff's suit for pre-emption was brought in good faith in-as-much as the plaintiff was indebted and was a minor and the suit was brought under the guardianship of a woman who was in the keeping of his uncle and the plaintiff himself was not possessed of any means to enable him to purchase the property, is not justified.

A man may be indebted and yet may be anxious to get new property by further borrowing or obtaining financial assistance from his relations if he considers the bargain sufficiently profitable. (*Kanhaiya Lal, J. C.*) **ATHAR HUSAIN v. IDU SHAH.**

23 O. C. 85:

56 I. C. 691.

—House—Sale of house apart from site—Vicinage right of. See MAHOMEDAN LAW.

58 I. C. 534.

—Involuntary sale—Whether custom applicable to—Sale of insolvent's property by Official Assignee—Public sale—Failure of

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Co-sharer having knowledge to bid there at—Tantamount to refusal—No further offer.

Where on the application of a creditor a person was adjudged an insolvent and his property was sold by public auction by the official assignee it was held that a village custom of pre-emption as recorded in the *wajib-ul-arz* which referred to voluntary sales by co-sharers, was not applicable to involuntary sale by a Court through the official assignee. 27 All., 672 doubted and distinguished.

Where an auction sale held by the official assignee was widely notified, and a pre-emptor having knowledge of the impending sale did not choose to bid at the sale, it was held that his failure to bid for the property was tantamount to a refusal to purchase it and that therefore it was not incumbent upon the official assignee to offer the property to the pre-emptor at the price which had been obtained from the purchaser. 27 All. 670 not followed. (*Tudball and Rafique, JJ.*) **GHULAM-MOHIUDDIN KHAN v. HARDEO SAHAL.**

42 All. 402 : 18 A. L. J. 413 :
58 I. C. 93.

—Right to—Collusive suit—Presumption that pre-emptor is suing for his own benefit—Rebuttal—Onus—Punjab Pre-emption Act—(I of 1913) S. 15—Right of a son.

Unless the contrary is clearly established it is to be presumed that the plaintiff sues for his own benefit.

The mere fact that the plaintiff is a minor and the son of the vendor does not prove that the suit is for the benefit of vendor, the motive which led the plaintiff to institute the suit and the source from which funds are now being derived do not prove that fact either, and it is immaterial whether vendor is helping his son.

It was for the defendant (vendee) to strictly prove that the suit had been instituted for the benefit of the plaintiff's father and this he has failed to do. It did not lie on the plaintiff to prove that the suit was not for the benefit of his father.

A son has a right to pre-empt apart from and independently of his father. 7 P. R. 1912 Rel. on. (*Broadway and Bevan Petman, JJ.*) **NAZAR MUHAMMAD v. SARDAR MUHAMMAD.**

2 Lah. L. J. 226.

—Mokarrari right—Sale of—No right of pre-emption See MAHOMEDAN LAW, PRE-EMPTION.

58 I. C. 534.

—Price—Property sold in lieu of mortgage thereon—Real sale price—Market value—Amount of mortgage.

The market value of a certain property was Rs. 1250. There was a mortgage on it, the amount due on which was Rs. 2468. The mortgagee purchased this property in lieu of the mortgage debt and a further sum of Rs. 100 in cash. At the date of the sale the personal remedy of the mortgagee had become

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time barred. In a suit to pre-empt the sale, held, that the real sale consideration was the market value, Rs 1250 and not more, (*Tudball and Sulaiman, JJ.*) JAGAT SINGH v. BALDEO PRASAD.

18 A. L. J. 974.

—Right to co-sharers in a sub-division of the same mahal but not in the khata.

The mere fact that the vendors and the vendees are co-sharers in some *shamilat* land appertaining to all the patti does not invest the vendees with any better right, for a vendee who was not a co sharer in the sub-division in which the share sought to be pre-empted was situated does not become a co-sharer in the sub-division because some of the land appertaining to the village had been lumped together as belonging to all the parties instead of being imperfectly divided. Within the *shamilat* patti itself each *patti* to which the *shamilat* land appertains exists as if it were in miniature and no right of pre-emption can be claimed in respect of such *shamilat* land.

Where a khata forms a subordinate and separate entity in a patti, in which defendants vendees have no share, and if the patti in which defendants vendees were co-sharers formed a separate sub-division of the same mahal, the plaintiffs who are co-sharers in the same patti have a preferential right of pre-emption. (*Pandit Kanhaiya Lal, J.*) KANTZ ZOHRA v. NEAD.

22 O. C. 297 : 54 I. C. 632.

—Right to—*Haqiat*—i—*Mudfarriga*—Application to—*Haqiat* if part of the mahal

In a suit for pre-emption relating to *haqiat*—*mudfarriga* in a village the court found that the *haqiat* once formed part of the 20 biswas mahal but circumstances had altered and the said *haqiat* ceased to be part of that mahal Held, that the provisions of the *wajib-ul-arz* relating to pre-emption did not apply to the property in suit. (*Tudball and Rafique, JJ.*) IZZAT HUSAIN KHAN v. RAM CHANDER.

18 A. L. J. 120.

—Right of—Locality—Town or village—Question as to if can be raised in second appeal. Sec (1919) Dig. Col. 894. MAHOMED v. JUMMA.

16 P. I. R. 1920 : 54 I. C. 646.

—Right to—Proprietor vendee joining with non-proprietor—Sale indivisible—Vendee proprietor if can resist claim in regard to his own share—Re-sale by non-proprietor—*Lispenders*.

A proprietor vendee joining with himself non-proprietors in the purchase is in no better position than that held by the latter, and cannot resist the claim even in regard to his own share, where the sale is indivisible and the deed does not specify the amounts to be paid by the several vendees.

100 P. R. 900; 41 P. R. 1907, and 6 P. R. 1914 Ref.

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A resale by a non-proprietor to a proprietor having taken place after the institution of the suit, the rule of *lis pendens* applied and the re-sale by a non-proprietor of his right after the institution of the suit cannot affect the plaintiff's claim notwithstanding the fact that it (re-sale) took place before summonses were served on the defendants. 29 A. 339 P. C. Ref. (*Shadi Lal and Martineau, JJ.*) PRABH v. HAMIRA. 1 Lah. L. J. 209.

—Right to—Right given inter se—Sale to remote co-sharer.

The *Wajib-ul-arz* of a village mentioned that in a sale of the property the vendor should offer to near co-sharers and in case of his refusal to any other co-sharers in the village and if they refused, the right of sale was given in favour a stranger. It was further provided that if he sold it to a stranger in spite of the willingness of a co-sharer, the latter would have a right of pre-emption. Property was in this case sold to a co-sharer. Held, that on a proper construction the *wajib-ul-arz* gave a right of pre-emption to co-sharers inter se (*Tudball and Rafique, JJ.*) JAIPAL RAI v. SAH DEO RAI. **18 A. L. J. 99 : 55 I. C. 85.**

—Right to—Right not in existence at date of suit—Subsequent accrual of right—Effect of.

A plif. in a suit for pre-emption must show that he is entitled to pre-empt not only on the date of suit but also on the date of the decree. Where therefore on the date of the suit the defendant was not a co-sharer but acquired a share in the village by gift during the pendency of the suit held that the suit for pre-emption could not be maintained. 21 All. 441 applied. (*Tudball and Rafique JJ.*) BEHARI LAL v. MOHAN SINGH. **42 All. 268 : 18 A. L. J. 220 : 55 I. C. 71.**

—Right to—Sale—Compromise of litigation.

Where a suit for the recovery of property is compromised it does not amount to a sale of the land but to an abandonment by the pliffs of their rights to obtain a decision of the Court in a case which was genuinely contested, and therefore no claim for pre-emption was competent. (*Abdul Roof and Bevan-Petman, JJ.*) MASIHUDDIN v. MATU RAM

1 Lah. 109 : 55 I. C. 865.

—Right to—Sale by Hindu father—Sale of son's interest for legal necessity—Right of sons to pre-empt.

A man cannot pre-empt a sale in which a portion of his own property has actually been legally and validly transferred.

A Hindu father, who was the manager of the family property sold certain shares in property which belonged to the family. The sons sued to set aside the sale and in the alternative for pre-emption of the share sold. The court found that the sale was for legal necessity but decreed the suit for pre-emption. Held, that the sons

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were practically parties to the sale and to allow them to pre-empt would be tantamount to allowing a man to be both vendor and pre-emptor. (*Tudball and Rafique, JJ.*) PRATAP NARAIN SINGH v. SHIAE LAL.

42 All. 264 : 18 A. L. J. 116 :
55 I. C. 37.

Right to—Sale or mortgage—Sankalapanam—Grant of land in perpetuity—Zwyyrpestgi rent.

A deed described as *shankalapramāṇa* with power of transfer recited that the grantors had in consideration of the payment of Rs. 84, which was described as *zur-e-peshgiyanbaithki* put the grantees in possession of certain land and that the grantees were to remain in possession for ever subject to an annual payment of Rs. 3 on account of *malgusari sarkari*. Held, that the document was an out and out sale of an under proprietary right and was therefore subject to pre-emption. 17 O. C. p. 299 dist. (*Lindsay, J.*) RAM SUCHIT v. SHEO SEWAK SINGH.

23 O. C. 50 : 56 I. C. 629

Right to wajib ul-arz—“Bhai”—Bhalija—Construction.

In a *wajib ul-arz* a right of pre-emption was primarily given to “Bhai” Bhatija Sarik Haqiyat.” The plaintiff pre-emptor was the own brother of the vendor, the vendees were cousins being the descendants of the great grand-father of the vendor. Held, that the words “bhatija” in the vernacular has a far wider meaning than the words “brothers” and “nephews” in English, and that the plaintiff had no preferential right as against the vendees. (*Tudball and Rafiq, JJ.*) SAMER SINGH v. SHER SINGH.

18 A. L. J. 454 :
56 I. C. 183.

Sale price—Bona fide sale—Test of Fairly price—Effect of fixing of.

To determine whether the price entered in a sale-deed has been fixed in good faith, the Court is entitled to examine whether there is any very great difference between that price and the market-value of the property. If the price entered in the sale-deed greatly exceeds the market-value that fact would be relevant to the issue of good faith but it would not of course be open to the vendee to show special circumstances which induced him to pay a fancy price for the property. (*Lyle and Ashworth, JJ.*) NARAIN PRASAD v. DURGA SINGH.

22 O. C. 335 : 54 I. C. 95.

Sale of share in a law suit—Whether gives rise to—See.

23 O. C. 13.

Suit for—Subject-matter of—Whole property sold to be includid.

The plaintiff in a suit for pre-emption must sue to pre-empt the whole property sold or mortgaged and not a portion of it and in respect of the whole transaction. (*Tudball and Rafiq, JJ.*) JWALA PRASAD v. MANNU SINGH.

18 A. L. J. 104 : 57 I. C. 10.

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Waiver—Refusal to purchase at price far below real value.

A member of an agricultural tribe applied to the Deputy Commissioner for permission to sell his land. His application was forwarded to the Taisidar, who went to the village to make inquiries and on the 8th January 1913 the vendee offered to purchase the land for Rs. 1,600 and the house for Rs. 400. On 19th January plffs: collaterals of H, stated that they were not prepared to pay more than Rs. 950 or Rs. 960 for both the properties and declined to buy them for more than that sum. The properties were then sold to the vendee.

Held, that the conduct of the plaintiffs amounted to a waiver and that they could not enforce their right of pre-emption. 37 All. 262; 33 All. 637 Ref.

Plaintiffs had not reasonable ground for entertaining the belief that Rs. 2,000 was an excessive price (*Shazil Lal and Martineau, JJ.*) MUKH RAM v. HARJAS.

1. Lah. 51 :
55 I. C. 879.

Withdrawal of claim for pre-emption superior rights—Effect on other pre-emptor's rights.

The withdrawal by a former proprietor of his claim for pre-emption with regard to a portion of the property sold gives an opportunity to the person, who has the next best right, to enforce pre-emption in regard to the portion about which the former had withdrawn his claim.

A compromise by the first pre-emptor withdrawing claim with regard to a portion of the property sold, left the rights of the other pre-emptor in respect of it unaffected and did not invest the vendee with any new title. (*Pandit Kanhaiya Lal, J.*) DEBI DAYAL SINGH v. INDARPAL SINGH.

22 O. C. 373 :
55 I. C. 830.

Zemindari village—Imperfect partition of mahal into separate pattis—No rights or property left in common—Owner of one patti—Right of pre-emption in respect of another—Mahomedan Law.

A mahal was “imperfectly partitioned” into several separate pattis in such a manner that the owner of one patti held no rights or property in common with the owner of any other patti. All the pattis being however jointly liable to Government for the Revenue of the mahal. Two of the pattis being sold to strangers the owner of another patti sued to pre-empt the sales. The *wajib ul-arz* recorded a custom of pre-emption but set out none of its incidents and admittedly the rule of Mahomedan Law stood. Held, that the plaintiff as owner of one of the pattis was better a *shafiqi* or a *shari’i*-*khul’i* under the M. H. Law—in respect of the other pattis than in right of pre-emption to a *shafiqi* as in respect of his class of property. 7 A. L. J. 839 ref. (*Thubalt with*

PRES. BANKS ACT, S. 23

Rafiq, J.J.) MATHURA PRASAD v. HARDEO BAKHSH SINGH. 42 All. 477 : 18 A. L. J. 518

PRES. BANKS ACT, S. 23—Succession Certificate Act, Ss. 16 and 17—Dividend—Recovery of—Transfer of shares—Right of person holding succession certificate.

S. 23 of the Insolvency Act, 1873 does not prevent the Bank from accepting a succession certificate granted under the Succession Certificate Act, and paying dividends on shares in the Bank to the person who has obtained the certificate and transferring the share to him. (*Macleod, C. J. and Heaton, J.*) KUMAR SHRI RANJIT SINGHJI v. THE BANK OF BOMBAY. 22 Bom. L. R. 869 : 57 I. C. 964.

PRES. SM. C. C. ACT (XV of 1882) Jurisdiction—Suit by Parsi wife to recover costs of matrimonial suit—Suit to recover arrears of maintenance awarded by arbitrators—*Parsi Marriage and Divorce Act.*

The Presidency Small Causes Court has jurisdiction to entertain a suit by a Parsi wife to recover costs incurred by her in a matrimonial suit and to recover arrears of maintenance awarded by arbitrators. (*Macleod, C. J. and Haweet, J.*) ERACASHAW DOSABAI v. BAI DINBAL. 22 Bom. L. R. 1293.

S. 19 (G)—Suit for recovery of stones forming part of well alleged to be removed by deft—Deft. setting up title Small Cause.

A suit to recover stones forming part of a well alleged to have been wrongfully removed or to recover their value, is a suit answerable to a Court of Small Causes; though, on the defendant's plea of title in the well, it may be necessary to determine the question of title, in order to dispose of the suit. 20 Mad. 155 (not till 16 C. 201 foll). (*Ayling and Krishnan, J.J.*) KRISHNAMACHARI v. KOMALAMMAL. 43 Mad. 903 : 39 M. L. J. 490 : 1920 M. W. N. 599 : 28 M. L. T. 275.

S. 38—Rules framed under—Rule 22, proviso, if ultra vires—Composition of the bench.

The proviso to R. 92 published in the "Calcutta Gazette" of the 16th July 1917 is not ultra vires, but so far as applications under S. 38 of the Act are concerned the preliminary hearing must be before a bench of not more than three laid down in R. 95. 1920 M. W. N. 117 : 39 Mad. 823 Ref.

Querier.—Whether the jurisdiction conferred on the Small Causes Court under S. 38 is revisional or appellate. 34 Bom. 315 : 21 C. W. N. 256 : 211 Mad. 232 Ref. (*Ghose, J.*) RAMCHANDRA SAGARMULLA v. AMARLAL AND MURALILAL. 24 C. W. N. 783.

PRES. TOWNS INS. ACT (III of 1909) Ss. 4101 and Sch. III S. 18.

PRES. TOWNS INS. ACT, S. 33

Calcutta Insolvency Rules, 5. Insolvency—by Order of Registrar—Appeal—Limitation.

The limitation prescribed by S. 101 of the Presidency Towns Insolvency Act (III of 1909) for an appeal from an order made by the Registrar in Insolvency, shall be computed not as from the date when the findings of the Registrar are signed or filed but as from the date when the report is signed by the Registrar and the matter is thereby completed.

Upon application by certain persons claiming to be mortgagees of an insolvent's estate, an order was made by the Court directing to prove their mortgage before the Registrar in Insolvency under S. 18 of the second schedule of the Presidency Towns Insolvency Act (III of 1909)—*Held*, that under such reference to him, the Registrar had no jurisdiction to deal with the question of validity or otherwise of a mortgage, even with the consent of the parties before him so as to affect the interests of infants adversely by his decision. (*Greaves, J.*) LALBIHARI SHAH IN RE. 47 Cal. 721.

S. 17—Effect of order of adjudication—Application for arrest.

The words "other legal proceeding" in S. 17 of the Pres. Towns Insol. Act include an application for arrest, and no such application can be made against an insolvent after an order of adjudication has been made except with the leave of the court. (*Maung Kin, J.*) THAKURDEEN v. J. DUBAY.

12 Bur. L. T. 218 : 55 I. C. 250.

S. 33 (2) (e) and (4)—Insolvency—Official Assignee—Disobedience to order of Contempt—Verbal order to attend—Motion to commit—Notice of application—Service of affidavits—Insolvency Rrs. 36 and 37.

Having regard to the terms of S. 33 (2) (e) of the Pres. Towns Insolvency Act there is no need for the Official Assignee to apply to the Court for an order for the insolvent's attendance nor any need for the Courts' order to be in writing to be served personally on the insolvent and to contain a notice that unless the insolvent complied with it he would be committed for contempt.

An order given by the Official Assignee to attend his office in pursuance of S. 33 (2) (e) of the Pres. Towns Insolvency Act need not necessarily be in writing. If an order is given by him verbally it is valid and there is a duty upon the insolvent to comply therewith. Non-compliance with such order will render the insolvent liable to be punished for contempt of Court.

There is no express provision that affidavits in support of the application for contempt should be served at the same time as the notice of application.

Per Curiam.—In future if the Official Assignee intends to apply for a committed order for contempt of Court he will be well advised to put the order into writing and serve it.

PRES. TOWNS INS. ACT, S. 36.

served on the persons intended to be proceeded against with a notice that if the order is not complied with proceedings for contempt will be taken. Further it is eminently desirable from all points of view that the procedure laid down by the Rules should be strictly complied with. (*Sanderson, C.J., and Woodroffe, J.*) *BHURAMULL BANKA v. THE OFFICIAL ASSIGNEE OF BENGAL.* 47 Cal 56: 56 I C 387.

—**Ss. 36, 103 and 104**—Deposition of insolvent under S. 36 if admissible in proceedings under Ss. 103 and 104. *See* (1919) *Dig. Col. 898. JOSEPH PERRY IN RE*

54 I C. 478.

—**Ss. 36 and 103**—*Examination of insolvent under—Admissibility of, in evidence.*

Quære. Whether an insolvent could be examined under S. 36 of the Pres. Towns Ins. Act.

If the insolvent had been examined without any objection on his part, under S. 36 his examination is voluntary and is admissible under S. 103 of the Act. (*Woodroffe and Walmsley, JJ.*) *JOSEPH PERRY v. OFFICIAL ASSIGNEE OF CALCUTTA.* 47 Cal. 254: 24 C. W. N. 425: 31 C. L. J. 209: 56 I. C. 778: 21 Cr. L. J. 522.

—**S. 38**—Insolvent—Order of discharge—Suspension—Effect—Final order after suspension period unnecessary—C. P. Code S. 80.—Official Assignee—Suit for injunction against—Notice—Necessary. *See* (1919) *Dig. Col. 900. MURADALLI SHAMJI v. B. N. LONG.*

44 Bom. 555.

—**S. 55—Insolvency—Mortgage by insolvent within two years of insolvency—Proof—Onus—Quantum—Admission of proof by Official Assignee—Mortgage deed—Set aside—Order to be passed.**

A mortgagee setting up a mortgage executed within two years of the insolvency of the mortgagor has the onus cast on him under S. 55 of the Presidency Towns insolvency Act and S. 36 of the Provincial Insolvency Act, to show that the transaction was one executed in good faith and for consideration. 20 I. C. 901 *coll.*

The burden is, if anything, stronger where the mortgage set up carries interest at the usurious rate of 24 per cent, and was executed by a young man who had just come of age and who was squandering his property in dissolute courses.

The fact that the Official Assignee moved the Court to expunge proof which he had admitted under S. 25 of the second schedule to the Act (Presidency. Towns Insolvency Act, 1909) does not alter the onus of proof.

Effect of an admission of proof by the Official Assignee pointed out.

Where the mortgage transaction set up was not shown to have been entered into in good faith and for consideration but it appeared that a portion of the mortgage amount had

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admittedly been advanced about the time of the execution of the mortgage, held, that the proper course was to set aside the whole mortgage and allow the mortgagee to prove as an unsecured creditor for the amount advanced. (*Wallis C.J. and Krishnam, J.*) *THE OFFICIAL ASSIGNEE OF MADRAS v. SAMBANDHA MUDALIYAR.*

43 Mad 739: 39 M. L. J. 345: 28 M. L. T 258.

—**S. 103, 104 and 36—Offences under the Insolvency Act—Notice of charges—Framing of Charges—Discrepancy—Examination of Insolvent**

Held, S. 103 of the Pres. Towns Insolvency Act applies to offences committed both before and after the adjudication. The section also applies to cases of wilfully withholding the production of books even after they have come to the possession of the Official Assignee.

Per Woodroffe, J.—Though a charge under S. 103 cannot be maintained if not framed in pursuance of the notice under S. 104 this must be taken as subject to the principle which is embodied in S. 537 Cr. P. C. namely that no error or irregularity in a charge will call for a reversal of an order unless it in facts has occasioned a failure of justice and in determining whether this is so the Court shall have regard to the fact whether the objection could and should have been raised in an earlier stage of the proceeding. (*Woodroffe and Walmsley, JJ.*) *JOSEPH PERRY v. OFFICIAL ASSIGNEE OF CALCUTTA.*

47. Cal. 254: 24 C. W. N. 425: 31 C. L. J. 209: 56 I. C. 778: 21 Cr. L. J. 522.

—**Ss. 103 and 104—Offence under the Insolvency Act—Trial of—Notice of charge and the charges framed if must agree—Undue preference when creditor not admitted.**

A charge framed under S 103 of the Pres. Towns, Ins. Act must be in pursuance of the notice required to be issued under S. 104.

When the Insolvent was charged with having withheld the production of the cash book or books for a certain period and the notice made no reference to the books.

Held, that the charge was not framed in pursuance of the notice and could not be maintained.

To establish the charge that books are being purposely withheld it must be shown that they exist and have not been destroyed.

The insolvent was also charged that on or about January or February 1912, the Insolvent for the purpose of giving undue preference to one of his alleged creditors made away with a stock of Shellac :

Held, that the charge was bad inasmuch as it was not alleged that the making away was done fraudulently as required by S. 103 (b). The charge was also bad as the creditor was not admitted as such by the Official Assignee

PRESS ACT, S. 3.

(*Jenkins C. J. and Woodroffe J.*) LUCAS v. OFFICIAL ASSIGNEE OF BENGAL,

24 C. W. N. 418 :
56 I. C. 577 : 21 Cr. L. J. 481.

—S. 115—Order in insolvency—Appeal by attorney for Official Assignee—Stamp duty on copy of order.

Where an attorney acting for the Official Assignee files an appeal against an order in insolvency proceedings, S. 115 of the Presidency Towns Insolvency Act exempts from stamp duty the copy of the order appealed against (*Wallis, C. J. and Moore, J.*) THE OFFICIAL ASSIGNEE v. RAMASAMI CHETTI.

43 Mad. 747 :
39 M. L. J. 135 : 12 L. W. 89 :
(1920) M. W. N. 424

PRESS ACT S. 3, Sub S. 1, S 4 Sub Sec. 1, Ss. 1 and 22—Liberty of the press—Control of printing press—Declaration by possessor of printing press—Deposit of security—Magistrate's order to dispense with security or to cancel or vary order relating to security—Nature of order—Judicial or administrative—Rights of person affected to be heard—Order forfeiting deposit—Revision *cetiorari*, *writ of*—Bringing into hatred or contempt—Attack on a system as distinguished from attack on a class—Press Act and Penal code compared—Practice, Privy Council in criminal case—Limitation on the power of the committee. See (1919) Dig. Col. 901. BESANT v. THE ADVOCATE GENERAL OF MADRAS. 43 Mad. 146.

—(I of 1910) S. 4 (1) (c)—Not ultra vires the legislature—Government established by law—Meaning of.

Following the decision of the Privy council in 37 M. L. J. 139 the High Court held that the Press Act was not *ultra vires* the legislature. 'Government established by law in British India, means the established authority which governs the country and administers its public affairs and includes the representatives to whom the task of Government, is entrusted. The word Government in Ss. 2 and 4 of the Act is equivalent to Government established by law in British India.

When a newspaper published articles which conveyed to an ordinary person that the rulers of this country "in addition to incompetence, cowardice and heartlessness" were guilty of slaughter of innocent people in order to terrorise them into subjection and to crush out all kinds of political movements and national aspirations, held that the Government was justified in forfeiting the security.

Held, on the facts that the articles in question were articles which justified the order of forfeiture of security by the Government. (*Mears, C. J. Banerji and Piggott, JJ.*) SUNDAR LAL v. EMPEROR.

42 All. 233 : 18 A. L. J. 11 :
55 I. C. 110 : 21 Cr. L. J. 238 : (F. B.)

—Ss. 4 (1) (c) Expl. 2, 17, 20 and 22—Forfeiture of security—Grounds for

PRESUMPTION.

setting aside—Defect in notice—Seditious intent—"Intention" and "tendency"—What evidence admissible—Justification by truth—Extrinsic evidence if admissible—Evidence Act, Ss. 92, 98 and 14—Onus of proving order of forfeiture is wrong See (1919) Dig. Col. 904. AMRITA BAZAR PATRIKA IN RE.

47 Cal 190 : 54 I. C. 578 :
21 Cr. L. J. 98.

PRESUMPTION—Discharge — Debt—Absence of demand for over a long period.

Where it is found that a money-lender has allowed a debt to remain outstanding for a very long period without obtaining some document or security for it and without at any time demanding payment the presumption is that the debt has been paid off. (*Lyle and Ashworth, A. J. C.*) NARAIN PRASAD v. DURGA SINGH.

22 O. C. 335 : 54 I. C. 95.

—Jurisdiction — Highest Court — Presumption of competency to entertain suit. See SUITS VALUATION ACT, S. 8.

55 I. C. 75.

—Landlord and tenant—Fixity of rent—Presumption from uniform payment for over 20 years. See B. T. ACT, S. 50 (2).

31 C. L. J. 11.

—Lost grant—Question of fact.

The gist of the principle upon which a lost grant is presumed, is that the state of affairs is otherwise unexplained: L. R. 2 Ch. D. 671 (698) referred to.

When from a certain set of facts, a Court infers a lost grant, the process is one of inference of fact and not of legal conclusion. (*Mookerjee and Fletcher, JJ.*) KASINATH BHATTACHARJEE v. MURARI CHANDRA PAL.

31 C. L. J. 501 : 57 I. C. 350.

—Possession, continuity, of—Until contrary is shown.

55 I. C. 344.

—Possession following title—Narrow ship of land adjoining land. See L.M. ACT, ART. 142 AND 144.

58 I. C. 773.

—Previous denial of title of vendor. Effect of—Sale of share in a law suit—Effect of.

A previous denial of title of the vendor does not deprive a person of a right of pre-emption under the Oudh Laws Act. 22 O. C. 144 foll. A sale of a mere share in a law suit does not give rise to a right of pre-emption and the mere fact that legal proceedings are necessary to obtain possession of the property sold is no ground for holding that the sale does not give rise to a right of pre-emption. The question whether a sale is a genuine sale or a sale of a share in a law suit is one to be determined on the facts of each case. (*Stuart, J.*) MUNTAZIM HUSAIN v. AHMAD HUSAIN.

28 O. C. 13 : 55 I. C. 529.

PRESUMPTION. LOITERATION

Ryotwari land—Claim of occupancy right by tenant of pattadar—Onus on him to prove claim. See LANDLORD AND TENANT, OCCUPANCY RIGHT.

(1920) M. W. N. 61 P. C.

PREVENTION OF CRUELTY TO ANIMALS ACT. S 3 (a)

Abandoning a horse—Starvation after abandonment—Effect of. See (1919) Dig. Col. 908.

44 Bom 159: 54 I. C. 481.

PRINCIPAL AND AGENT—Accounts

Claims and cross claims—Business of principal company transferred to another company set up by former and closely identified with it—Business conducted as before—Latter Company if may sue without reference to set off.

A and Co. were entitled to receive from the Respondents the price of sugar purporting to have been sold by the latter on their behalf and the respondents had a larger sum of money in deposit with A and Co as bankers, A & Co., it appeared had incorporated another Compay—called the Mysore Sugar Company which as to personnel, and otherwise was closely identified with A & Co., and completely controlled by them, the object being that the Mysore Sugar Company would take over the sugar factory of A & Co, and though this was technically done, the factory continued to be run and managed in the same way as before and the Respondents never knew of what had happened. The Official Trustee in whom the assets of the Mysore Sugar Co. vested upon insolvency having sued the Respondents for the price of sugar sold out of the factory without reference to the cross-claim and set off of the Respondents against A & Co.

Held—that if the Mysore Sugar Company could bring actions for sums due from the Respondents in respect of sales of sugar they could bring them only as principals in this sense they could take the benefit of these sums subject to every equity which affected these sums in the hands of A & Co., (Viscount Haldane), THE OFFICIAL TRUSTEE OF MADRAS & SUNDARAMURTI MUDALIAR.

24 C. W. N. 1004. (P. C.)

Constructive notice.—Knowledge of agent when imputed to principal—Fraud of agent—Effect of. See (1919) Dig. Col. 909. THE TEXAS CO. v. THE BOMBAY BANKING COMPANY LTD. 44 Bom 189: (1920) M. W. N. 70: 11 I. W. 320.

24 C. W. N. 469: 22 Bom. L. R. 429: 54 I. C. 121.

Duty to render accounts—Liability of agent's legal representative—Extent of. During the pendency of a suit by a principal against his agent for an account, the agent died after the framing of the issues and the suit was conducted against his legal representatives. Held, the principal was entitled to a decree for sums actually due to him on account

PRINCIPAL AND AGENT—GENERAL

of the agent having received and failed to account for them and also for other sums which he negligently failed to collect when it was his duty to collect. (Spencer and Odgers, JJ.) SRIMAT TIRUMALA PEDDINTI SAMPAT KUMARA VENKATA CHARYULU v. MOHANA PANDA. 39 M. L. J. 586: (1920) M. W. N. 650: 12 I. W. 390.

Factor—Agent for sale of goods making advances as against goods—Agreement to recover advances from sale proceeds—Suit by agent for refund of advances before actual sale—Maintainability of. See CONTRACT ACT, S. 171. 11 I. W. 1.

Fraud of agent—Principal when bound.

Where an agent acting in collusion with a third party does an act without the consent of his principal and the act is detrimental to the interests of the principal the latter is not bound by the act. (Shadi Lal and Broadway, JJ.) MUSSAMMAT RAM KAUR v. RAGHBIR SINGH. 2 Lah. L. J. 516: 56 I. C. 631.

Pakka Adatia—Difference between ordinary broker and Pakka adatia—Cross contracts—Liability under. See CONTRACT ACT, S. 30. 22 Bom. L. R. 1018.

Power of agent—General agent having power to execute deeds—Omission to mention capacity—Liability of agent—Contract—Negotiable Instruments.

Where B who held a general power-of attorney from L—a prisoner, in Andamans, executed a deed of mortgage jointly with his wife R, hypothecating the property of L and himself; and the reverors of L brought a suit to set aside the alienation on the ground that the mortgage could not affect the property of L as there was nothing in the deed to show that it was executed by B in his capacity of general agent, held, that in face of the fact that the power-of attorney gave power to execute a deed and under his own name and signature, and there being a reference in the deed in express words to the powers of alienation, the omission on the part of the general agent to mention either in the body of the document or in the signature his capacity of the agent could not affect the substance of the transaction and the omission was immaterial.

The question whether an agent is to be taken to have contracted personally or on behalf of his principal depends on the intention of the parties to be deduced from the nature and terms of the particular contract and the surrounding circumstances.

The law relating to liability on the negotiable instruments should not be confused with the law bearing on the liability arising out of contracts as the laws relating to the two subjects are not exactly similar. (Wazir Hasnul, A. I. J. C.) JACKUR SINGH & RAY KRISHNA DAS. 1925 (1) 18. 23. O. C. 353.

PRINCIPAL AND SURETY.

—Right to—Sale of property by Judgment debtor under O. 21, R. 83 (2)—Right to pre-emption if exists—Pre-emptor bidding at auction—Waiver. See (1919) *Dig. Col.* 908. AHMED JAN v. KISHEN CHAND.

1 Lah. L.J. 101.

PRINCIPAL AND SURETY—Discharge of principal debtor with reservation of right against sureties—Sureties not exonerated. See *CONT. ACT ACT*, SS. 144 AND 139.

38 M. L.J. 131.

—Discharge of surety—Conduct of creditor—Negligence—Proof of:

A surety who has bound himself for a person's doing certain things, is not discharged from his liability unless it is shown that the creditor has by his conduct either prevented the things from being done or caused by the omission or enabled the person to do what he ought not to have done, and that but for such conduct the omission would not have happened (*Abdul Rahim and Ayling, JJ.*) SUBRAMANIA AIYAR v. SHAW WALLACE & CO

38 M. L.J. 402 : 12 L.W. 117.

28 M. L.T. 107 : 58 I.C. 648.

PRIVY COUNCIL—APPEAL—Leave to appeal—Value of claim—Value at date of the H.S. Court decree. See *C.P. Code*, S. 110. 22 Bom. L.R. 243

—Death of party—Representative not brought on record—Effect:

The fact that one of the respondents in the appeal to the Privy Council died before the appeal was heard and his legal representative has not been brought on the record does not make the decree of the Privy Council a nullity (*Mullick and Sultan Ahmad, JJ.*) DEONANDAN PRASAD SINGH v. JANKI SINGH

5 P.L.J. 314 : 1 P.L.T. 325 : (1920) Pat. 266 : 56 I.C. 322

—Ex parte hearing—Application for re-hearing—Knowledge of original hearing effect of. *C.P. Code*, O. 45, R. 8 (6).

The accidental omission to notify respondents of the admission of an appeal to the Privy Council is not a sufficient ground for re-hearing, provided such respondents in fact knew of the admission. (Lohi Singh, Hukum Singh v. GURMUKH SINGH) 22 Bom. L.R. 550 (P.C.)

—Preparation of record—Unnecessary printing—Costs:

The Judicial Committee condemned the printing by the Appellants of an entire measurement chart of 1852 when a few specimen pages printed and described as such would have sufficed, advertising in particular to the responsibility which rested on legal practitioners and other advisers of the parties in India in the matter of preparing printed records is Costs Uncurled (for printing unnecessary papers) and disallowed to the successful Appel-

PROBATE.

lants. (*Lord Phillimore*) GOPAL CHANDRA CHAUDHURI v. RAJANIKANTA GHOSH.

47 Cal. 415 : 24 C.W.N. 553 (P.C.)

PRIZE COURT—German ship—Capture of at three miles from port—Cargo at sea or in the port—Hague convention No. VI 1907. Arts. 1, 2 and 3. See (1919) *Dig. Col.* 911. THE RHEINFELS. 54 I.C. 444.

PRIZE—Vessel—Ownership—Seizure as price—Commercial domicile—Condemnation of vessel. See (1912) *Dig. Col.* 912 THE KARADENZ,

44 Bom. 61.

PROBATE—Revocation—Service of citation on father of testator's minor widow appointed as guardian ad litem—Application for revocation by widow who received benefit under will. *C.P. Code*, O. 32, R. 4 applicability of:

Where the mother of the testator, as executrix applied for probate, citation was issued upon the father of the testator's childless widow who was appointed guardian ad litem for the widow. The father refused to accept the citation and it was fixed on the door of his house. Probate was granted on 13th March, 1912. The widow came of age in 1913. On the 18th November, 1913 a petition for revocation of probate was filed.

Held, that the widow for several years having received benefits under the will, the proceedings could not be re-opened.

14 C.W.N. 1068 ; 19 C.W.N. 336.

Where a Will of which probate is sought affects the interest of a minor it may be expedient as a rule of practice to appoint a guardian ad litem for the minor. But it does not follow that every rule in O. 32 is thus made strictly and legally applicable.

A citation for probate is not a summons to appear. The object of citations, whether general or special, is to give those interested an opportunity of coming in if they so chose, and contesting the application for probate. Until a caveat is entered the proceedings are not contentious. S. 32 of the Probate and Administration Act shows that up to the state there is no "lis" and no suit. Until contest arises, O. 32 of the C.P.C. would seem to have no application to the proceedings. (*Richardson and Huin, JJ.*) RADHASEYYAM D.S.V. RANGA SUNDARI DASSI. 24 C.W.N. 541.

—Will—Executor + Corporation—Benares Hindu University Act XVI of 1915.

A testator appointed the Benares Hindu University as his executor. On his death, the University applied for probate and the question was whether Act XVI of 1915, creating the University gave authority to the University to be an executor or trustee of a trust created partly for educational and partly for other purposes. Held, that as the granting of probate was in no way cognizant to the functions of the University, but was merely a prelude to the obtaining of benefits under the will which

PROB. AND ADMN. ACT, S. 4.

the University was permitted to accept both generally and under the provisions of S. 20 of the Act the University was not debarred from obtaining probate as an executor. (*Stuart and Kanhaiya Lal, A. J. C.*) THE BENARES HINDU UNIVERSITY v. SRI KISHEN DAS.

23 O. C 288.

PROB. AND ADMN. ACT (V of 1881) S 4—Property belonging to joint family—Effect of grant of probate.

Under S. 4 nothing can vest in an executor or administrator which was the subject of joint family and which would have otherwise passed by survivorship and so the applicant gets nothing at all by the grant and it does not cause prejudice to any one. (*Das and Foster, JJ.*) DEBENDRA PD. SUKUL v. SURENDRA PD. SUKUL. 5 P. L. J. 107 : (1920)

Pat. 88 : 1 P. L. T. 19 : 54 I. C. 807.

S 8—Executor—Conditional appointment—Death of executor—Legatee—Letters of administration.

Where a testator appoints the son of his executor to be an executor after the death of the latter, if the son is fit for the work, it merely means that the person named as executor is free from any of the legal disabilities mentioned in S. 8 of the Probate and Administration Act.

Where an executor appointed under a will dies, a universal or residuary legatee may be admitted to prove the will. Letters of Administration with the will annexed may be granted to him of the whole estate or of such portion thereof as may be unadministered. Where such universal or residuary legatee is a minor, his mother may be appointed administrator during his minority. (*Mitter, C. J. and Coutts, J.*) MUSSAMAT MANKI KOER v. MANRAKHAN KUER. 56 I. C. 841

Ss 13, 31 and 33 and 41—Letters of Administration granted to manager of Court of Wards—Grant to a nominee of Court of Wards in his personal capacity if valid—Grant to a statutory person—Letters of administration to a minor and disqualified proprietor who is not a minor or lunatic.

Letters of administration cannot be granted to a minor. They may be granted to the legal guardian of the minor under S. 31 or to the person to whom the care of the minor's estate has been committed by a competent authority under S. 33 until the minor attains majority provided in the first case, the minor is a sole residuary legatee or a person who would be solely entitled to the estate of the intestate.

Legal guardian means a guardian appointed under the Guardians and Wards Act.

The application for letters of administration must be on behalf of the guardian and not on behalf of the minor through the guardian and the guardian must in the first instance apply to be appointed the minor's guardian for the purpose of enabling him to obtain letters of

PROB. AND ADMN. ACT, S. 23.

administration for the use and benefit of the minor. Until he has obtained an order of the Court appointing him guardian, he cannot be considered a legal guardian within S. 31 or a person to whom the care of minor's estate has been committed by a competent Court within S. 33 of the Probate Act. 34 Cal. 708 ref.

The right of administration follows the right to the property. It is a good general rule to grant administration to the largest interest and that the rule ought not to be departed from except under urgent necessity for the protection and preservation of the estate.

It is an elementary rule, that in dealing with a statutory person, the statute must be examined to see what powers he can properly exercise under the Statute and to regard that as impliedly prohibited which is not conferred on him expressly or by necessary implication. 38 Cal. 53 Ref.

The manager of a Court of Wards has large powers of management over the estate of the proprietor, but there is nothing in the Act which entitles him as manager and by virtue of his office to apply for letters of administration to the estate of the deceased in which the disqualified proprietor may have a large interest.

While the Probate Act makes special provision for a minor or lunatic there is provision in the statute that takes away administration from a disqualified proprietor who is not a minor or lunatic and gives it to the manager of the Court of Wards.

The essential condition for the exercise of the Court's discretion under S. 41 of the Probate Act is the presence of such special circumstances in the case as render such a grant absolutely necessary, not convenient merely as being a saving of time or expense to the applicant.

The Court under no circumstances can grant letters of administration to a nominee of the Court of Wards by virtue of his office, but it may be granted to him "as some person" with in S. 41. That power can only be exercised when the Court is of opinion that the estate is likely to be wasted or dissipated in the hands of the persons entitled under the general provisions of the Statute to the grant. 10 C. W. N. 241. dist, 1 Sw. and Tr. 462 ; 2. P and D. 244 ref. (*Das and Adami, JJ.*) BABUI BHAGWATI KUER v. BAHURIA RAM SAKHI KUER.

(1920) Pat. 187 : 1 P. L. T. 304 : 57 I. C 583.

S. 23—Letters of administration—Rival applicants—Procedure.

Where there are rival applicants for letters and the status of one of the applicants to so apply is disputed while the other is entitled to a portion of the estate the proper procedure for the Court is to ignore the question of status and grant Letters of administration to the applicant entitled to a part of the estate. (*Two-mony C. J. and Robinson, J.*) MA THU DAW v. MA NGWE NU. 56 I. C. 764.

PROB. AND ADMN. ACT, S. 23.

S. 23—Probate—Grant of—Person entitled to inherit.

Under S. 23 of the Prob. and Admn. Act if the person making the application is according to the law of inheritance, entitled to the whole or a part of the property, and alleges the fact that the property is of that nature and there is no other application for letters of administration the applicant is clearly entitled to the grant. (*Das and Foster, JJ.*) DEBENDRA PD. SUKUL v. SURENDAR PD. SUKUL.

5 Pat. L. J. 107 : (1920) Pat. 83 :
1 Pat. L. T. 19 : 54 I. C. 807.

S. 50 (4)—Probate — Revocation—Sufficient cause—Rule as to—Omiss on of executant to furnish additional security required by Court. See (1919) Dig. Col. 916 SURENDRA NATH PRAMANIK v. AMRITA LAL PAL CHAUDHURI.

47 Cal. 115

Ss. 64, 69, 70 and 73—Caveat—Paramount title set up by caveator, not to be investigated—Applicant's interest—Proof of "Contention" in S. 73, meaning of.

A court of probate is not duly entitled to, but even bound to enter into questions of title if it is necessary to decide that question in order to determine which of the two contesting parties is entitled to the grant of the letters, of administration. But when the objector sets up a paramount title, e.g., that he being an adopted son is entitled to the whole estate not by inheritance but by survivorship the probate court is entitled to go into the merits of the title set up by the objector and the nature of the estate left by the deceased. 3 C. W. N. 277 : 6 C. W. N. 345 ; 28 Bom. 644 foll.

The objector is fully entitled to deny the right in which the applicant for letters of administration claims which refers to the correctness of the pedigree upon which the petitioners base their claim but the objector cannot be allowed to raise in a probate court a separate case based upon a paramount title and not a preferential claim to letters of administration which if the objector, has also applied for letters, would have been properly in issue to be decided by the probate court.

Ss. 64, 69 and 70 do not authorise a probate court to discuss the question of paramount title set up by the caveator who puts forward title to the property not for the purpose of preventing a grant to others, 17 C. W. N. 615 foll.

The word "contention" used in S. 73 does not empower the objector to oppose the proceedings on the ground that there was no estate at all to which letters of administration could be taken. (*Das and Foster, JJ.*) DEBENDRA PD. SUKUL v. SURENDAR PD. SUKUL

5 Pat. L. J. 107 : (1920) Pat. 83 :
1 Pat. L. T. 19 : 54 I. C. 807.

Ss. 70 and 86—Probate—Application for by stranger—Opposition by grandfather's daughter's son's son—Order that

PROB. AND ADMN. ACT. S. 130.

caveator has locus standi—Appealability of—Revision—C. P. Code S 115.

An application for the probate of a will was opposed by the daughter's son's son of the grandfather of the testator while the propounder was a perfect stranger to the family. The District Judge held that the caveators had no *locus standi*.

Held, that the order of the District Judge was not appealable but could be revised by the High Court under S 115, C. P. C.

In the circumstances the caveators had some interest in appearing and opposing the application for probate and it should be disposed of in their presence.

Quaere:—Whether grandfather's daughter's son's son is an heir under the Hindu Law. (*Chatterjea and Newbould, JJ.*) RADHA RAMAN CHOWDHURY v. GOPAL CHANDRA CHUCKER BUTTY.

24 C. W. N. 316 :
31 C. L. J. 81 : 56 I. C. 122.

S 82—Executor—Right of to sue on behalf of the estate—C. P. C. O. 31, R. 1.

Under S. 82 of the Prob. and Admn. Act and O. 31, R 1, C. P. C. no one but an executor is competent to prosecute a suit with respect to matters arising out of the estate of the deceased. (*Sultan Ahmad, J.*) SAKLI v. RAM KISAN DAS.

55 I. C. 504.

S. 86—Appeal—Order of District Judge rejecting caveat on the ground that caveator has no *locus standi*.—Not appealable—Revision — Interference. See PROB. AND ADMN ACT., Ss. 70 AND 86.

24 C. W. N. 316.

S 89—Survival of cause of action—Malicious prosecution, suit for. See (1919) Dig. Col. 917. PANJAB SINGH v. RAMAUTAR SINGH

(1920) Pat. 52.

S. 90—Hiudu widow — Grant of letters of administration to—Exception to her powers of alienation—Administrator—Order permitting Collateral attack—Permissibility—Grounds See (1919) Dig. Col. 918. CHUN LAL HALDER v. SRIMATHI MOKSHADA DEBI.

31 C. L. J. 379.

S. 92—Joint executors — Suit for rent by one—Co-executors if necessary parties

Probate of a will was granted to the two executors named therein. One of them sued for rent and joined his co-executor as defendant.

Held, that there was no flaw in the frame of the suit on the ground that the two executors did not both join as plaintiffs. (*Newbould, J.*) SOUDAMINI GHOSE v. TENIRAM MAHALDAR.

54 I. C. 755

Ss. 130 and 134—Scope of—Moneys to be paid out of profits of land—Interest.

The provisions of Sections 130 to 134 of the Probate and Administration Act relate to interest on annuities or legacies payable by the

PROMISSORY NOTE.

executor, and cannot apply to a sum directed to be paid out of the profits of immoveable property which a legatee was entitled to as part of the properties obtained by him under a will, and which devolved upon his heir. (*Chatterjee and Duval JJ*) PANCHAGOPAL MOOKHERJEE v. KALIDAS MUKERJEE.

24 C. W. N. 592 : 54 I. C. 140.

PROMISSORY NOTE—Original consideration—Decree on, when to be granted—Note inadmissible in evidence for want of stamp. See STAMP ACT, S. 35.

13 S. L. R. 169-

—*Suit on—Decree on original Consideration—When to be given—Form of decree—Note not returned—Security.*

Where a promissory note has been executed for an existing liability a plaintiff can comprise either or both the claims, viz., on the promissory note and on the existing liability. 41 Ind. App. 142 dist.

If a plaintiff sues on one of such causes of action and the right to sue thereon is not free from doubt it is always open to the Court (and it is desirable) to direct the plaintiff to amend the plaint so as to convert it into a suit based on both causes of action or treat it as so amended and then to decide the suit once for all.

Where the lower Appellate Court dismissed a suit on the promissory note and refused to allow the plaintiff to fall back upon the original cause of action,

Held, that it was wrong and that the suit must be treated as based on both claims and disposed of accordingly.

Where the promissory note sued on is not returned to the defendant and the defendant may become liable to third persons who may become holders of the note in due course the Court can obtain proper security from the plaintiff before awarding him the amount found due from the defendant (*Sadasiva Aiyar and Spencer, JJ*) DUGGEMPUDI NAGAMMA v. PEDDA VENKATAREDDI.

12 L. W. 147.

—*Suit on original consideration—Maintainability of.*

If in a suit upon a hand-note, alleged to have been executed after an adjustment of accounts between the parties, the hand-note is proved to be a forgery, the plaintiff is entitled to sue for the original consideration. (*Mullick and Sultan Ahmed JJ*) SURUJ LALL v. ANANT LAL,

55 I. C. 556.

PROVIDENT FUNDS ACT, S 4—Provident—Funds—Attachment on—Ilegal—Revision—C. P. Code S. 115. See (1919) *Dig. Col. 920*. HINDLEY v. JOY NARAIN MARWAR.

24 C. W. N. 288 : 54 I. C. 439.

PROV. INSOLVENCY ACT, Ss 2 (e) 16 and 18—Father adjudicated insolvent son's share if vests in official Receiver—Joint Hindu family—Power of father to dispose of

PROV. INSOLVENCY ACT, S. 6.

his son's share. See (1919) *Dig. Col. 921*. HARMUKH RAI MUNNA LAL v. RADHA MOHAN. 54 I. C. 931.

—**S. 4—Insolvency—Transfer with intent to deprive creditors—Firm—Partner Adjudication of.**

A transfer of property with intent to delay or defeat creditors is an available act of insolvency. Although a notice suspending payment of debts by one of the partners of a firm cannot be used for the purpose of getting an order of adjudication against the firm, it can be used for the purpose of showing whether or not transfers which were made shortly before the petition of insolvency were made for the purpose of defeating or delaying the creditors. (*Fletcher and Duval, JJ*) DEBENDRA CHANDRA SARKAR v. PURUSOTTAM DAS.

55 I. C. 186.

—**S. (4) (b) (d) and (e)—Act of insolvency—Property of debtor put up for sale but not sold.**

If property of a debtor is put up for sale but not actually sold that does not constitute an act of insolvency. (*Fawcett, J. C.*) DHOLANDAS v. WALABDAS.

13 S. L. R. 187:

56 I. C. 158.

—**Ss. 5 and 6—Application for adjudication by debtor—Bad faith—Dismissal of application.**

Where the requirements of the Prov. Ins. Act have been complied with, an order of adjudication should follow almost as a matter of course. Whether the debtor has or has not committed acts of bad faith is to be determined by the Court, not at the stage when the order of adjudication is to be made, but at the final stage when an application is made for an order of discharge 7 I. C. 394 and 12 C. L. J. 400 foll. (*N. R. Chatterjee and Panton, JJ*) MOHIRUDDIN SARKAR v. THE SECRETARY, HADAL GRAMYA RINDAN SAMITI.

57 I. C. 977.

—**Ss. 5 and 6—Insolvency application—Several debtors—Joint Hindu family.**

A joint application against seven persons, members of joint family who are jointly liable for insolvency is not maintainable 2 C. L. J. 318 foll. (*N. R. Chatterjee and Panton, JJ*) KALI CHARAN SAHA v. HARI MOHAN BASAK.

24 C. W. N. 461 : 31 C. L. J. 206 :

58 I. C. 531.

—**S 6 Sub-Sec. (4). Cl. (b), Debt—Liquidated sum—Rights in respect of mutual contract.**

In cases where there are—between two merchants, contracts of sale and of purchase the practice is to set off the first transaction out of an excess of sales against the equivalent in purchase or vice versa. In such cases the difference between the contract rates does give an ascertained sum due by one party to the other

PROV. INSOLVENCY ACT, S. 10.

which is a liquidated sum. (*Fawcett, J. C.*)
DHOLANDAS v. WALABDAS.

13 S. L. R. 187 : 56 I. C. 158.

—**Ss. 10, 24 (3) and 47—Adjudication—Death of insolvent—Continuation of proceedings—Right of representatives to contest.**

Where on the death of an insolvent after the order of adjudication, the proceedings in insolvency are directed to be continued under S. 10 of the Prov. Ins. Act at the instance of the representatives of the deceased insolvent. On general principles as well under S. 24 (3), read with the further provision contained in S. 47 of the Act, it is incumbent upon the Court to permit the representatives of the insolvent to be present so as to give them an opportunity of cross examining the claimants-creditors and their witnesses and to offer rebutting evidence in support of their plea that their claims have either been satisfied or are barred. (*Teuwen and Chaudhuri, JJ.*) **SRIPAT SINGI v. PRODAYAT KUMAR TAGGAE.**

57 I. C. 810.

—**Ss. 16, 18 and 55 (1) (a)—Adjudication—Vesting order not passed—Effect of—Sale by Official Receiver—No title passes.**

Where an adjudication of insolvency is made by an Official Receiver in the exercise of the powers delegated to him under S. 52 (1) (a) of the Provincial Insolvency Act, the insolvent's estate does not vest in the Official Receiver under S. 18 or any other provision and will not so vest unless an order vesting it in him is passed by the Court. **30 M. L. J. 415 toll (Oldfield and Sesagiri Aiyar, JJ.) MUTHU SWAMI AIYAR v. SOMOO KANDIAR.**

39 M. L. J. 438 : 12 L. W. 262 : (1920) M. W. N. 537.

—**Ss. 16 and 17—Member of an agricultural tribe—Bundelkhand Land Alienation Act Ss. 16 and 17—Insolvency of agriculturist—Property not saleable and does not vest in the Receiver. See BUNDLEKHAND LAND ALIENATION ACT, Ss. 16 AND 17.** **18 A. L. J. 59.**

—**Ss. 16 (2) (6) and 38—Date of adjudication—Relation back to presentation of petition—Transfer ipso facto void—Scope of, S. 38.**

The joint effect of Sub-Sections (2) and (6) S. 16 of the Prov. Insolvency Act is that it is the making of the order of adjudication which vests the property in the receiver, and only upon such an order being made can any vesting take place at all; but once the order is made the effect created by it is by a legal fiction taken to relate back to the presentation of the insolvency petition. Hence where an insolvency petition was presented by a creditor on 3rd March, 1919 and the debtor sold his immoveable property on 12th March, 1919 and the order of adjudication was passed on 21st March, 1919, it was held that on these facts alone the sale was void under S. 16

PROV. INSOLVENCY ACT, S. 17.

and the property vested 49 I. C. 283 referred to.

Per *Curiam*: The protection given by S. 38 of the Prov. Ins. Act is not available to a transferee where the circumstances show that the transfer which he has taken is in itself an offence against the Bankruptcy Law; e.g., as giving an undue preference to some creditors, or as being a transfer of the whole of the debtor's property with the intention of defeating or delaying some of his creditors. (*Piggot and Walsh, JJ.*) **SHEONATH SINGI v. MUNSHI RAM.** **42 A.I.L. 433 : 18 A. L. J. 449 : 55 I. C. 941.**

—**S. 16 (2)—Father insolvent—Sons' interest not vested.**

The estate of the sons cannot be dealt with by the Receiver. 49 I. C. 848 toll. (*Chevis, C. J.*) **SHIB CHARAN v. SHEIKH MUHAMMAD ISMAIL.** **2 Lah. L. J. 401.**

—**S. 16 (4)—Mahomedan Law—Bequest Consent of insolvent heir—Not a transfer.**

When the consent of the heirs of a Mohamedan is signified to a bequest in a will in favour of an heir, the legatee takes from the testator and the consent does not operate as a transfer by the heirs signifying their consent. Where the consenting heirs are insolvents their consent is equally effective in validating the bequest and the property vests in the legatee and not in the Receiver. (*Piggott and Walsh, JJ.*) **AZIZ-UN-NISSA BISI v. O. M. CHIENE.** **42 A.I.L. 593 : 18 A. L. J. 745.**

—**Ss. 16 (6) and 34—Execution of decree against property of insolvent—Assets Realised prior to—Order of adjudication—Right of decree-holder to benefit against receiver.**

The provisions of S. 16 (6) of the Provincial Insolvency Act cannot control the provisions of S. 34 (1), of that Act. Where after the filing of an application by a debtor to be adjudged an insolvent, but before the making of the order of adjudication, two houses belonging to him were sold in execution of a money decree against him and purchased by the decree-holder, it was held, that the execution sale having taken place and the assets having been realized before the order of adjudication the ownership of the houses vested in the decree holder and not in the receiver. **11 I. C. 433 and 10 A. L. J. 252** approved. (*Tudball and Rafiq, JJ.*) **DIN DAYAL v. GURSARAN LAL.** **42 A.I.L. 336 : 18 A. L. J. 287.**

—**S. 17—Insolvency of firm—Order of adjudication—Administration of joint and separate estates.**

At the time of making an order of adjudication against the partners of a firm the Court need not make any order as to the course of administration in insolvency with reference to the joint estate of the firm and the separate

PROV. INSOLVENCY ACT, S. 18.

estate of the partners. That is a matter that must be considered and determined during the course of the insolvency proceedings. (*Fletcher and Duval, JJ.*) DEBENDRA CHANDRA SARKAR v. PURUSOTHAM DAS.

55 I. C. 186

Ss. 18 and 20—Official Receiver—Sales by, of insolvents properties—Procedure.

Sales by the Receiver in whom the property of an insolvent vests under S. 18 of the Provincial Insolvency Act are really sales by the owner, and may be held either by public auction or by private treaty. The procedure for sales in execution of decrees under the C.P. Code does not apply to them. (*Teunon and Newbould, JJ.*) ENTAZUDDI SHIEKH v. RAM KRISHNA BANK. 24 C. W. N. 1072

Ss. 18 and 36—Receiver appointed after adjudication—Effect of—Order passed while property in the custody of ad interim receiver—Effect.

Where an interim receiver has been appointed in insolvency proceedings, the Receiver appointed after adjudication does not stand in the shoes of the interim Receiver but stands on a higher footing. The property of the Judgment-debtor vests in him, he holds it for the benefit of the whole body of the creditors and he has special rights conferred and special duties imposed upon him by Statute. One of such rights is the right to make an application under S. 36 of the Prov. Ins. Act, and this statutory right which has been conferred on him cannot be taken away by an order in a proceeding to which he was not a party.

An order as to the validity of a transaction obtained upon an application to which the debtor and creditors alone are impleaded as parties while the debtor's estate is in the custody of an *ad interim* Receiver does not operate as *res judicata* as against the Receiver appointed after the order of adjudication and does not debar him making an application under S. 36 of the Prov. Ins. Act, (*Coutts and Sultan Ahmed, JJ.*) BABU SHIVA PRASAD v. PRASAD NAIK. 58 I. C. 783

Ss. 20 (d) and 37—Application to avoid sale—Official Receiver necessary party, See (1919) Dig. Col. 924. NIKKA MAL v. THE MARWAR BANK LTD. 2 Lah. L. J. 68

S. 20 (d)—Insolvency—Suit to recover deferred dower of daughter—Maintainability of.

Where a person is adjudicated an insolvent and his estate is in the hands of a receiver he cannot maintain a suit in his own name for the deferred dower of his daughter even though the Receiver has refused to bring such suit. (*Coutts and Adami, JJ.*) SYED KHELAFAT HUSSAIN v. AZMAT HUSSAIN. 54 I. C. 699

S. 22—Aggrieved person—Right to bring conduct of Official Receiver to notice of Court—Inherent power of Court.

PROV. INSOLVENCY ACT, S. 36.

Any person, and not merely the insolvent or the creditors or any other aggrieved person, can take action to bring the conduct of a Receiver in any particular respect to the notice of the Court with a view to having his act or decision in any particular matter reversed or modified.

The Court has inherent powers to rectify the Receiver's errors or mistakes or to reverse or modify his acts or decisions, 18 C. W. N. 366 foll.

Where the Court acts upon information supplied by persons who are outside the scope of S. 24 of the Provincial Insolvency Act, the time limit prescribed in that section would be no bar to an action being taken by the Court. (*Rattigan J.*) DATA RAM v. DEOKI NADAN. 1 Lah. 307 : 58 I. C. 6.

Ss. 24, 28 and 38—Adjudication of insolvency—Composition—Private arrangement with creditors—Payment under—Subsequent petition by creditors to reopen—Proof of debts.

After being adjudicated insolvents the appellants proposed a scheme for composition which was rejected by the District Judge. They subsequently represented to the court that a majority of the creditors had accepted from one M half their respective dues in full satisfaction of their claims as suggested in the scheme for composition. These creditors subsequently filed petitions in the Court stating that they had been induced by false and fraudulent misrepresentations of the insolvents to accept from them half of the principal sums due to them and prayed that on payment by them into the Court of the said sums they should be permitted to prove their claims.

Held, that in view of the provisions of secs. 28 and 38 of the Act these transactions could not be recognised in insolvency proceedings and the petitioning creditors were entitled to prove their claims as they stood on the date of adjudication.

The framing of schedule of creditors and debts under sec. 24 of the Act is the duty of the Court which is to decide on each claim on evidence and in case of contest after hearing necessary parties. (*Teunon and Newbould, J. J.*) BEHARY LAL SIKDAR v. HARSUKH DAS CHAKMAL. 25 C. W. N. 137.

Ss. 36 and 37—Fraudulent transfer—Decision of insolvency Court—Finality of.

A creditor who has unsuccessfully opposed his debtor's application to be declared an insolvent on the ground that he had made fraudulent transfers of property is bound by the decision of the insolvency Court and cannot in a subsequent suit raise the plea that the transfers were fraudulent and void. (*Halifax, A. J. C.*) NARAYAN v. HARDATTARAI. 57 I. C. 612.

Ss. 36 and 37—Sale of debtor's whole property to near relation—Preference—fraud—Presumption.

PROV. INSOLVENCY ACT, S. 37.

Where a near relation of a debtor purchases the whole, or substantially the whole, of the property of a person in insolvent circumstances with notice of the insolvency he cannot be said to be acting in good faith.

The repayment of a debt not yet due, to a near relative by a person in insolvent circumstances amounts to undue preference.

Where the effect of a conveyance of the whole of the debtor's property is to defeat and delay the creditors it may be presumed that the debtor acted with intent to defeat and delay the creditors. (*Mittra, A. C. J.*) DAOLAT V. PANDURAM. 55 I. C. 57.

—S. 37—Application by creditor for declaration that sale by insolvent is null and void—Limitation—Starting point—Lim. Act. Art. 181—jurisdiction to entertain application. See (1919) Dig. Col. 928. NIKKA MAL v. THE MARWAR BANK LTD. 2 Lah. L. J. 68.

—S. 37.—Application under—Conditions for—Limitation for application. See (1919) Dig. Col. 929, NIKKA MAL v. THE MARWAR BANK LTD. LAHORE. 2 Lah. L. J. 68.

—Ss. 43 and 46 (1)—Failure of insolvent to produce his books—Creditor's application to court to proceed against insolvent—Refusal—Appeal by creditor, if maintainable.

Under S. 43 of the Prov. Ins. Act the creditor has no right to set the Court in motion for the insolvent's failure to produce his books, of account although in practice the Court may avail itself of any assistance which the creditor may render to it by bringing to its notice the delinquency of the debtor.

The person therefore who is 'aggrieved' by the failure of the insolvent to produce his account—books is the 'Court' and not the 'creditor' and no appeal lies at the instance of the latter against the order of the Court refusing to proceed against the insolvent under S. 43 of the Act. (*Seshagiri Aiyar and Moore JJ.*) PALANIAPPA CHETTY v. SUBRAMANYA CHETTY. 11 L. W. 145 : (1920) M. W. N. 135 :

54 I. C. 740.

—Ss. 43 and 46—Order refusing application by creditor to take action against insolvent—Appealable.

An order refusing an application by a creditor to take action against the insolvent under S.43 of the Prov. Insol. Act is not appealable, because the application is not one which the Insolvency Act entitles a creditor to make, and the applicant is therefore not a person aggrieved by the order refusing the application within S. 46 and the order is one under S. (2) which makes provision only for an order sentencing the debtor. 40 Mad. 630 ; 39 All. 161 foll. 21 Q. B. D. 24 dist. (*Martineau, JJ.*) GUJAR SHAH v. BARKAT ALI SHAH.

1 Lah. 213 : 56 I. C. 744.

PROV. INSOLVENCY ACT, S. 46.

—S. 43—Railway employee—Insolvent adjudication as employee withdrawing his provident fund from the Railway Company—Payment of the money by insolvent to his wife—Fraudulent transfer whether offence, Provident Funds Act (IX of 1897) S. 4.

A railway employee was adjudicated an insolvent under S. 16 of the Provincial Insolvency Act 1907 and a receiver was appointed. Subsequently the employee resigned his appointment with the Railway Company and drew from them a sum of Rs. 2,000 odd which was his Provident Fund, this money was not paid over to the receiver; but Rs. 1,600 out of it were paid by the insolvent to his wife. For this, he was found guilty of a fraudulent act within the meaning of S. 43 (2) of the Act, and sentenced to three months' simple imprisonment. On appeal:—

Held, reversing the conviction and sentence that neither the receiver nor the creditors had any claim to the money drawn by the insolvent as his Provident Fund, and therefore there could be no fraudulent dealing such as was made punishable by S. 43 of the Provincial Insolvency Act 1907. (*Shah and Crump, JJ.*) NAGINDAS BHUKHANDAS v. GHELABHAI GULABDAS. 44 Bom. 673 : 22 Bom. L. R. 322 : 56 I. C. 449.

—Ss. 46 and 48—Appeal—Creditors—Aggrieved person—Who is.

To entitle a creditor to appeal against an order passed in proceeding started on his application against an insolvent under S. 43 of the Prov. Ins. Act, he must show that he is a "person aggrieved" by the order within S. 46 of the Act. He is not so aggrieved if the order merely holds that there is no *prima facie* case against the insolvent. 40 M. 630 ; 39 A. 172 ; foll. (*Mittra, J.*) VIRCHAND v. BULAKIDAS. 55 I. C. 717.

—S. 46—Creditor—Appeal by official receiver a party—Other creditors if necessary.

In an appeal by one of the creditors of an insolvent against an order overriding his contention that he was in the position of a secured creditor the Appellant joined as party respondent the receiver. Two of the creditors appeared by leave to support the order appealed against but other creditors who did not appear to contest the Appellant's case in the Lower Court were not made parties to the appeal.

Held, that the appeal was competent and it was not necessary to make the last mentioned creditors parties to it. (*Mookerjee and Panton, JJ.*) THE EAST INDIA CIGARETTE MANUFACTURING CO., LTD. v. ANANDA MOHAN BASAK. 24 Cal. W. N. 401 : 58 I. C. 10.

—S. 46 (1)—Aggrieved person—Failure of insolvent to produce account books—Creditor's application for production refused—Creditor not entitled to appeal, as not being an

PROV. S. C. C. ACT, S. 17.

aggrieved person. See PROV. INS. ACT, Ss. 43 AND 46 (1). **11 L W. 145.**

PROVINCIAL SMALL CAUSES COURTS ACT (IX of 1887) S. 17—Application for review of judgment on the last day—Deposit, omission to make—Deposit within time allowed—Application if competent.

An application for review of Judgment on a Small Cause Court suit was made on the last day of the period prescribed for limitation. But without deposit of the amount of costs or security for the same as required by Sec 17 of the Provincial Small Cause Courts Act. On the following day the Court allowed the applicant time for making the deposit which was eventually made and the application for review was granted:

Held, that as the application failed to comply with the provisions of Sec. 17 of the Prov. Sm. C. C. Act, the application for review was not a proper application in time and it was barred under Art 161 of the Limitation Act.

It was doubtful whether Sec. 5 of the Lim. Act applied to the case at all as the application for review was made within time. (*Sanderson, C. J. and Walmsley, J.*) **ABDUL SHEIKH v. MUHAMMAD AYUB.** **24 C. W. N. 380 :**

31 C. L. J. 197 : 56 I. C. 551

S. 17—Ex parte decree—Application to set aside—Security or deposit—Condition precedent.

Under S. 17 of the Prov. Sm. C. C. Act, it is a condition precedent to the granting of a new trial that the applicant should at the time of presenting his application deposit in Court the decretal amount or tender security for payment of the same. (*Adami, J.*) **KHANTAR POTDAR v. PUNNI NADDAF.**

54 I C. 971.

S. 17—Provisions of, not mandatory—Deposit beyond prescribed period—Amount of decree.

The provisions S. 17 of the Prov. Sm. C. C. Act requiring the deposit of the decree amount or the giving of security for it at the time of the presentation of an application to set aside an *ex parte* decree is not mandatory, but only directory; and such deposit may be made or security given at any time the Court fixes for it before the hearing.

The expression "the amount due under the decree" in S. 17 of the Act does not include costs of execution. (*Krishnan, J.*) **SURYA-NARAYANA IYER v. T. SOUNDARARAJA IYENGAR**

55 I. C. 618.

(Overruled in **38 M. L. J. 539 : 55 I. C. 977.**)

S. 17—Provisions of, mandatory—Deposit within period of limitation for application, sufficient.

The provision as to the deposit of the decree amount or the giving of security in the proviso to S. 17 of the Provincial Small Causes Courts Act is sufficiently complied with, if the deposit

PROV. S. C. C. ACT, S. 25.

is made or the security is given before the time prescribed for such application in the Limitation Act has elapsed. (*Walis, C. J. Oldfield and Seshagiri Aiyar, JJ*) **ASSAN MAHOMED SAHIB v. RAHIMAN SAHIB,** **43 Mad. 579 : 38 M. L. J. 539 : 28 M. L. T. 17 : (1920) M. W. N. 375 . 55 I. C. 977.** [Overruling **55 I. C. 618.**]

S. 17—Provisions of mandatory—Time for deposit—Extension of—C. P. Code S. 148.

S. 17 of the Prov. Sm. C. C. Act which imposes certain conditions upon a defendant who applied for re-hearing or review is mandatory, the Legislature intending thereby to discourage such applications as far as possible.

A security bond filed after the period of limitation is inoperative and time cannot be extended under S. 148 C. P. C.

Quare, whether it is necessary that the security bond should be filed along with the application. (*Das J.*) **RAMCHARITAK MAR v. HAKHIM KHAN.** **1 Pat. L. T. 323 : (1920) Pat 203 : 56 I. C. 810.**

S. 23—Return of plaint for presentation to proper Court—Jurisdiction—Interference—C. P. Code S. 115.

In a suit by plif. to recover money due on two chittas, the defence was that there was a subsequent agreement, whereby in satisfaction of the amount found due upon the two chittas a certain amount of land would be conveyed to the plaintiff and that the subsequent agreement had the effect of rescinding the prior agreement. The plaintiff submitted the subsequent agreement, but contended that defendant had refused to carry it out and that in consequence of such refusal he had rescinded that agreement and was entitled to sue upon the original agreement in the Small Cause Court. The Court, being of opinion that the question raised involved the question of title, returned the plaint for presentation to a Court having jurisdiction to determine the question. Plff. applied to the Court under S. 115 of the C. P. Code.

Held, that the High Court was competent to act under S. 115 of the C.P. Code, inasmuch as the Court below had declined to exercise a jurisdiction which was vested in it by law. Before that Court decided that it had no jurisdiction to decide the suit, it ought to have come to the conclusion whether the plaintiff's case, that the defendant had refused to perform, or had disabled himself from performing, his promise in its entirety, was untrue. (*Das, J.*) **MEWA LAL SAHU v. RAMADHIN CHOWDHURY,**

57 I. C. 602.

S. 25—Case not tried by Small Cause Court—Revision.

The power conferred upon the High Court by S. 25 of the Prov. Sm. C.C. Act can only be exercised where the case has been tried by the Small Cause Court. (*Das, J.*) **JAGARNATH JHA v. RAJNATH SAHAI,** **57 I. C. 551.**

PROV. S. C. C. ACT, S 25.

—S. 25—*Finding of fact—Interference when.*

Per Oldfield, J.—A finding of Small Cause Court on a question of fact reached without reference to material evidence must be rejected even in revision under S. 25 of the Prov. Sm. C. C. Act. (*Oldfield and Sesagiri Aiyar, JJ.*) M. & S. M. Ry. Co v. SUBBA Row.

43 Mad. 617:

38 M. L. J. 360 : (1920) M. W. N. 198:

11 L. W. 358 : 28 M. L. T. 49:

55 I. C. 754.

—S. 25—*Finding of fact—Revision.*

Under S. 25 of the Provincial Small Cause Courts Act 1887, though the High Court is averse to interfering on pure questions of fact, yet it has power to interfere with decisions on questions of fact. (*Macleod, C. J. and Fawcett, JJ.*) NATHURAM SHIVANARAYAN v. DHULARAM HARIRAM MARWADI.

22 Bom. L. R. 1199.

—S. 25—*Fresh Plea of limitation—When can be raised in revision.*

Omission to raise a plea or limitation in the trial Court would not estop the debt from taking the plea in revision before the High Court. If such plea depends upon evidence, the proper course is to remand the case for retrial. (*Rafique, J.*) DEBDIN BHAGWAN DIN v. SARAKAR & Co.,

56 I. C. 513.

—Ss. 25 and 28—*Omission to determine material issue of fact—Revision.*

A mortgagee who had paid the arrears of Govt. Revenue to prevent the mortgaged property being sold sued the deft. the purchaser of the property, in the Court of Small Causes, for recovery of the arrears paid. The deft. pleaded that the mortgage was not genuine. The court declined to decide the question of the genuineness of the bond as being beyond the scope of the suit, and decreed it.

Held, that the omission to determine the issue as to the genuineness of the mortgage bond amounted to an error in law and the High Court had power to interfere under S. 25 of the Prov. Sm. C. C. Act.

If the court was of opinion that the question of the genuineness of the bond was beyond the scope of the suit it was incumbent on the court to exercise the discretion vested in it by S. 23 and to return the plaint to be presented to the proper court, and failure to do so brought the case within S. 25. (*Jwala Prasad, J.*) RAJKUMLAL v. JAIKARRAN DAS.

5 Pat. L. J. 248 : 1 Pat. L. T. 225 : 57 I. C. 653

—S. 25—*Revision—Interference discretionary.*

It is purely discretionary with the High Court to exercise its revisional powers. The broad rule is that this court should not interfere to perpetuate injustice but only to promote the ends of justice. (*Broadway, J.*) THE FIRM

PROV. S. C. C. ACT, Sch. II Art. 15.

PRABH DIAL KISHEN CHAND v. THE FIRM OF HARI CHAND-SOBHA RAM. 55 I. C. 209.

—S. 25—*Revision—Powers of High Court.*

Under S. 25 of the Prov. Sm. C. Courts Act the High Court has wider powers of interference than under S. 115 of the C. P. Code (Scott-Smith, J.) PRABH DIAL v. SHAMBHU NATH.

20 P. L. R. 1920 : 54 I. C. 436.

—S. 27—*Small Cause suit—Trial as ordinary suit—Appeal.*

Where a Court invested with Small Cause Court jurisdiction tries, under the regular procedure, a suit which should be tried as Small Cause Court suit the decree made in the suit is not appealable. (*Beachcroft, J.*) MANMATHA NATH v. KSHETRA NHTH.

55 I. C. 642.

—Ss. 32 (2) and 27—*Case filed in Munsif's Court not invested with Small Cause Jurisdiction—Decision by officer so invested—Appeal—Revision.*

A suit valued at Rs 50 was filed in the Munsif's Court at a time when the presiding officer was not invested with Small Cause Court powers. When the case came on for hearing the permanent incumbent of the post who was invested with such powers and who was on leave, had taken over charge. He however tried the suit as a regular suit. In appeal his judgment was reversed by the subordinate Judge. Held in revision that the Munsif was right in trying the suit as a regular suit and an appeal therefore lay to the Subordinate Judge (*Lindsay, J.*) BHAGWAN DAS v. GANGA PRASAD.

42 All. 195 : 18 A. L. J. 89 : 54 I. C. 428.

—Sch. II, Arts. 11 and 15—*Suit for unpaid purchase money—Completion of sale deed and placing vendee in possession—Jurisdiction of Small Cause Court.*

A suit by a vendor of immoveable property for the unpaid purchase money against the vendee where the sale deed has been executed and registered and the vendee placed in possession of the lands sold is not a suit for the determination or enforcement of any right to or interest in immoveable property or suit for specific performance of a contract within Art 11 and 15 of Sch. ii of the Prov. Sm. C. C. Act, (*Odgers, J.*) CHERRUNNI MOOTHEAN v. AMMUNNI

11 L. W. 211.

—Sch. II, Art 13—*Suit for price of trees sold by tenant—Jurisdiction of Small Cause Court.*

A suit by a *zemindar* to half the price of trees sold by his tenant based on the terms of the village *wajib-ul-arz* is cognizable by a Small Cause Court. (*Rafique, J.*) BOHRA BHOJ RAJ v. RAM CHANDRA.

42 All. 448 :

18 A. L. J. 561 : 55 I. C. 950.

—Sch. II Arts. 15 and 35 (ii)—*Suit for return of article—Compensation.*

PROV. S. C. C. ACT, Sch. II Art. 24.

A suit for the return of an article lent by the plaintiff to the defendant or, in the alternative for compensation, is not cognizable by a Court of Small Causes. (*Lindsay, C. J. MATA DIN v MADHO CHARAN.* 56 I. C. 877.)

Sch. II Art 24—Suit founded on award—Jurisdiction of Small Cause Court.

An award had been made out of Court between the parties, under which a certain sum of money had been declared payable to the plaintiff. Held, that the suit being one to recover money payable to the plaintiff under the award, was not barred by Art. 24 of the Prov. Small Cause Courts Act, 1 A. W. N. 159 not foll. (*Lindsay, J. MIZAJI LAL v. PARTAB-KUAR.* 42 All. 169. 18 A. L. J. 70. 58 I. C. 546.

Sch. II Art. 31—Suit for accounts—What is.

The mere fact that in deciding the question in controversy between the parties to a suit accounts may have to be gone into, would not necessarily make the suit one for accounts. The question whether the suit is one for accounts, within Art. 31 Prov. Sm. C.C. Act must depend upon the relation in which the parties stand to each other. It is only where the relation of the parties is such that one of them is bound to render an account to the other that the suit may be said to be a suit for accounts. (*N. E. Chatterji and Panton, JJ. JOGESH CHANDRA MANDAL v. CHINTA MANI PRODHAN.* 57 I. C. 951.

Sch. II Art. 31—Suit to recover profits of mortgaged land and value of trees cut down by the mortgagee—Not cognizable by Small Causes Court.

A suit by a mortgagee, after redemption, to recover from the mortgagee the profits of the mortgaged property and the value of certain trees alleged to have been cut down by the defendant, is exempted from the cognisance of a Small Cause Court by Art 3 of the Small Cause Courts Act. (*Ryves, J. CHAUBEY BASDEO v BEHARI LAL.* 54 I. C. 117.

Sch. II Art. 35—Damages for mental worry—Prosecution for Criminal breach of trust.

Where the defendant was charged with criminal breach of trust and convicted by criminal court and plaintiff filed a suit for damages for mental and physical worry, cost of criminal prosecution and other expenses and loss. Held, that under Art. 35 (ii) of the 2nd Schedule of the Provincial Small Cause Courts Act, the suit was not cognizable by Small Cause Court. (*Daniels, A. J. C. SUGHRA, v. RAM LAL MISRA.* 23 O. C. 352.

Sch. II Art. 35 (h)—Rogha—Suit for recovery of—Small cause Court Jurisdiction.**PROV. S. C. C. ACT, Sch. II Art. 41.**

A suit for the recovery of a certain sum of money on account of *rogha* (compensation) due to the plaintiff by custom of the tribe for losing his wife is excluded from the jurisdiction of a Court of Small Causes. A second appeal can be maintained in such suit. (*Scott Smith and Dundas, JJ. ABBAS KHAN v. RASUL.* 1 Lah. 574 : 58 I. C. 167.

Sch. II, Arts 35 (2) and 43 A—Suit to recover property or its value—Alleged misappropriation of property by persons other than debtors.

Where in a suit for the recovery of certain ornaments or their value, it was not alleged that the defendants had committed any criminal offence in respect of the ornaments but certain other persons, namely the plaintiffs' *gumasta* was said to have misappropriated them and pledged them without any authority with the defendant, it was held that Art. 35 (ii) and 43 of the second Schedule to the Prov. Sm. C.C. Act were not applicable to the case. (*Banerji, J. MATHURA v. RAGUNATH SAHAL.* 18 A. L. J. 354 : 58 I. C. 663.

Art. 41—Contribution—Joint owners—Removal of bricks by some—decree—Satisfaction by one.

The decree against certain joint owners was executed against the present plaintiff alone who now sued the defendant the other owner in the Small Cause Court to recover half of the amount which he had to pay.

Held, that the suit being one for contribution by a sharer in joint property in respect of a payment made by him of money due from a co-sharer is not cognizable by a Small Cause Court and the fact of the plaintiff paying a decree against him and the defendant instead of paying the amount before it was sued for makes really no difference 4 I. C. 59 ; 27 I. C. 56; 40 A. 135 Rel. and 15 M. 155. (*Martineau, J. NAND LAL v. HARBANS LAL.* 2 Lah. L. J. 387.

Sch. II Art. 41—Contribution—Mortgage-occupancy holding—Failure of mortgagee to pay rent—Suit by landlord against tenant—Payment by mortgagor—Suit for its recovery.

Plff. mortgaged a portion of his holding to deft. and the latter agreed to pay a proportionate amount of the rent to the landlord. Defendant failed to pay his share of the rent to the landlord and the latter obtained a rent decree against the plaintiff, who was the recorded tenant in respect of the whole of the holding. To save the holding from being sold in execution of the rent decree the plaintiff paid off the amount of the decree, and then brought this suit to recover his share of the rent from the defendant.

Held, that the plaintiff and the defendant were joint holders of the holding and were co-sharers therein, and that, therefore the suit was one by a sharer in joint property to recover money due from a co-sharer and its cognizance

PROV. S. C. C. ACT, Sch. II Art. 43.

by a Small cause Court was barred by Art 41 of the Prov. Sm. C.C Act. (*Jwala Prasad, J.*) RAM SARUP PATHAK v. HAZARI MAHTON.

57 I.C. 595.

Sch. II, Art 43 A—Plaintiff accusing deft. of criminal offence—Jurisdiction of Small Cause Court.

If in a Small Cause claim the plff. accuses the deft. of conduct amounting to a criminal misappropriation the jurisdiction of the Small Cause Court to try the suit is barred by Art. 43 A of Sch II of the Pro. Sm. C. C. Act. (*Duke Brockman, J. C.*) NANDLAL v. NARAYAN,

55 I.C. 328.

PUBLIC GAMBLING ACT (III OF 1867) Ss. 3, and 6—Presumption as to occupation—Issue of warrant.

Where there is a fair presumption under Section 6 of the Public Gambling Act that a person is the occupier or has the use of a room within S. 3, of the Act as a common gaming house, the issue of a warrant is not illegal (*Piggott, J.*) BHOLA NATH v. EMPEROR.

56 I.C. 284 : 21 Cr. L.J. 442.

Ss. 5, 10 and 11—Search warrant—Endorsement of officer—Examination as witnesses of persons sent up as accused—Weight due to evidence.

A Magistrate issued a search warrant under S. 5, of Act III of 1867, to a police officer, who endorsed it to another police officer of rank qualifying him to conduct searches under that section. Held, that the search conducted by the latter officer was valid and operative so as to give rise to the presumption referred to in S. 6, 30 All. 60 Ref.

As a result of the search two distinct cases were taken before the Magistrate one against M. under S. 3, of Act III of 1867 and the other against a number of persons under S. 4 of the Act. At the trial of M. the Magistrate called and examined as witnesses two of the persons who had been sent as accused persons in the case under S. 4. The Magistrate concluded by recording a formal order of acquittal in favour of those two persons.

Held, that in accordance with S. 10 of the Act it was lawful for the Magistrate to examine these persons as witnesses at the trial of M., that their evidence was legally admissible, but that such evidence being usually the evidence of an accomplice and given by a person who is under a certain inducement to make a statement favourable to prosecution case in order to secure a certificate of indemnity for himself must be received with caution.

Sembler: For the purpose of terminating the proceedings which have already been instituted against the persons whom the Magistrate sees fit to examine as witnesses under S. 10, of Act III of 1867, a formal order of acquittal requires to be recorded in their case, over and above the granting of the certificate provided for by S. 11,

PUNJAB LAND ACT, S. 2.

of the Act. (*Piggott, J.*) MAHADEO v. EMPEROR.
42 All 385 : 18 A. L. J. 383 :
58 I. C. 241 : 21 Cr. L. J. 737.

S. 6—Common gaming house—U.P. Public Gambling Act (I of 1917) S. 3.

Upon the search of a house persons were found therein engaged in gambling and instruments of gambling were also found. There was evidence that the owner made profit by allowing his house to be used as a place for gambling. Held that it must be presumed under S. 6 of the Public Gambling Act, as amended by the U. P. Public Gambling (Amendment Act of 1917) in the absence of evidence to the contrary, that the house in question was a common gaming house. (*Banerjee, J.*) BHAGGILAL v. EMPEROR.

42 All 470 : 18 A. L. J. 562 :
56 I. C. 230 : 21 Cr. L. J. 438.

S. 13—Public place—Place exposed to public view.

Gambling at a place near a public street and exposed to public view but which is not part of the public street is not an offence under S. 13 of the Public Gambling Act. (*Shadi Lal C. J. MOULA v. EMPEROR.*) 56 I.C. 672.

S. 13. Public place—Meaning of—Outskirts of railway Station.

The outskirts of a railway station (*i.e.*) those parts to which the public have no right of access do not constitute a public place within S. 18 of the Public Gambling Ac.

Where certain persons were found gambling near water tank within the premises of a railway station held, that the place was not a public place and the accused could not be convicted under S. 13 of the Public Gambling Act. 9 P. R. 105 (Cr.) foll. (*Dundas, J.*) BADRUD-DUN v. EMPEROR.

57 I.C. 981 : 21 Cr. L. J. 691.

PUNJAB ALIENATION OF LAND ACT (XIII of 1900) Ss. 2 (3) & 16—“Land” Meaning of—Trees growing on land exempt from attachment.

The definition of “land” given in S. 2 (3) of the Punjab Alienation of Land Act is not intended to be exhaustive. Although the maxim *quicquid plantatur solo, solo cedit* cannot be accepted in India as having the wide meaning attached to it in England, it does not cover the case of trees growing on the land. 52 P. R. 1906, 102 P.L.R. 1905 followed. It was not the intention of the Legislature to exclude standing trees from the definition of land in S. 2 (3) of the Punjab Alienation of Land Act. Such trees are therefore exempt from attachment and sale under the provisions of S. 16 of the Act. (*Wilberforce, J.*) RULIA RAM v. SULTAN KHAN.

54 I.C. 38.

S. 2 (3)—Trees standing on land if “land”. See (1919) Dig Col. 935. AMIR KHAN v. LAHON MAL. 58 I. C. 688.

S. 2 (3) (b)—Trees belonging to agriculturist—Attachment of.

PUNJAB LAND ACT, S. 4.

The protection afforded by S. 2 (3) (6) of the Punjab Alienation of land Act does not apply to things material, such as standing trees but to incorporeal rights. Therefore, trees standing on land belonging to a member of agricultural tribe are liable to attachment in execution of a decree. (*Leslie Jones, J.*) AHMAD KHAN v. JHANDA RAM. **54 I. C. 262.**

S. 4—Adoption of a profession, if changes status—Non-agriculturist, marriage with Effect of.

The adoption of a profession cannot change a man's status for the purpose of the Punjab Alienation of Land Act.

Members of an agricultural tribe do not cease to hold the status they adopt or if their ancestors adopted, prostitution as a profession nor can such adoption vary their custom in respect of inheritance.

Obiter :—In the case of a Muhammadan belonging to an agricultural tribe marrying a woman not a member of such a tribe his wife does not attain the status of a member of his agricultural tribe. (*Abdul Raouf and Bevan Petman, JJ.*) MUSSAMMAT UMRAO BIBI v. MUHBMAD BAKHSH. **2 Lah. L. J. 215 : 55 I. C. 238.**

S 16—Execution of decree—Temporary alienation of land—Power to order.

A Civil Court can in execution of a decree order a temporary alienation of the land of a Judgment-debtor who is a member of an agricultural tribe and S. 16 of the Punjab Alienation of Land Act prohibits only a sale and not a temporary alienation of such land. 4 P. R. 1903 and 1 P. Re. (Rev) 1916 toll. (*Shadi Lal, Le Rossignol and Broadway, JJ.*) SARDARNI DATAR KUAR v. RAM RATTAN. **1 Lah. 192 : 2 Lah. L. J. 333.**

S. 16—Judgment-debtor member of an agricultural tribe—Temporary alienation of land by collector in execution of decree—Validity of. See C. P. CODE S. 72.

2 Lah. L. J. 333.

PUNJAB COLONISATION OF GOVERNMENT LANDS ACT (V of 1912) S. 19—Devise by tenant—Subsequently becoming proprietor—Validity of.

One S. held a square of land in Chak No. 157 in the Lyallpur District as a tenant. On the 5th July 1909 he made a will bequeathing "my square in Chak No. 157" to his son by a second wife. After Act V of 1912 came into force he acquired proprietary rights in the said square, and in 1913 he died. The plaintiff, the son of S. S. by his first wife, then brought the present suit claiming half of the said square and contended, inter alia, that the will was rendered void and inoperative by Act V of 1912, and that a devise of occupancy rights could not pass proprietary rights. But the Lower Courts dismissed plaintiff's suit. Plaintiff appealed to this Court.

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Held, that as the testator was a proprietor at the time the succession fell in the will was in no way rendered void or inoperative by S. 19 of Act V of 1912.

Held also, that as the occupancy rights had ripened into proprietary ownership before the will became operative the square passed to the devisee under the will. 13 Ch. D. 359. (*Broadway and Wilberforce, JJ.*) DALIP SINGH v. BALWANT SINGH. **1 Lah. 500.**

PUNJAB COURTS ACT, (III of 1914) S. 41—Custom—Certificate—General rule abrogated by special custom.

Where the question for decision before the lower Appellate Court was whether the general rule of custom had been abrogated by a special custom no second appeal is competent without a certificate. (*Broadway and Dundas, JJ.*) FITHA v. DEVAKEE. **2 Lah. L. J. 503 : 56 I. C. 651.**

S. 41—Pre-emption—Question whether property is a shop—Question of law.

The question whether a property of which pre-emption is claimed, is a shop, is one of law i.e., the facts found by the Court below are unchallengeable, but the inference to be drawn from these facts is one of law. (*Le Rossignol and Broadway, JJ.*) DEWAN CHAND v. BASANT RAI. **2 Lah. L. J. 302.**

S 41 (3)—Hindu Law—custom—Applicability of—Certificate.

A finding that the parties are governed by Hindu Law and not by custom cannot be challenged in second appeal without a certificate. (*Scott-Smith and Dundas, J.*) MUSSAMMAT ASO v. MUSSAMMAT HARNAMI.

1 Lah. L. J. 60 : 56 I. C. 944.

S. 41 (3)—Second appeal — Certificate—Delay—Extension of time.

Where an appellant applied to the District Judge for a certificate under S. 41 (3) of the Punjab Courts Act, 1914, explaining her delay in applying for the certificate as due to the fact that she had erroneously supposed that a second appeal would lie as of right to the Chief Court and that she did not discover her mistake until sometime after passing of the decree, when she consulted a lawyer at Lahore, the District Judge accepted her application and granted her a certificate on the 3rd February 1919 :

Held, that in the circumstances and having regard to S. 41 (3) of the Punjab Courts Act, 1914, the appeal must be held to have been filed in time. (*Rattigan, C. J.*) MUSSAMMAT ALAM BI v. LATTU. **1 Lah. 245 : 57 I. C. 204.**

S. 41 (3)—Second Appeal—custom.

Whether by the custom prevailing in the tribe to which the parties belong a union between a man and his nephew's widow is recognized as valid and whether by custom issue of such a union should be regarded as legitimate and entitled to succeed are questions

PUNJ. COURTS ACT, S. 41.

of custom into which the High Court cannot enter in second appeal in the absence of a certificate.

Taking the defendants to be the legitimate sons of a union between a man and his nephews widow they are entitled to hold the land and cannot be ousted by the more distant collaterals. (*Chevis, A. C. J. and Wilberforce, J.*) MAHARAM v. BASAU. 2 Lah. L. J. 370.

S. 41 (3)—Second appeal—Custom.

A second appeal on a question of onus in a custom case, is not competent in the absence of a certificate. 7 P. R. 1911 foll.

Where a certificate is refused on the ground that the requirements of S. 41 (3) of the Punjab Courts Act were not fulfilled the case cannot be remanded for reconsideration of the question whether a certificate should be granted 7 P. R. 1918 dist. (*Scott Smith and Leslie-Jones, JJ.*) SUBA v. JALAL.

2 Lah. L. J. 479.

S. 44—Interlocutory order—Revision.

The Chief Court should not ordinarily interfere with an interlocutory order in revision but in exceptional cases to shorten litigation (*Le Rossignal, J.J.*) RADHA KISHIN v. TIRATH RAM. 1. Lah. L. J. 220.

S. 44—Revision—Error of Law—

Not a sufficient ground

An error of law does not amount to a material irregularity and is not a good ground for interference in revision.

The High Court could not interfere in revision simply on the ground that the Court below had come to a wrong conclusion on the question of limitation. 11 C. 6 760 foll. (*Shadi Lal, C. J J FAQUIR CHAND v. DULLAH*)

56 I. C. 848.

S. 44—Revision—Interlocutory order.

It is only in very exceptional cases indeed that High Court should exercise its revisional powers of interfering with an order of interlocutory nature and although an order passed under O. 41 R. 25, C. P. C. is strictly speaking not an interlocutory order, the High Court should only interfere in an order passed under that rule in exceptional cases. (*Broadway, J.*) ALLAH BAKHSH v. LALKHAN.

2 Lah. L. J. 662.

S. 44—Revision—No interference—When substantial justice is done.

It is discretionary with the High Court to exercise revisional powers and where substantial justice has been done the High Court will not interfere. (*Petman, J.*) BUTARAM v. CHARHTA RAM.

55 I. C. 82.

PUNJAB COURT OF WARDS ACT (II of 1903) Ss. 11 and 12—Deputy Commissioner's order restraining alienation—Person and property outside jurisdiction affected—Effect of.**PUNJ. LAND REV. ACT. S. 117.**

A Deputy Commissioner has no authority, under, Ss. 11 and 12 of the Punjab Court of Wards Act, to issue an injunction restraining a landholder from alienating his property when both the person and the property affected are outside his jurisdiction. (*Lord Buckmaster.*) MAHOMED RUSTAM ALIKHAN v. MUSHTAQ HUSSAIN. 42 ALL. 609 : 39 M. L. J. 263 : (1920) M. W. N 565 : 18 A. L. J. 1089 : 12 L. W. 539 : 28 M. L. T. 220 : 47 I. A. 224 : 57 I. C. 329. (P. C.)

S. 31 (2) and (3)—Application for execution of decree against a ward of the Court whether filing of certificate necessary in each application. See (1919) Dig. Col. 937. DEPUTY COMMISSIONER, AMRITSAR v. BALLAMAL.

58 I. C. 635.

S. 31 (2) and—Power of executing Court to order sale of attached property after certificate has been filed without Consent or concurrence of the Court of Wards. See (1919) Dig. Col. 937. DEPUTY COMMISSIONER AMRITDAR v. MAHINDAR SINGH.

58 I. C. 631.

PUNJAB GOVERNMENT TENANT ACT (III of 1893) Ss. 7 and 8—Grantee—Transfer of right—Suit—cause of action.

The interests of a grantee vested in him as provided by S. 7 of Act III of 1893 are declared untransferable by S. 8 of that Act except with the previous consent in writing of the Financial Commissioner.

A transfer however effected i. e., be it formal transfer or transfer by conduct, is clearly barred by statute.

The alleged cause of action (investiture of a share of interest in the grant by the grantee) contravened a statute and the suit was properly instituted. 36 I. C. 125 ref. (*Le Rossignal and Broadway, J. J.*) UTTAM CHAND v. JINDA RAM.

2 Lah. L. J. 597 :

58 I. C. 298.

PUNJAB LAND REVENUE ACT. (XVII of 1887) Ss. 6 and 34—Girdawar karungo—Revenue officer—attestation of mutation.

A girdawar karungo is not a Revenue Officer within S 6 of the Punjab Land Revenue Act and cannot attest a mutation within S. 34 (4) of the Act. (*Scott Smith, J.*) SUBA v. MOHAMAD ALI,

57 I. C. 721.

S. 117 (2) (c)—Amending Act III of 1914 S. 49—Decision of question of title by Revenue Officer as a Civil Court—Appeal to Dt. Judge.

A Revenue Officer deciding a question of title as though he were a Civil Court is to be deemed a Subordinate Judge for the purpose of determining the forum which is competent to hear an appeal from a decree passed by him.

The Assistant Collector in the matter of determination of the question of title is acting

PUNJ. LAND REV. ACT, S. 158.

as Subordinate Judge, and that the appellant was justified in filing his appeal in the court of the District Judge. (*Shadi Lal and Martincoo, JJ.*) SADDA SINGH AND CO, v. KUPALA AND CO. 1 Lah. 387 : 2 Lah. L. J. 269 : 58 I. C. 768.

S. 158 (1) and (2) (XVII)—*Suit for declaration that partition by revenue authorities is not binding—Jurisdiction—Civil Court.*

S. 158 (2) (XVII) of the Punjab Land Revenue Act excludes from the jurisdiction of the civil courts any question arising out of proceedings for partition, provided such a question is not a question of title in any of the property covered by the application for partition ; and S. 158 (ii) prohibits a Civil Court from taking cognisance of the manner in which a revenue officer exercises any power vested in him under the Revenue Act.

The defects such as, the revenue officer did not specifically refer to the trees in his method of partition, nor did he carry out the partition in the manner prescribed by himself in his order, for instead of effecting the partition by the drawing of lots he permitted the minor's representative to select one of the two portions drawn upon the spot ; nor did he expressly give sanction as provided for in O. 32 R. 7, C. P. C to the agreement between the minor's representative and defendant to take shares by selection instead of by drawing of the lots ; nor was that agreement sanctioned by the District Judge under Section 29 of the Guardians and Wards Act, do not give the Civil Court Jurisdiction in face of the clear prohibition set forth in S. 158 of the Land Revenue Act. (*Le Rossignol and Bevan Pctman, JJ.*) GHULAM HAIDAR v. AMIR HAIDAR 1 Lah. 298 : 2 Lah. L. J. 192 : 58 I. C. 19.

PUNJAB LIMITATION ACT—Provision—Applicability when a son or daughter died leaving a widow. See (1919) *Dig. Col.*, 938. HIRU v. SOHNUN. 1 Lah. L. J. 44 : 54 I. C. 964.

PUNJAB MUNICIPAL ACT (III of 1911), S. 3, Sub-S. (13)—Highway—Dedication—Evidence of—Road through private market—License to public trading in market.

In determining whether a road through private property is a public highway, although not expressly dedicated to the public it is important to distinguish between evidence showing an intention to dedicate to the public generally and evidence showing that visitors to or traders with tenants whose shops abut on the road have permission to a right of passage.

Held, that the evidence in the present case was of the latter description only, and that the road in question was not a "public street" within S. 3, Sub-S. 13 of the Punjab Municipal Act. (*Lord Shawe.*) MUHAMMED RUSTAM ALI

PUNJ. PRE-EMPTION ACT, S. 3.

KHAN v. THE MUNICIPAL COMMITTEE OF KARNAL CITY. 1 Lah. 117 : 22 Bom. L. R. 563 : 28 M. L. T. 1 : 38 M. L. J. 455 : 13 P. L. R. 1920 : 25 C. W. N. 122 : 32 C. L. J. 471 : 56 I. C. 1 : 47 I. A. 25 (P. C.)

S. 172—Scope of—Notice by Municipal committee requiring demolition of bridge constructed with permission, if valid—Injunction. See (1919) *Dig. Col.* 939. THE MUNICIPAL COMMITTEE OF LUDHIANA v. AHAD SHAH. 1 Lah. L. J. 168.

PUNJAB PRE-EMPTION ACT (II of 1905) Ss. 13 and 14 (e)—Stair case—Step to a thara "if an entrance from the street"—Rival Pre-emptors—Election—Decree in suit before repeal of Act.

In a suit for pre-emption of a house Held, that the sale having been made and the suit having been instituted while the old Act was in force, it was governed by the Punjab Pre-emption Act of 1905.

The step leading to the *thara* could not be called a "stair case" within S. 13 of that Act : nor could it be said to be an entrance from the street within S. 13. The rival pre-emptor who was elected by the vendor was entitled to a decree for pre-emption. (*Scott-Smith and Abdul Raof, JJ.*) NANAK CHAND v. THEK CHAND. 2 Lah. L. J. 630 : 56 I. C. 17.

S. 13 (1) and 14 (e)—Step leading to a thara—Stair case—Entrance from street—Rival claimants—Option of vendor—Sale before the Act.

One D. sold a house to J. Two suits were brought to pre-empt the sale : (1) by T. and others and (2) by N. and others. Both sets of rival pre-emptors claimed the right of pre-emption on the ground that their houses were adjacent to the house sold and the party-wall between their houses and the house sold was jointly owned by the owners of the respective houses. T. and others, however, claimed a superior right of pre-emption by reason of fact that a step leading to the *thara* was common between them and the owner of the house sold. The court of first instance held that both sets of rival pre-emptors had equal right of pre-emption and the vendors having elected N. and others they were entitled to a decree under S. 14 (e) of the Punjab Pre-emption Act, 11 of 1905. On appeal the Lower, Appellate Court held that T. and others had a preferential right under S. 13 fifthly and passed a decree in their favour. N. and others preferred a second appeal to the High Court.

Held, that a step leading to the *thara* cannot be called a "stair case" within the meaning of S. 13 (1) fourthly, nor can it be said to be "an entrance from the street" within the meaning of clause fifthly of the said section.

Held, also, that the sale having taken place while the old Act was in force, and the suit having been instituted and the decree of the

PUNJ. PRE-EMPTION ACT, S. 1.

trial Court having also been passed before the present Act came into force, the present suit is governed by Act 11 of 1905 and the pre-emptors N. and others were entitled to the benefit of the election made by the vendors in their favour under S 14 (e) of the Act. (*Scott-Smith and Abdul Raoof, JJ.*) NANAK CHAND v. TEK CHAND.

2 Lah. L.J. 630 : 56 I.C. 17.

—(1 of 1913) Ss 1 and (2) and 4—*Sardarakhti right—Agricultural land or village—Immoveable property.*

The subject of sale i. e., Sardarakhti rights, is neither agricultural land nor village immoveable property within the meaning of S. 3 of the Punjab Pre-emption Act of 1913 and consequently is not liable to pre-emption under S. 4 of the Act. (*Scot-Smith and Abdnl Raof, JJ.*) MAHOMED ISMAIL v. SHAMS-UD-DIN

1 Lah. 567 : 2 Lah. L.J. 684 : 58 I.C. 321.

—S 3 (3)—*Pre-emption—Taunsa if a town or village—Census Register—Entry in Value of.*

Taunsa is a town for the purposes of the Punjab Pre-emption Act.

In deciding whether a place is a town or a village the fact that it is described as a town in the Census Report is of great importance (*Scott Smith, J.*) ALLAH BAKHSH v. TOPAN RAM. 18 P.L.R. 1920. : 54 I.C. 642.

—S. 3 (3)—*Town or village—Test of Padhana in Lahore Tahsil—Pre-emption.*

A town may be defined as an area inhabited by residents not bound together by a common interest in agriculture that is, a place which depends mainly on trade while a village appears to mean the area occupied by a body of men mainly dependent upon agriculture or occupations subservient thereto

For the purpose of the Pre-emption Act, Padhana in the Tahsil and District of Lahore is a village. (*Shadi Lal and Wilberfore, JJ.*) SHANKAR DAS v. MATHRA DAS.

55 I.C. 520.

—S. 3 (5) (a)—*Sale of minor's property under—Leave of Court—S. 29 of the Guardian and Wards Act—Right to pre-emption.*

In a suit for pre-emption, it appeared that terms of the sale were settled between the parties privately, but as to complete a sale on behalf of a minor permission had to be obtained under S. 29 of the Guardian and Wards Act. It was therefore obtained by the guardian and the sale was completed by the guardian privately in favour of the vendee.

Held, that the sale was a private sale and a claim for pre-emption was not prohibited by S. 3 clause 5 (a). 46 P.R. 1909, dist. 52 I.C. 337. (*Abdul Raoof, J.*) HAR KISHEN SINGH v. KALA RAM.

2 Lah. L.J. 261.

—S. 5 (a)—*Pre-emption—Building whether a shop or house.*

PUNJ. PRE-EMPTION ACT, S. 15.

In a suit for possession by pre-emption of a house it appeared that the plaintiff, when mortgagee of this property described it as consisting, *inter alia* of shops. The buildings in dispute were suited for use as shops as well as for use as residential buildings.

Held, that in the presence of two lease deeds which show that the buildings were leased as residences and in the absence of any clear evidence that they were ever actually used as shops i.e., places where commodities are bought and sold the inference drawn from the facts by the learned District Judge was correct. (*Le Rossignal and Broadway, JJ.*) DEWAN CHAND v. BASANT RAI.

2 Lah. L.J. 302.

—S. 6—*Pre-emption—Village—Sale of house apart from site.*

Held, that the house in suit was a standing building in a village, and that it was village immoveable property and liable to pre-emption even apart from the site; but the pre-emptor would hold just on the same terms as the vendor did. 10 P.R. 1909 at p. 21 foll. (*Chevis, C.J.*) WAGHA v. MUHAMMAD ALI.

2 Lah. L.J. 345.

—S. 15—*Pre-emption—Right to—Co-sharers in well and not agricultural land—Adjunct or appendage.*

Plaintiff sued to pre-empt certain land on the ground that he was a co-sharer therein. It appeared however that the land in dispute consisted of a certain area held separately and of a share in a well, with path attached to it, by which the rest of the land was irrigated. The plaintiff was found to be a co-sharer only in the well and not in the agricultural land sold.

Held, that although the plaintiff was a co-sharer in the well with path attached to it this fact would not give him a right of pre-emption, being a mere appendage or adjunct to the other land.

The well and the path to the well being clearly an adjunct or appendage to the other land the plaintiff cannot treat it as a property separable from the rest of the land and claim a right of pre-emption in it alone on the strength of his being a co-sharer therein when he has no such right in the other land sold. 131 P.R. 1892 and 44 P.R. 1900 foll.

There has been no change in the law by the passing of the Pre-emption Act, inasmuch as the words used in S. 15 (b) of the Pre-emption Act are "joint land or property" and the omission of the word "undivided" which occurred in S. 12 (a) of the Punjab Laws Act, is in no way material. (*Martineau, J.*) SUBA v. SHAHAB DIN.

1 Lah. L.J. 238.

—S. 15 (c)—*Owners of estate—Right to pre-empt—Malik Kabza.*

A man is not debarred from pre-empting by the mere fact that he is only a *malik kabza* and owns no share in the village shamilat,

PUNJ. PRE-EMPTION ACT, S. 16.

Nor is he debarred by the mere fact that he is an owner by purchase. A person is not necessarily one of the owners of the estate merely because he owns some immoveable property in the village.

The words "owner of the estate" in S. 15 (c) of the Punjab Pre-emption Act refer to the proprietary body of the village.

A man who owns only a small plot of 8 marals unassessed to revenue, hitherto uncultivated except to a trifling extent and destined to be a building site, cannot be regarded as one of the owners of the estate. 106 P. R. 1913 foll. (*Chevins and Dundas, JJ.*)

JWALA SINGH v. TARA SINGH.

1 Lah. 503:

2 Lah. L. J. 565 : 57 I. C. 159.

S. 16—Pre-emption—Sale of a house apart from site—Rights of owner.

The owner of a site cannot exercise the right of pre-emption if a non-proprietor effects a sale with respect to his house standing on site. 2 N. W. P. H. C. R. 101. Ref. (*Abdul Raouf, J.*) BUTA v. ALI BUKSH.

2 Lah. L. J. 252 : 55 I. C. 609.

S. 16—Sale of right of residence in house—Pre-emption by owners of site.

The owner of a site cannot exercise the right of pre-emption in respect of a sale by a non-proprietor of the materials and the right of residence in the house. (*Abdul Raouf, J.*) BUTA v. ALI BAKSH. 2 Lah. L. J. 252 : 55 I. C. 609.

S. 22—Extension of time for making deposit—Discretion of Court—Powers of Appellate Court.

Plffs. filed a pre-emption suit on the last day of limitation and was ordered by the court to deposit one fifth of the sale price in cash on or before a certain date. The plffs. asked the court to accept security instead of a cash deposit but the court refused to do so and extended the time for making the deposit. The plffs. having failed to make the deposit the court rejected the plaint. The Appellate Court allowed further time and the plaintiffs having made the deposit set aside the order rejecting the plaint.

Held, on second appeal, that under the circumstances of the case the Lower Appellate Court ought not to have gone out of its way to exercise the discretion extending time in favour of the plaintiff.

According to general rules of procedure an Appellate Court has all the powers which the original Court has and can do all that the original court can do.

S. 22, (2) of the Punjab Pre-emption Act was enacted rather to enlarge the powers of an Appellate Court authorising it to make the same orders with respect to an appeal as the original court can with regard to the original suit. (*Abdul Raouf, J.*) INAYAT v. DALPAT RAI.

55 I. C. 621.

PUNJ. PRE-EMPTION ACT, S. 5.

S. 22, (5) (a)—Suit for pre-emption—Withdrawal of deposit money—Dismissal of suit.

Where in a pre-emption suit the money deposited by the plaintiff is withdrawn the suit is liable to be dismissed. (*Martineau, J.*) PARASRAM v. DALPAT RAI. 54 I. C. 268.

PUNJAB REGULATION (XVII of 1806)—Mortgage—Foreclosure—Demand if necessary—Delay—Effect of—Minor—Service of notice on relation, sufficiency of.

A demand need not immediately precede the application for foreclosure.

105 P. R. 1907 ; 134 P. L. R. 1910 ; 91 P. R. 1913 ; 134 P. L. R. 1901. Ref.

A mortgagor is in no way prejudiced by any delay between the demand and the application for foreclosure. Indeed the delay is to his advantage as it gives him further opportunity to arrange for payment.

The service of notice on the relation of the minor with whom the minor lived and who himself happened to be a mortgagor is sufficient notice, especially as the minor and his relation formed members of a joint Hindu family. 4 M. I. A. 392 ; 94 P. R. 1892, Ref.

Notice to a subsequent mortgagee is only necessary if there has been a complete assignment in his favour. 31 P. R. 1883, Ref. (*Scott-Smith and Wilberforce, JJ.*) GORDHAN DAS v. RUKMANI. 1 Lah. 292 : 2 Lah. L. J. 198 : 58 I. C. 11.

PUNJAB RESTRICTION OF HABITUAL OFFENDERS' ACT (V of 1918) Ss 3 and 7—Order of restriction following order of security for good behaviour—Legality of.

A restriction order under S. 7, of the Restriction of Habitual Offenders Punjab Act following an order for security for good behaviour is *ultra vires* under the proviso to the section and must be set aside. (*Rattigan, C. J.*) KABIR BAKHSH v. EMPEROR.

1 Lah. 100 : 55 I. C. 993 : 21 Cr. L. J. 385.

PUNJAB TENANCY ACT, (XVI of 1887) S. 5 (1) (c), 111 and 112—Erroneous statement by tenant interred in record of rights as to his being a new occupancy tenant—Whether an agreement. See (1919) Dig. Col. 942. JIWAN v. MAHOMED HAYAT.

2 Lah. L. J. 165 : 54 I. C. 969.

S. 5 (1) (d)—Muafid entered as haqq murshidi—Madad moash—Muafidars—Rights of—Right of occupancy,

Inasmuch as either *Haqq murshidi* (the right of spiritual leadership) or *madad moash* (aid to subsistence), figures through-out the earlier records as the purpose of muafid and they contain a reference to the service of the shrine or to the expenditure upon a fair held there, the muafidars were not village servants, but jagirdars.

PUNJ. TENANCY ACT, S. 50.

Held, consequently, that they are occupancy tenants under S. 5 (1) of the Punjab Tenancy Act and not liable to ejection. (*Maynard, J.C.*) *GILANI SHAH v. MUSAMMAT HASSAN.*

2 Lah. L.J. 714.

—**S. 50—Tenant—Wrongful dispossession—Limitation for suit for recovery of possession.**

A person wrongfully dispossessed of his tenancy is bound to bring his suit for recovery of possession in a Revenue Court within one year from date his dispossession. (*Shah Din, J.*) *LOCHANGIR v. SADA.*

54 I.C. 832.

—**S. 77 (3) (d) (e)—Creation of occupancy rights by widow—Suit by reversioner to contest alienation.**

A suit by a reversioner to contest the validity of the creation of occupancy rights by the widow of the last male owner is cognizable by a Civil Court. (*Wilberforce, J.*) *SARDHA v. LAKHU.*

56. I.C. 465.

—**S. 77 (3) (i)—Civil and Revenue Court Suit for injunction restraining proprietors from interfering with user of site.**

In a suit by plffs. occupancy tenants for an injunction restraining defts. members of the proprietary body from preventing them from using a certain site.

Held, that as the plff. claimed to use the land not by reason of their having been enjoying the use of it for many years, the suit did not fall under S. 77 (3) (i) of the Pun. Ten. Act and was cognizable by a Civil Court. 44 P.R. 1914 dist. (*Martineau, J.*) *KHAIRATI v. INDAR.*

55 I.C. 720.

—**S. 77 (3) (1)—Suit for declaration that plffs. are not liable to pay rent as entered in revenue record—Forum.**

A suit for a declaration that plffs. are not liable to pay rent as entered in the revenue records falls within the purview of S 74 (3) (1) of the Punjab. Ten. Act. and is exclusively triable by a Revenue Court. (*Broadway, J.*) *SAWAN SINGH v. RAHMAN.*

55 I.C. 739.

PURDANASHIN-LADY—Deed executed by when enforceable against her.

In order to enforce a document executed by a *purdanashin* lady, all that is necessary is to convince the court that the transaction was a fair one and that the lady understood the act to which she was subscribing. (*Le Rossignol and Broadway, JJ.*) *BHAGWATI v. CHOLI*

2 Lah. L.J. 689 : 55 I.C. 698.

—**Execution of document—Mortgage.**

Every protection should be given to *purdanashin* ladies and that the proof required from the persons who have entered into transactions with *purdanashin* ladies and seek to enforce those transactions against them should be adequate and satisfactory. (*Ameer Ali, J.*)

RAILWAYS ACT, S. 42.

MUHAMMAD ALI MUHAMMAD KHAN BAHADUR v. RAMZAN ALI QAZI. 24 C.W.N. 977 : 23 O.C. 150 : 58 I.C. 891. (P.C.)

—**Mortgage Independent advice—Absence of undue influence Misrepresentation—Onus of proof on mortgage. See CONTRACT Act Ss. 16 AND 74.** (1920) *M. W. N. 631.*

—**Setting up money lending business.**

Where a *purdanashin* lady sets up in business as a money lender, and it is proved that she employs a manager to transact that business on her behalf and herself sees nobody it must be taken that she holds out to the public that the manager has full authority to act on her behalf in all matters connected with that business, and she is not entitled, when it suits her convenience, to repudiate contracts so entered into on the ground that express authority is not proved. (*Miller, C.J. and Mullick, J.*) *BAIJU SINGH v. DHAPI KUER.*

1 Pat. L. T. 578 : 58 I.C. 310.

RAILWAYS ACT, (IX of 1890) S. 7.

—**Railway—Damages—Authority to execute necessary works—Level crossing—Closing of old one and opening of new.**

The plff. owned a bungalow which could be reached from the townside by passing through a level crossing on the defts' railway. The defts. closed the level crossing in order to provide increased sidings at their station, and opened a new level crossing lower down the railway. The result of the change was that the plff. had to take a longer route to reach the station or to the town; but that route had a dip which remained flooded in monsoon. The plff. filed a suit to compel the defts. to re-open the old level crossing :

Held, dismissing the suit, that the defts. were well within their powers in closing the old level crossing and that they had fulfilled all the requirements which the law imposed on them to provide another level crossing. (*MacLeod, C.J. and Crump, J.*) *HARILAL v. BOMBAY BARODA AND CENTRAL INDIA RAILWAY.*

44 Bom. 705 : 22 Bom. L.R. 822 : 57 I.C. 601

—**Ss. 42, 45, 47 and 109—Railway—Reservation of seats for a class of public—Legality of—Breach of the rules—Offence.**

A rule providing for special accommodation or for the special convenience of a particular individual or of a particular class of individuals and for the general convenience of the travelling public is legal under S. 47 of the Railways' Act. The "preference" forbidden by Ss. 42 and 43 refers to goods traffic and rates charged upon traders and does not apply to passengers.

A person who enters a compartment of a Railway carriage reserved by a Railway Co. for the use of passengers of a particular class

RAILWAYS ACT, S. 47.

to which he does not belong and refuses to leave when required to do so by a Railway servant is liable under S. 139 of the Railway Act (*Piggott and Walsh, J.J.*) *BIRJABASI LAL v. EMPEROR.*

18 A. L. J. 254 : 55 I. C. 342:
21 Cr. L. J. 294

—**Ss. 47 and 101 (C)—Rules 87 and 87 (A)—Accident—Message by guard for assistance.**

Where under Rr. 87 and 87 (A) of the rules framed under Railways' Act, the guard of a train sends a message asking for assistance it is the duty of the driver to ascertain the terms of the message and his omission to do so would make him liable under S. 101 (c) of the Act if such omission results in endangering the safety of any person. (*Mittra, A. J. C.*) *LOCAL GOVERNMENT v. KHAIRAT ALI.*

54 I. C. 988 : 21 Cr. L. J. 204

—**Ss. 72 and 80—Duty of railway to which goods are delivered for carriage—Bailee—Injury—Loss of goods—Continuous transit—Liability.**

The duty of a railway to which goods have been delivered for carriage is that of a bailee as defined in Ss. 151, 152 and 161 of the Contract Act.

When a thing is injured or lost while in the charge of a bailee, the burden of proving that he has exercised ordinary care must generally be upon the bailee the reason being that he has special knowledge of the facts.

The plaintiff having alleged and proved the loss of goods, the burden of proof shifted on to the defendant railways to establish that they had discharged a statutory duty under S. 72 of the Railways Act read with Ss. 151 and 152 of the Contract Act.

S. 80 of Indian Railway's Act while it gives an option to a plaintiff to sue one or other of two railway administrations in cases where the goods have been booked through, cannot surely mean that in a case where the plaintiff has brought the suit against both railway administrations, he is entitled to a decree against that one of them also which has satisfied the Court that it was in no way to blame for the loss accruing to the plaintiff. (*Lindsay, J. C.*) *SECRETARY OF STATE FOR INDIA v. AFZAL HUSAIN.*

28 O. C. 986:
56 I. C. 714.

—**S. 72—Railways—Carriage of goods—Liability for loss—Railways if mere bailees—Contract Act, Ss. 151 and 152—Special contract reducing liability—Risk note—"Loss"—Meaning of default of servant—Liability of master.**

Railways in India are common carriers; and a Railway Company has not the liabilities of an insurer but only those of a bailee under Ss. 151, 152 and 161 of the Contract Act. 40 Cal. 761 and 18 Cal. 620 followed.

RAILWAYS ACT, S. 113.

It is open to a Railway Company by means even less than contract to limit its liability to a special contract the minimum care which the Indian Contract Act imposes on bailees 32. Mad. 95, 25 M. L. J. 162 Ref.

A rule enabling a Railway Company to limit its responsibility provided it is in a form approved by the Governor-General-in-Council is not *ultra vires*.

30 Cal. 257 ; 17 Bom. 417, 18 All, 22 Ref.

Where in pursuance of a special contract embodied in a risk note, a Railway in consideration of acceptance of a reduced charge, limited its liability only to cases of loss through wilful negligence.

Held, that the Company can be held liable only for the loss of a complete consignment or one or more complete packages and the Company would be exempted from liability where there has been merely "destruction, deterioration and damage."

It cannot be said that there is no loss what ever happened to the contents if the outer cover which encloses the parcel was delivered by the Company.

Per *Seshagiri Iyer, J.* :—Persons who undertake to do certain things and who employ servants to do those things must be responsible for the careless negligence or wilful default of the servants in the discharge of their duties. (1919) 1 Ch 1 Ref. (*Oldfield and Seshagiri Iyer JJ.*) *THE MADRAS SOUTHERN MAHARATTA RAILWAY COMPANY LIMITED, MADRAS v. MATTAI SUBBA RAO.*

43 Mad. 617 :
38 M. L. J. 360 : (1920) M. W. N. 198 : 28 M. L. T. 49 : 11 L. W. 358 : 55 I. C. 754.

—**S. 112—Travelling without ticket—intention to defraud.**

The accused was charged under S. 112 of the Railways Act with entering a railway carriage without a ticket with intent to defraud the railway. He pleaded guilty to entering the carriage but said that as the train was about to start he had no time to purchase a ticket.

Held, that the conviction was bad as the petitioner's plea amounted to a denial of having intended to defraud. (*Walsh, J.*) *BANWARI LAL v. EMPEROR.*

57 I. C. 825 : 21 Cr. L. J. 685.

—**S. 113—Conviction—No enquiry into liability of accused to pay higher fare—Distress warrant—Illegality of.**

The petitioner was prosecuted for an offence under S. 113 of the Railways' Act and he pleaded in defence that he had not travelled by the train as alleged. The Magistrate without any enquiry disposed of the case by issuing distress warrant for the amount of penalty imposed:

Held, that the Magistrate could pass orders in accordance with law only after taking evidence on the question whether the accused was liable to pay and how much was payable by

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him. (*Walmsley and Huda JJ*) STATION MASTER, RANAGHAT v HABUL SHEIKH.

24 C. W. N. 195 : 55 I. C. 593 :
21 Cr. L. J. 320

S. 121—Railway servant acting in the discharge of his duty—Meaning of—Station master—Delegation of duties of ticket — Collector to signaller—Validity—Obstruction to signaller so acting—Offence—General Rules Rr 229, 231 and 244—Effect of *Sec (1919) Dig Col. 948*. CHITRULKA BHEEMANNA IN RE. (1920) M. W. N. 156 : 21 Cr. L. J. 62. 54 I. C. 414.

RATEABLE DISTRIBUTION—Function or executing and custody Court—Fund in courts—Attachment in execution rival decree holders priority. See C. P. CODE, S. 73 O. 21, R. 52. 39 M. L. J. 608 (F. B.)

RECEIVER—Appointment of—Trust property—Removal of trustee—Grounds for—Decree against waqf property—How executed — Receiver — Disinterested person to be appointed as *See (1919) Dig Col. 949*. SYED ASAD RAZA v. WAHIDUNNESSA BEGAM.

57 I. C. 70

Suit against—Sanction of Court subsequent to filing of suit—Effect of.

The necessity of obtaining the sanction of the Court for suing a receiver appointed by the said Court is a rule of common law which does not affect the jurisdiction of the Court to entertain the suit. The initial want of sanction will be effectively cured by a sanction obtained during the course of the litigation. 31 Cal. 306; 15 C. W. N. 872; 15 C. W. N. 54 and 24 I. C. 622 Ref. (*Sadasiva Aiyar and Spencer, JJ*) LAKSHMI AMMA v. KUTTI KUNHUNNI. 43 Mad 793 : 12 L. W. 381

Suit against without leave of Court—Application for such leave after filing of suit—Jurisdiction—Practice.

The plaintiff filed a suit against the receivers appointed by the High Court without first applying to the Court for leave to file such suit. He subsequently applied for such leave.—

Held, that the failure to obtain leave prior to the institution of the suit could be cured by leave subsequently granted if there was no bar to the institution of the suit, that is, to the jurisdiction of the Court to admit the plaint. (*Pratt, J.*) JAMESDJI F. SHROFF v. HUSSEIN BHAI AHMEDBHAI. 22 Bom. L. R. 319: 56 I. C. 424.

Waste—Life tenant—Mahomedan widow—Bhag property—Gift of a portion.

The gift of a portion of the property of which the donor is a life tenant constitutes waste, unless the alienation is supported by necessity.

A Mahomedan widow, who according to custom is only a life tenant of the Bhagdari property which belonged to her husband, cannot on that account make gifts of the estate as

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if she were in the position of a Hindu widow who is entitled to make alienations to secure spiritual benefit to her husband.

The anxiety of a life tenant to get a portion of the estate transferred to another person, though it might not by itself constitute waste, yet it might constitute a danger to the interests of the reversioner which a Court might take into consideration on the question whether his interests should be protected by the appointment a receiver. (*Macleod, C. J. and Heaton, J.*) AHMAD ASMAL MUSE v. BAI BIBI. 44 Bom. 727.

22 Bom. L. R. 826 : 57 I. C. 553.

RECORD OF RIGHTS—Entry in—Value of—Not conclusive as to title—Hindu joint family—Entry of name of manager. See HINDU LAW, JOINT FAMILY, MANAGER. 1 Pat. L. T. 546.

REDEMPTION—Clog on equity of redemption—Deed of mortgage restricting redemption in mortgagor planted fruit trees on mortgaged lands—Whether amounts to. (*See* T. P. ACT, S. 16. 22 Bom. L. R. 1141.

Mortgage—Taking of accounts under S. 13 Dekhan Agriculturists Relief Act—Mode of taking accounts (*See*)

22 Bom. L. R. 1299.

REGISTRATION—Validity—Sale, inclusion of property not intended to be conveyed for registration in a particular district. See REGISTRATION ACT. Ss. 28, 29 AND 31.

38 M. L. J. 327.

When notice—Index in the registration records. 22 Bom. L. R. 1158.

REGISTRATION ACT Ss. 2 (7) and 17—Lease, agreement to lease not importing a present demise, whether requires registration. *See (1919) Dig. Col. 953.* SECRETARY OF STATE FOR INDIA v. MAHOMED YUSUF. 54 I. C. 134.

S. 2 (7) and 17 (1) (d)—Agreement to lease—Meaning of — Registration when essential. *See (1919) Dig. Col. 953.* RANI HEMANTHA KUMARI DEBI v. THE MIDNAPORE ZEMINDAR CO., LTD. 31 C. L. J. 298 : 47 Cal. 485 : 24 C. W. N. 177 : 27 M. L. T. 42 : 11 L. W. 301.

S. 17—Mortgage—Prior and Subsequent—Unregistered agreement between prior and subsequent mortgagee to share moneys realised equally—Registration unnecessary to make agreement admissible in evidence *See MORTGAGE, PRIOR AND SUBSEQUENT.* (1920) M. W. N. 360.

S. 17—Mutation proceedings—Petition of compromise—Registration if necessary—Family settlement of doubtful claims—Registration.

In the course of mutation proceedings in a Revenue Court a petition was presented, which

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stated that the parties had arrived at a settlement out of Court fixing the share of each party, and asked that mutation might be effected accordingly.

Held, (Per *Kanhaiya Lal*, J.), that such a petition which contained nothing more than a recital of the oral settlement effected out of court and did not by itself purport to create, assign or declare any rights in immoveable property, did not require to be registered.

5 Bom. 232 ; 19 O. C. 75 ; 22 Mad. 508 (P. C.) ; 20 All. 171 (P. C) Re . 32 All. 206 dist.

(*Per Piggott*, J.)—Any petition intended by the parties to serve, and so drafted as to serve as a document of title that is to say, as an authoritative admission by such party as against the other of the title of the other party, to whatever share has been agreed upon amongst them, becomes a document purporting to declare the rights of the parties concerned in immoveable property and requires registration if that property exceeds Rs. 100 in value 38 All. 366 (F. B) Ref.

A family settlement of disputed claims, which proceeds on the assumption of an antecedent title of some kind in the parties which it merely acknowledges or defines, does not involve a conveyance of property by one party to another and does not fall within the purview of any of the provisions of the Transfer of Property Act which require an instrument in writing 1 I. A. 157 (P. C.) 3 Agra H. C. R. 82 ; 33 All. 356 (P. C) Referred to 12 A. L. J. R. 998 ; 33 All. 722 dist. (*Piggot and Kanhaiya Lal*, JJ.)

BALDEO SINGH v. UDAL SINGH.

18 A. L. J. 877 : 58 I. C. 732

—Ss. 17, 49 and 50—Object of registration—Registration if notice to the public.

The real purpose of registration is to secure that every person dealing with property where such dealings require registration may rely with confidence upon that statement contained in the register as a full and complete account of all transactions by which his title may be affected unless indeed he has actual notice of some unregistered transaction which may be valid apart from registration.

The object of registration is to protect against prior transactions.

Notice cannot in all cases be impured from the mere fact that a document is to be found upon the Indian register of deeds.

There may be circumstances in which omission to search the register would result in notice being obtained and the circumstances necessary for this purpose may be very slight.

The true position is well stated in the judgment of Brett and Mittra, JJ. in (1902). 7 Cal. W. N. 11 and in the Judgment of Sir Lawrence Jenkins in (1898) 2 Cal. W. N. 750.

In a country where registration is rendered compulsory a subsequent encumbrancer could secure himself against all possibility of fraud by searching the register in order to ascertain

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what were the prior claims upon the property and then giving notice on his mortgage to the prior mortgagees, this is one of the essential reasons for registration. (*Lord Buckmaster*)

TILAKDHARI LAL v. KHEDAN LAL,

39 M. L. J. 243 : (1920) M. W. N. 591 :

25 C. W. N. 49 : 22 Bom. L. R. 1319 :

28 M. L. T. 224 : 18 A. L. J. 1074 :

32 C. L. J. 479 : 57 I. C. 465.

47 I. A. 239 :

—S. 17—Receipts of property—Partition—Registration if necessary.

The receipts signed by brothers at a partition among themselves in which they acknowledge having accepted portions of the family property, detailed in the respective receipts, are compulsorily registrable.

If the brothers are shown to be in separate occupation of the various properties detailed in the receipts from their date up to a long period thereafter, the receipts though unregistered can be taken as evidence that there was a partition. 42 I. A. 1 expl. (*Mackzad, C. J. and Heaton, J.*) NILKANTH BHIMAJI v. HANMANT. 44 Bom. 881 :

22 Bom. L. R. 992 : 58 I. C. 415.

—Ss. 17 and 49—Unregistered lease for less than six months—Inadmissible to convey title but admissible to prove character of possession. (See T. P. ACT, Ss. 107 AND 4. (1920) M. W. N. 711.

—Ss. 17 (1) (6) and 49—Agreement embodying a completed contract and entitling a person to a right to come into existence in future—Registration if necessary.

The words "in future" relate to the preceding infinitives and not to the succeeding nouns, and therefore the right title or interest whether vested or contingent must be a present and not a future right title or interest ; for the document to fall under the section must itself purport or operate to create the right, etc., contemplated by the section.

A document which recites that a certain contract had already been entered into and that in the event of certain happenings a certain future right would accrue in favour of certain persons does not fall within the purview of S. 17 (1), (b) of the Registration Act.

S. 17 read with S. 49 must be very strictly construed imposing as it does such grave disqualification for non-observance of registration, and the benefit of any doubt should be given in favour of the document not being compulsorily registrable.

89 P. R. 1608 ; 16 P. R. 1896, 120 P. R. 1894, 10 P. R. 1896, 51 P. R. 1898 ref. (*Broadway and Abdul Raoof, JJ.*) RAM DAS v. NADIR SHAH. 1 Lah. L. J. 79.

—Ss. 17 (1) (6) and 49—Agreement to surrender rights—Registration—Absence of—Moveables—Document if admissible—Evidence Act, S. 97.

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In a suit by plff for possession of properties the defence was the plff. had waived his rights by an agreement by which he gave up all his rights in the estate, real and personal, on condition that deft paid Rs. 1,000 to the gowshala. Held, that the document was inadmissible in evidence for want of registration; that the fact that the plaintiff admitted execution of the document did not make any difference; and that oral evidence was inadmissible to prove the contents of the document. 24 Cal. 120, dist.

The document was not admissible even in so far as it related to moveable property.

44 Ind. Cas. 837, 47 Ind. Cas. 563, dist. 34 I. C. 542 foll. (*Shadi Lal and Broadway, JJ.*) BISHESHAR LAL v. BHUR.

1 Lah. 436 : 56 I. C. 595.

S. 17 (1) (b)—Compromise—Arrangement arrived at between parties—Compulsory registration—Deed effecting division of properties.

A deed of compromise which gives effect to an arrangement arrived at between the parties about some estate is compulsorily registrable. Though a document containing a mere recital of past acts and of a past partition or merely declaring the divided status of the parties need not be registered, yet when the document itself is a record of property subjected to a division which took place on the date on which it was written and which declares that in certain immoveable properties certain parties had a share and that their former right in certain immoveable properties are extinguished the document falls under S. 17 (1), (b) of the Registration Act and is compulsorily registrable (*Pridcaux, A. J. C.*) RAMBHA ROSA v. SUKHDAS.

54 I. C. 804.

S. 17 (1) (b) and 69 and 87—Deed appointing trustee but not vesting property in them—Registration if necessary—Registration—Validity of—Registrar having interest in property.

Where a "trustenamah" does not purport to transfer to the trustees the ownership of the property, it is outside the provision of the Registration Act and does not require registration. "Trustees" in such circumstances are mere superintendents of the property, and are trustees only in the general sense that every man is a trustee to whom is entrusted the duty of managing and controlling property that belongs to another.

A Sub-Registrar acting in good faith is not disqualified from registering a deed by reason of his possessing an interest in the property dealt with by the deed within the meaning of R. 174 of the rules made under S. 69 of the Registration Act.

The disability created by R. 174 is a mere question of procedure which is covered by s.

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87 of the Act. (*Lord Buckmaster*) MAHOMED RUSTAM ALI KHAN v. MUSHTAQ HUSSAIN.

39 M. L. J. 263 : (1920) M. W. N. 665 : 18 A. L. J. 1089 : 12 L. W. 539 : 28 M. L. T. 220 : 47 I. A. 224 : 57 I. C. 329. (P. C.)

S. 17 (1) (b) and 49—Mortgage—Redemption—Unregistered receipt—Not admissible to prove that mortgage has been redeemed. See MORTGAGE, REDEMPTION.

54 I. C. 117.

S. 17 (1) (b)—Partition—Memorandum of prior partition.

A memorandum in an account-book of a partition which has already taken place does not require registration to be admissible in evidence. (*Wilberforce, J.*) KANSHI RAM v. LAL CHAND.

56 I. C. 182.

S. 17 (1) (b)—Partition—Status—Registration.

A deed of partition of joint family property including immoveables, which effects a division in status only and not by metes and bounds creates and extinguishes rights within the meaning of S. 17 (1) (b) the Registration Act, and is inadmissible in evidence unless it is registered. (*Wallis, C. J and Krishnan, J.*) RAJANGAM AIYAR v. RAJANGAM AIYAR.

39 M. L. J. 382 : 12 L. W. 435 : 57 I. C. 18.

S. 17 (1) (b)—Recital of mortgage—Chupatta—Registration.

An entry in a Chupatta account book giving a detail of the money due on a mortgage effected orally does not create the mortgage and is not compulsorily registrable.

The plea of the inadmissibility of a document for want of registration ought to be raised in the Court of first instance and cannot be raised in appeal. (*Abdul Raof, J.*) CHANIA v. SHIAMON.

57 I. C. 58.

S. 17 (1) (b) and (3)—Sale—Receipt for consideration—Proof of payment.

A receipt for the balance of purchase money on an oral sale of land said to have taken place previously is not a sale deed, but is registrable under S. 17 (1) (c) of the Registration Act as a receipt. Though an unregistered receipt is not admissible in evidence the payment may be proved *aliunde*. (*Rattigan, J. C.*) SHER KHAN v. MUZAFFAR KHAN.

1 Lah. 25 : 55 I. C. 944.

S. 17 (1) (b) (5)—Partition—Document effecting decision in status—Registration—Deed contemplating another document registered—Effect of—Admission—Relevancy of.

For a document to be brought within S. 17 (2) (5) of the Registration Act, it is necessary not only that the document should create a right to obtain another document, which will when executed create etc, any right, title or interest in immoveable property but that it

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must not in itself create etc , any right title or interest.

Where a deed executed among members of a joint Hindu family effected a separation or division in status as from the date of its execution, stated from that day forward each party should enjoy the properties in the schedule allotted to his share and provided that a partition deed in the terms mentioned therein should be executed and registered as soon as possible and that till then it should itself be in force held, that the deed came within cl. (5) of sub section (2) of S. 17 of the Registration Act and was inadmissible in evidence unless registered. (*Walid, C. J. and Krishnai, J.*) RAJANGAM AYYAR v RAJANGAM AYYAR.

39 M. L. J. 382 : 12 L. W. 435
57 I. C. 12

—S. 17 1 (b) and (iv)—Compromise decree—Creation of tenancy—Change in pre-existing terms—Registration if necessary. See (1919) Dig. Col. 956. RAM PEDARATH SINGH v. SOHRA KOERI. (1920) Pat. 114.

—S. 17 (2)—Compromise — Matters partly outside suit—Registration.

When a suit is properly compromised but the adjustment consists partly of an agreement relating to matters outside the scope of the suit, if the entire compromise is laid before the Court and the court is invited in consequence to dispose of the suit, and the court does dispose of the suit, accordingly, then the agreement is exempt from registration although the decree deals only with the subject matter of the suit and does not deal with the portion of the compromise which lies outside the suit. (*Das and Adami, J.J.*) MUSAMMATT ARUNBATI KUMARI v. RAMNANJAN MARWARI.

58 I. C. 299

—Ss. 17 (2) (vi)—Compromise — Award on—Decree—Registration if necessary.

Where an award given by arbitrators is in accordance with a compromise made by the parties to a suit and not going beyond the scope of the suit, and the award is made a decree of court, registration of the award is not necessary under S. 17 (2) (vi) of the Registration Act. (*Lyle and Ashworth, A. J. C.*) GANDHRI SINGH v. NIRMAL SINGH.

22 O. C. 300 : 54 I. C. 825.

—S. 17 (2) (vi)—Compromise—Decree—Immoveable property affected — Document not registered—Decree admissible in evidence. See C. P. CODE O. 23 R. 3. 57 I. C. 751.

—S. 17 (2) (vi)—Compromise—Effective as conveyance—Registration if essential.

A compromise which contains matter relating to a suit or covered by its subject-matter and which is embodied in a decree does not need registration even though the transaction amounts to a conveyance of properties worth

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more than Rs. 100 (*Sanderson and Duval, JJ*) JAGHMONDAL v CHENINNESSA BIBI.

24 C. W. N. 328 : 54. I. C. 538.

—S. 17 (2) (vi)—Scope of—Compromise affecting immoveable property—Petition under O 21, R 2, C P. C.—Registration.

A compromise affecting immoveable property of over Rs 100 embodied in a petition under O. 21, R. 2, C. P. C. which has been recorded by the Court is exempt from registration.

36 Mad. 47 and 27 M. L. J. 651 Overruled (*Wallis, C. J., Oldfield and Scshagiri Aiyar, JJ*) TRAZHATHI TATHIL POOVVANAI AYISSA v. KUNDRON CHOKRU. 43 Mad. 688 : 39 M. L. J. 77 : (1920) M. W. N. 431 : 28 M. L. T. 90 : 12 L. W. 35 : 58 I. C. 554.

—S. 17 (2) (xi)—Release of mortgaged property—Endorsement on back of bond—Receipt of payment—Registration if necessary.

D, a mortgagee, agreed by a clause in the mortgage deed to release S, one of the mortgaged properties, on the receipt of the balance of the consideration money, left with the subsequent purchaser of the said property, after redeeming a prior mortgage upon it, and the mortgagee having negotiated for its sale with B, B approached D's manager, who agreed to release the property S, upon receipt of Rs. 1,000, upon which assurance B purchased the property for Rs. 3,478 out of which he paid Rs. 1,745 to the pr'or mortgagee, Rs. 1000 to D, and Rs. 773 to the mortgagor and an endorsement, purporting to release the property S, was made on the back of the mortgage bond by D's amuktear, K, in the presence of D's mortgagor R. D brought the mortgage suit, ignoring the release, and the lower court ordered the sale of all the mortgaged properties, including S, holding that D was not bound by any release granted by R, whose authority to do so was not proved:

Held; that D was bound by the release given by R, who was held out as her general agent for transacting all matters connected with her money lending business; that, even if it be assumed that a release of the mortgaged properties extinguishes the mortgage within the meaning of S. 17 (2) (xi) of the Registration Act, the appellant B, who was no party to the original contract of release embodied in the mortgage bond, was entitled to prove the subsequent agreement between him and the mortgagee's manager agreeing to release upon payment of Rs. 1,000 only.

The mortgagee, having accepted the receipt of Rs. 1,000 which was the consideration for the release, was estopped from seeking to enforce the mortgage against the property in the hands of S.

*Quare—*Whether the release of one of the mortgaged properties by means of an endorsement on the back of the mortgage bond

RES JUDICATA.

A money decree was passed on 18-2-1899 and the first application to execute it was dismissed for want of a succession certificate on 20-3-1907. The second application was filed on 31-3-1910 and disposed of on 8-9-1910. Another application to execute the decree was presented on 12-9-1910 in the course of which the deft. pleaded the law of limitation and prayed for instalments. The Court made an order for instalments and deft. paid Rs 200 to plff. on 26-3-1913. The present application filed on 19-11-1915 to recover the balance due under the decree was objected to as having been barred by limitation:

Held, overruling the objection, that the order made on the application of the 12th September, 1910 should be considered as valid since it was not reversed on appeal and that therefore the present application was within time as the last instalment had been paid by the defendant on the 26th March, 1913. (*Macleod, C. J. and Heaton, J.*) DESAI APPA KHALILAPPA DESAI v. DUNDAHAPA MALKAPPA.

44 Bom. 227 : 22 Bom. L. R. 76 : 55 I. C. 329.

Execution proceedings—Decision of objections—Effect of—Subsequent application.

Where in a suit for a declaration that a transfer by a judgment-debtor was during the pendency of an attachment by the decree-holder and the property is liable to satisfy the decree of the plff. it is found that the alienation was void as against the decree-holder and the property was liable to satisfy the decree, it is not open to the transferee on an application for execution against him to raise the same defence and to plead that the transfer in his favour is valid and that the properties are not liable to attachment. (*Tudball and Sulaiman, J.J.*) SAYED DAOOD ALI SHAH v. HAYAT ALI SHAH. **58 I. C. 711.**

Execution proceedings—Executability of decree—Decision on.

Where on an application for execution it was decided that the decree as it stood was not executable.

Held, that the order was binding on the decree-holder as *res judicata* and no further application for execution would lie unless the decree had been made absolute and executable. (*Oldfield and Seshagiri Aiyar, J.J.*) RAMALINGA ROWTHAN v. SHEIK IBRAHIM SAHIB.

12 L. W. 34

Execution proceedings — Ex parte order not res judicata.

An order made in execution proceedings without notice to the judgment-debtor does not estop the latter from subsequently contending that the application on which the order was made was barred by time. (*Adami, J.*) SOBRAN MAHTON v. SIBILAS KUER. **54 I. C. 933**

Execution proceedings—order at one stage of the execution—Subsequent execution

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application—Prior order *res judicata*. See C. P. CODE O. 21, R. 16. **5 Pat. L. J. 639.**

Execution proceedings — Order in when res judicata—Order by consent.

A decision in the course of execution proceedings of a question which properly arises for consideration is final and binding between the parties. The binding character of the order is not affected by the circumstance that as to some of the parties it was based on agreement and as to the others on an adjudication by the Court. (*Mukerjee and Panton, JJ.*) KALI DAS CHAUDHURY v. PRASANNA KUMAR DAS.

47 Cal. 446 : 24 C. W. N. 269 : 55 I. C. 189.

Execution proceedings — Order on prior application when constitutes a bar.

An order delivering possession of property under an execution application amounts in law to an adjudication that the application is in time and it is not open to the judgment-debtor to question the legality of that order in proceedings started on a subsequent application for execution. (*Mitra, A. J. C.*) AMIR ALI v. GOPALDAS. **54 I. C. 924.**

Heard and decided—Cause of action different—First suit on pronaote—Dismissal of subsequent suit on original cause of action — Bar.

The dismissal of a suit on a promissory note is a bar to a subsequent suit on the original cause of action. Plaintiff's cause in such a case is one and indivisible and the fact that the transaction was recorded in his account book did not give him another or different cause of action. It is only where a promissory note is invalid owing to some inherent defect therein that the party suing is entitled to fall back on an action for money had and received to his use. (*Lindsay, J.*) MUNDAR BIBI v. BAJNATH PRASAD. **42 All. 193 ; 18 A. I. J. 81 : 54 I. C. 424.**

Heard and decided—Order returning a plaint as disclosing a cause of action—Order res judicata See C. P. CODE O. 7, R. 11 AND 13. **(1920) M. W. N. 616.**

Heard and finally decided— Dismissal for default—Decision how for resjudicata.

The dismissal of a suit under O. 9, R. 8 C. P. C. is not intended to operate in favour of the deft. as *res judicata*.

The application of principle of *res judicata* cannot be avoided by a deft. on the ground that he did not appear at the trial, but the conclusive effect of the decision must be confined to the point actually decided in the suit 16 C. 300 (F. B) Foll. (*Drake-Brockman, J. C.*) TIKARAM v. RAMACHANDRA. **54 I. C. 789.**

Heard and finally decided Ex parte decree—Rent decree—Relationship of landlord and tenant

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A rent decree though only ex parte is res judicata on the question of the existence of the relationship of landlord and tenant between the parties. (*Shamsul Huda J.*) **BASANTA KUMAR ROY v. SURHOMOY MONDAL.**

54 I. C. 763.

—Heard and finally decided—Meaning of—Decision in prior suit turning on another question—Effect of decision.

A former suit between the parties to recover possession of certain *bhag* lands was dismissed on the ground that the present defendants No. 1, 3, 4 and 5 (who were plaintiffs in the first suit) had not made out their right to sue. An issue was also raised and decided that the present plaintiff No. 1 (who was a defendant in the first suit) being a daughter of the original *bhugdar* was by custom excluded from inheritance.

The plaintiff No. 1 brought the present suit against defendants Nos 1 to 5 to recover possession of the *bhag* land as the daughter of the original *bhugdar*.

Held that the bar of *res judicata* was not applicable for though no doubt the issue as to the custom of exclusion of females from inheritance was heard and decided it was not finally decided because it was not necessary for the decision which the court came to dismissing the suit and the plaintiff. No 1 had no opportunity of appealing against the Court's finding on that issue. (*Macleod, C. J. and Heaton, J.*) **BAI NATHI v. NARSHI DULLABH.**

44 Bom 321:
22 Bom. L. R. 64: 55 I. C. 322.

—*Interlocutory order*.—Order for withdrawal of a suit by appellate Court absence of formal defect as laid down in O. 23, Institution of new suit. See C. P. Code O. 22 R. 1.

1 Pat. L. T 300.

—*Issue of law*.—Decision as to jurisdiction of Court—Civil or Revenue Court—*Res judicata*. See C. P. CODE SS. 2 (2) AND 100.
11 L. W. 3.

—*Issue of Law Interpretation of Judgment—Decision in partition proceedings, if binding, when partition not carried through.*

The interpretation of a judgment in a previous complete partition case by a Court to try the subsequent case between the same parties and the same subject-matter operates as *res judicata*.

A decision constituting *res judicata* passed in a partition case does not lose its force as *res judicata* because the partition was not ultimately carried through (*Ferar. I. S. M.*) **MUSSAMMAT MUBARAK FATIMA v. MUHAMMAD QULI KHAN.**
54 I. C. 303.

—*Limited owner—Decree against Omission to raise plea.*

A decree fairly obtained against a female restricted owner as representing the estate is binding on the revercioners unless it can be

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shown that there was not a fair trial of the right in the suit against the female owner.

Where however the female owner failed to raise a plea owing to a misconception as to her locus standi to raise it :

Held, that the decree was not binding on the revercioners (*Batten, A. J. C.*) **SHESHRAO v. MAROTI.**
55 I. C. 407.

—*Litigating under different title—Claim not allowed to be raised in first suit—Whether can be raised in subsequent suit.*

The present suit was instituted against J. asking for a declaration that the properties mentioned in the plaint were acquired by D. and that he died possessed thereof and that the plffs. as his heirs were entitled to possession of such properties. Previously a suit No. 217 of 1912 were brought by the present plffs. against their father D. and the present deft. asking for a declaration that D. held the identical properties which were claimed in the present suit as trustee for them. D. died shortly after the institution of suit No. 217. That suit was amended on the plff's application by recording the death of D and a new summons was issued to J. the remaining sole deft. in suit No. 217. No amendment having then been made or applied for in order to raise the claim put forward in the present suit, all matters in the suit were referred to arbitration. Late in the arbitration the present plffs. applied to the arbitrators to decide the claim which was made in the present suit. The arbitrators decided that they had no jurisdiction to do so as the only matter referred to them had been the question of trust. Thereafter the plffs. in suit No. 217 applied to the Court asking that they might be at liberty to amend by raising in that suit the claim that was made in the present suit. The application was refused.

Held, that the suit, was not barred by *res judicata*, as the plffs. were suing under a different title to that under which they were endeavouring to support their claim in the first suit, as also that the plff's attempt to raise that point was refused by the former Court. (*Sanderson C. J. Mookerjee and Fletcher, JJ.*) **MOHAN, LAL SHAH v. JAHURY LAL SHAH.**
31 C. L. J. 163 : 55 I. C. 767.

—Matter directly and substantially in issue—Reference to pleading and Judgment—Issue of Law—Decision on when *res judicata*. See (1919) *Dig. Col. 983.* **VENKITASUBBAN PATTAR v. AYYATHURAI.**

54 I. C. 202.

—*Mortgage—Prior and subsequent—Suit on subsequent mortgage—Prior mortgage not attacked—Subsequent-suit on prior mortgage—No bar.*

The puisne mortgagee sued for sale under S. 96 of the T. P. Act joining as a party the first mortgagee who did not appear. A decree was

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made and the property was bought by the second mortgagees. The first mortgagee afterwards sued for a sale decree. It did not appear that in the former suit the puisne mortgagee attacked the first mortgage or sought to postpone it.

Held, that the decree in the former suit was not res judicata under S. 11 C. P. C. against the first mortgagee and that he was entitled to a sale decree. (*Sir Lawrence Jenkins*). RADHA KISHUN v. KHURSHED HOSSEIN.

47 Cal. 662 : 38 M. L. J. 424 :
(1920) M. W. N. 308 : 11 L. W. 518 :
55 I. C. 959 : 22 Bom. L. R. 557 :
47 I. A. 11. (P. C.)

—Mortgage—Suit—Joinder of parties as representatives of mortgagor and in their own right—Omission to set up non-liability—Subsequent suit for declaration barred.

In a suit on a mortgage persons who had not joined in the mortgage were impleaded not only as the representatives of the mortgagor but also as liable in their personal capacity. They did not plead that their shares in the hypotheca were not properly mortgaged and should be exonerated, but subsequently brought a suit for a declaration that the decree in the mortgage suit was not binding as against their interest in the property.

Held, that they were barred by res judicata from setting them up in a separate suit having omitted to set up their rights in the prior suit 20 C. W. N. 675 dist. (*Spencer and Krishnan, JJ.*) RANGAI GOUNDAN v. VENKATAMMAL.

55 I. C. 30.

—Mortgage suit—Party setting up paramount title exonerated—Subsequent suit for redemption—Bar.

Where a person was made a party to a suit on a mortgage but was dismissed from it on the ground of having repudiated his right to redeem and set up a paramount title adverse to that of the mortgagor and the mortgagee, the decree in the suit, though made in his absence, would operate as res judicata so as to preclude him from subsequently claiming a right of redemption of the mortgaged properties 12 C. 414 P. C. foll. (*Chaudhuri and Ghose, JJ.*) RAM GOPALDAS v. JOGENDRA NATH MARTY.

57 I. C. 980.

—Mortgage Suit—Puisne mortgagee—Omission to set up right to redeem in prior suit—No bar to redemption.

A puisne mortgagee is not bound to set up his right of redemption in a suit against him for ejection and his failure to do so does not preclude him from relying upon the right in a subsequent suit for possession upon redemption (*Mittra, A. J. C. J. BALIRAM v. NARAYAN*).

54 I. C. 276.

—Mortgage—Suit for sale—Omission of mortgagor to counter claim—Subsequent suit if barred—General doctrine of res judicata apart from S. 11 C. P. C.

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Where the plaintiff a simple mortgagee of certain lands under a bond of 1899 executed by third persons to her predecessors-in-title hypothesized that hypothecation right and other properties to the defendant in 1908 for Rs 200 and the hypothesized hypothecation right became barred in 1911 owing to a suit not having been brought against the third parties either by the plaintiff or by the defendant and the defendant brought a suit in 1915 against the plaintiff on her own mortgage of 1908 for recovery of the amount due, whereupon the plaintiff pleaded as defendant in that suit that the present defendant having by her default failed to sue for and recover from the 3rd persons the money due under the bond of 1889 was liable to account to the plaintiff for much more than what was due from the latter under the bond of 1908 and that the suit ought to be dismissed which was accordingly done, and then the plaintiff brought the present suit to recover the difference between the amount alleged to be due to her as damages caused by the defendant's default and the amount due by the plaintiff to the defendant under the mortgage of 1908.

Held, that the plaintiff could and should have put forward her present claim as a counter-claim in the suit brought by the defendant against her on the bond of 1908 and (11) the plaintiff having failed to do so, her present claim was barred by res judicata.

Per Sadasiva Aiyar J. The principle of res judicata is wider than S. 11, C.P.Code. Where a gage has become fully ripened so that the rights and liabilities of the parties can be dealt with in a suit, whether for sale or foreclosure or redemption, all questions relating to the taking accounts as between mortgagor and mortgagee ought to be decided in one and the same and the very first suit. No second suit could be brought by either party on any claim arising out of the transaction of mortgage. (*Sadasiva Aiyar and Spencer, JJ.*) AMEENAM-MAL v. MEENAKSHI.

12 L. W. 173.

—Rent suit—Suit by purchaser at revenue sale to recover rent from tenant at rate decreed in favour of ex-proprietor:

A decree for rent obtained by a proprietor of a revenue paying estate against a tenant is not res judicata in a suit for rent by a purchaser of the estate at a revenue sale as the purchaser does not claim under the ex-proprietor within S. 11, C. P. C. But that the purchaser is not in any worse position than the ex-proprietor and may elect to take advantage of the decree obtained by the latter and if the purchaser sues the tenant for recovery of rent at the same rate the tenant whose rights are in no way enlarged by the sale cannot object (*Woodroffe and Chatterjee, JJ.*) NAKUL CHANDRA BASU v. SOSHTI CHARAN BISWAS.

24 C. W. N. 399 : 56 I. C. 390.

—Representative suit—Former suit brought to establish personal right—Dismiss-

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sal of subsequent suit on behalf of entire guild of pandas—Not barred.

The dismissal of a suit brought by the members of a community to assert their personal right is no bar to a subsequent suit by them as representatives of the community to establish the right of the community. (*Piggot and Walsh, JJ.*) RADHA KISHEN v. RAM NATH.

18 A. L. J. 150.

—*Representative Suit—Joint Hindu family—First suit by manager—Junior member made pro forma deft—Second suit by latter—Resjudicata—Co-defendant.*

B, the managing member of a joint Hindu family had brought a suit against certain persons in respect of a house belonging to the joint family. In the plaint however he did not say that he sued in his capacity as managing member. J, another member of the joint family, was made a proforma defendant. The suit was dismissed on the merits. Then J. instituted the present suit in respect of the same house against the same defendants and on the same cause of action. It was admitted by J. in the present suit, that B had brought the first suit in his capacity as manager of the joint family and with the full knowledge and express consent of J. Held that the suit was barred by the rule of *Resjudicata* (*Tubdall and Rafiq, JJ.*) CHAUBE KUNJ MAN v. CHAUBE JAGANNATH.

42 All. 359 : 18 A. L. J. 326 :
55 I. C. 846.

—*Settlement Court — Decree-Rival claims—Adjudication in.*

A number of persons preferred their claims to an estate before the Settlement Courts. Plff. was also a party and some of the claimants then took objection to his status as a reverisoner but the defendant-appellant also who was a claimant did not then raise the plea. The several claims were tried and decided together and the objection as to status was decided in plff's favour. In the present suit deft. raised the same objection as to plffs. status as a reverisoner.

Held, that the previous decision of the objection by the Settlement Courts operated as *res judicata* in the present suit. (*Mr. Amer Ali, JJ.*) INDAR KUAR v. BALDEO BAKSH SINGH.

23 O. C. 291 : 18 A. L. J. 1057 (P. C.)

RESTITUTION OF CONJUGAL RIGHTS—Decree — Injunction against parents of wife not to harbour her—Proximity.

In decreeing a suit for restitution of conjugal rights it is not proper for the court to issue an injunction to the parents of the wife restraining them from keeping her under their roof. 1 Bom. 164 dist. (*Sir Norman Macleod, C. J. and Heaton, J.*) BAI JAMNA v. DAYALI MAK-ANJL.

44 Bom. 454 :

22 Bom. L. R. 214 : 57 I. C. 571.

—*Defence—Danger to health.*

A husband is entitled to the society and companionship of his wife just as a wife is

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entitled to the society and protection of her husband. But before a Court can be asked to compel a reluctant wife to return to her husband's custody it must be shown that there is no legal ground, e. g., danger to health to justify the wife's refusal to live with her husband. One such ground is that the health or safety of the wife is likely to be endangered if she is forced to return to her husband's house. (*Sir Henry Rattigan, C. J.*) GANGA SINGH v. MUSAMMAT DHANNO. 7 P. L. R. 1920 : 1 Lah. L. J. 193 : 54 I. C. 383.

REVENUE SALE and Court Sale—Different between. See **LIMITATION ACT. ART. 12 (A Ss. 26 and 28).**

22 Bom. L. R. 1082.

—*Mokuraridars—Receipt of rent by patwaris—Recognition—Difference between ordinary case of transfer and of revenue Sale.*

The grant of receipts of a Patwari does not amount to a recognition of a transfer of a holding.

But in the case of a purchase by a landlord at a revenue sale where he knew the encumbrance of a mokurar and that he was entitled to avoid it, but instead of avoiding if he allowed the Patwari to collect from the mokuraridars he must be bound by the acts of the Patwari. (*Coutts and Sultan Ahmad, JJ.*) SRI RADHA KRISHNA JI v. SUKH NANDAN SINGH.

(1920) Pat. 332 : 58 I. C. 193.

REVISION—*Finding of fact.*

Evidence may be looked into in an application in revision to see whether the jurisdiction of the Court has been properly exercised, but if there is a conflict of evidence, and an issue of fact has been found in one way revisional the court does not revise the finding of fact. (*Walsh and Gokul Prasad, JJ.*) MUNNA LAL v. SADANUN LAL.

18 A. L. J. 1104.

RIGHT OF SUIT—Contract—Stranger to—*Not entitled to enforce.*

It is not open to a stranger to a reference and award to enforce a provision in his or her favour in the award. (*Broadway, J.*) DIWAN CHAND v. BISHEN DAS. 2 Lah. L. J. 255.

—*High way—Obstruction—Special damage.*

An action for obstructing a public road and is not maintainable, unless the plaintiff proved some injury or damage peculiar to himself and different from the damage that would be suffered by other people who used the road. Special damage does not mean serious damage, but means damage of a special nature, that is damage affecting the plaintiff individually or damage peculiar to himself, his trade or calling. (*Newbould and Panton, JJ.*) BATIRAM KOLITA v. SIBRAM DAS. 25 C. W. N. 95.

—*Lessor and lessee—Holding over—Trespass—Right of lessor to eject trespasser. See ADVERSE POSSESSION, LESSOR AND LESSEE.*

57 I. C. 994.

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—Minor—Agent appointed by guardian—Suit by minor for accounts against agent or for recovery of particular amount—Maintainability.

An agent appointed by the guardian of a minor is not liable to account to the minor for his acts as an agent. It would be unsafe to extend the rule laid down in (1873) L. R. 9 Ch. App. 244 and similar cases with respect to trustees *de son tort* to the persons in the position of agents of the guardian of a minor. It is doubtful if the minor can ask the agent appointed by his guardian to hand over any account. (*Abdur Rahim and Ayting, JJ.*) RAMANATHA CHETTIAR v. MUTHIAI CUMARI 43 Mad 429 : 38 M. L. J. 247 : 11 L. W. 405 : 27 M. L. T. 242 : 56 I. C. 358

—Record of rights—Suit to correct entry in.

S. 106 of the B. T. Act does not provide the only method of obtaining the correction of the entry in a finally published record of rights and a civil suit instituted with that object is competent.

25 C. W. N. 13.

—Stranger to contract—Deposit in a fund—Nomination of payee by deposition—Effect of—Rights of nominees and heir at law—Stranger beneficiary—Rights of See FIXED DEPOSIT.

39 M. L. J. 391.

RIPARIAN RIGHTS—Ownership of river bed—Tidal and navigable rivers—Presumption as to ownership of river—Tidal and navigable river—Test of Lankas in the Krishna river.

As regards the portion of a river bed where a river is both tidal and navigable there is a very strong presumption that it belongs to the Crown.

Where however the river is not tidal the question whether the bed must be presumed to belong to the Government or the riparian owners on either bank will depend on the fact whether the river is navigable in the legal sense 41 M. 840 F. B. Rel. on.

A river in India is not navigable in the legal sense unless it is navigable throughout the year 42 C. 4829 ; 46 C. 300 ; 17 W. R. 73 ; 15 W. R. Ref.

Per. Burn, J. :—Conditions in Madras are so dissimilar from those in great Britain that the English Common Law rule as to the ownership of river beds should not be applied here without modification and public rights should be recognised in the beds of rivers which are navigable but not tidal. 6 M. I. A. 267 ; 30 C. 201 : 10 B. L. R. 406 ; 26 C. L. J. 590 Ref.

Applying the above principles their Lordships held that the lankas and keelankas formed in the bed of the Krishna river at a place where it was navigable only for about 4 months in the year belonged to the riparian owners on

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either bank and not to the Government (*Sadasiva Iyer and Burn, JJ.*) SECRETARY OF STATE FOR INDIA v. VEKATANARASIMHA. NAIDU.

11 L. W. 256 : 27 M. L. T. 147 : (1920) M. W. N. 209 : 58 I. C. 689.

—Public river—Obstruction of un-lawful.

Riparian owner is entitled to obstruct a public river. (*Kanhaiya Lal, A. J. C.*) JAGAN NATH v. CHANDRAKA PRASAD.

54 I. C. 407 : 21 Cr. L. J. 55.

—River beds—Ownership of—Usque ad medium filum aquae. See ALLUVION AND DILUVION.

55 I. C. 770.

RIWA-JI-AJ—Presumption as to correctness rebuttable. See CUSTOM, SUCCESSION.

54 I. C. 416.

RYOTWARI LAND—Occupancy Right.

—Claim of, by tenant under pattadar—Onus of proof on him. See LANDLORD AND TENANT, OCCUPANCY RIGHT.

(1920) M. W. N. 61.

SALE OF GOODS—C. I. F. Contract—Indentor who has accepted shipping documents and draft—Refusal to take delivery of goods—Failure of consideration.

Deft's purchasers of goods under a C. I. F. Contract accepted shipping documents and drafts the amount due but refused to take delivery on the ground that the goods were not in accord with the description as entered in the indents. The indents also shewed that the indentors were bound to pay the drafts at maturity and if they had any claim in regard to the nature of the goods they would bring it in the manner laid down in the indent.

Held, that defts, could not in answer to the claim upon the draft plead failure of consideration because what they contracted for were the shipping documents and not the actual goods. (*Scott Smith and Martineau, J. J.*) STIRLING MASON AND CO. v. JAWALA NATH BIAGWAN DAS.

1 Lah 22 : 1. Lah. L. J. 51 : 55 I. C. 975.

SANKALAP—Grant by way of—See DEED CONSTRUCTION.

23 O. C. 30.

SECOND APPEAL—Discretionary matter—Interference by High Court, rare.

Where two Courts fully acquainted with the circumstances of a case and before whom evidence could be, but was not led, exercise a discretion, the High Court will not interfere with the exercise of such discretion. (*Fletcher and Cumming, JJ.*) SWORUP MANDAL v. AYAN KAI KOWRA.

54 I. C. 781.

—Evidence—consideration of by lower appellate court—Documents not referred to, when deemed to have been considered.

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The mere omission of a Court to mention a document in its judgment is no sufficient proof that the Court failed to consider it. The omission of a Court first hearing to mention a document of obvious importance in its judgment is proof that it failed to consider the document inasmuch as it may be presumed that the document if duly considered, would have been mentioned. Where however the omission of reference to a document by a first appellate Court is urged by a party in second appeal as proof that the first appellate Court failed to consider the document that party must either prove that he relied on the document in argument in first appeal or that he relied on the particular part of the judgment of the first court treating the document as supporting its decision. (*Lyle and Ashworth, JJ.*) RAM UDIT v. BISHESHWAR.

22 O. C. 312 : 54 I. C. 353

Evidence—Objection to admissibility of—Not to be allowed on second appeal for the first time.

An objection to the admissibility of a document cannot be taken for the first time in second appeal where an answer to the objection involves an enquiry into facts (*Woodroffe, Chatterjee, JJ.*) RAJ MOHAN DHOPE v. HIRENDRA CHANDRA.

56 I. C. 816.

Finding of fact—Error as to onus by trial Court—Effect of.

Where a District Munsif misdirected himself as to the burden of proof but the Subordinate Judge on appeal considered the evidence from the correct stand point and concurred in the Munsif's finding.

Held, in second appeal that the finding of the Appellate Court must be accepted. (*Sadasiva Aiyar and Spencer, JJ.*) SHANMUGHA UDAYAR v. KANDASAMI ASARY.

12 L. W. 170.

Findings of fact—Error in weighing Evidence—Effect of. See (1919) Dig. Col. 992. BHAN SINGH v. GOKAL CHAND.

1 Lah. 83.

Finding of fact—Evidence legally insufficient—Interference.

Where an Appellate Court reaches a finding on evidence legally insufficient to support it, and fails to give any reasons for the finding, the High Court will interfere in Second appeal. (*Adami, J.*) DEBI LAL SINGH v. HARIDAY MAHTO.

58 I. C. 482.

Finding of fact—Evidence when open to examination.

It is not necessary in law for Appellate Courts such as the District Judge to refer in detail to every piece of evidence on the record. So long as the judgment leaves no doubt that all the available evidence has been given due weight to, his findings on questions of fact cannot be attacked in second appeal.

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Whether or not there had been a complete separation, is a question of fact. (*Broadway and Abdul Raoof, JJ.*) NATHU SHAH v. HAVE LI SHAH

1 Lah. L. J. 72.

Finding of fact—Legitimacy.

The finding as to the legitimacy is one of fact which cannot be gone into in second appeal. (*Broadway and Dundas, JJ.*) GURDIT SINGH v. SUNDAR.

2 Lah. L. J. 505.

Finding of fact—Not based on evidence—Set aside on second appeal.

Where a finding of fact is arrived at by a wrong construction of the pleadings, and upon no evidence the finding is liable to be set aside in second appeal. (*Jwala Prasad, J.*) RAGHUA—NATH CHATTEAJI v. JUTHU CHATTAR.

56 I. C. 466.

Finding of fact—Not to be questioned.

Grounds which impugn findings of fact cannot be entertained in second appeal. (*Broadway and Raoof, JJ.*) MUSSAMMAT NEM KUAR v. AMRIK SINGH.

1 Lah. L. J. 64.

Finding of fact—Not supported by reasons—Not binding on second appeal.

A finding of fact to be binding on a Court of second appeal must be a judicial decision reached on a consideration of the evidence. When no reasons are given for such finding and no reference is made to the evidence the finding is open to question in second appeal. (*Hopkins, S. M. and Porter, J. M.*) SHEIKH MOHAMMAD v. JANKI.

56 I. C. 529.

Finding of fact—When conclusive.

Where an Appellate Court bases a finding of fact upon one piece of evidence alone without considering the whole of the evidence bearing upon the point the finding is not binding in second appeal. (*Tudball and Rafique, JJ.*) MAHRAJ SINGH v. PITAMBAR SINGH.

55 I. C. 768.

Grounds of—Point not pressed in court below.

A point raised in the memorandum of appeal to the lower Appellate Court but not pressed before that Court cannot be raised in second appeal. (*Lindsay, J. C.*) SAJJAD HUSAIN KHAN v. AMIR JAHAN.

55 I. C. 441.

Issue of fact—No decision by first appellate court—Remand by High Court.

In a suit on a mortgage by a Hindu father the trial Court finds in favour of the mortgagor on the question of necessity and there is an appeal by the son of the mortgagor the appellant is entitled to have the opinion of the Appellate Court on the point and if such Court fails to determine the point the High Court will remand the case for re-decision of the appeal. (*Das, J.*) RUPAN RAUT v. PITAMBAR LAL.

55 I. C. 238.

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Jurisdiction of High Court to go behind finding of fact of first Appellate Court, limited Sec. (1919) *Dig. Col.* 992. THE MIDNAPUR ZEMINDARI CO., LTD. v. UMA CHARAN MANDAL. 24 C. W. N. 201:

22 Bom. L. R. 7: 11 L. W. 371.

Maintainability of—Order passed under O. 21, R. 89—Auction purchasers, decree holder. See C. P. CODE, S. 104 (2).

22 Bom. L. R. 383.

New Case—Not to be allowed.

A point which ought to be, but is not, taken in the trial Court and in respect of which no direct evidence is given cannot be taken in second appeal especially if it involves a question of fact. (*Chaudhuri, J.*) ANWAR BEWA v. SURENDRA NATH RAUT. 56 I. C. 844.

New Case—Objection necessitating remand if case be given effect to.

The High Court in second appeal would not entertain an objection involving the remand of a case to the Court of first instance to determine a question of fact which was not specifically raised in the first Court and in the lower Appellate Court. (*N. R. Chatterjee and Panton, JJ.*) NEWAJUDDIN MONDAL v. SASHI KANTA ACHARJEE BAHADUR. 57 I. C. 883.

New plea—Not allowable.

A plea which is opposed to that put forward in the lower court cannot be allowed in second appeal. (*Beachcroft, J.*) EPASAN ALI v. RAM KUMAR DE. 55 I. C. 375.

New point not to be raised.

A new plea of *lis pendens* cannot be allowed to be raised in the High Court in second appeal for the first time especially as the raising of it would entail a remand for further enquiry. (*Scott-Smith, JJ.*) SHER SINGH v. KHEM SINGH. 2 Lah. L. J. 230.

New point—When can be taken.

A new point, which is not a pure question of law, cannot, for the first time be taken up in second appeal. (*Teunon and Newbold, JJ.*) NILRATAN MITTER v. ABDUL GAFUR GAZI. 32 C. L. J. 75.

Plea abandoned in Courts below—Not to be raised.

A plea taken in the trial Court but abandoned in the first Appellate Court cannot be entertained in second Appeal especially where such plea depends for its decision upon a question of fact. (*Kotval, A. J. C.*) AMOLAKSAO v. EKNATH. 16 N. L. R. 89: 55 I. C. 481.

Question of Law—Abandonment of holding—Adverse possession—Misreading of evidence—Interference. See (1919) *Dig. Col.* 995. MAHOMED UMAR KHAN v. RAZI KHAN.

2 Lah. L. J. 136: 54 I. C. 873.

SONTL. PARGANAS REGN. S. 5.

Question of law—Adverse Possession.

The question of adverse possession is a mixed question of fact and law. The soundness of the conclusions from the facts found is a matter of law and can be questioned by the High Court in second appeal. (*Mookerjee, A. C. J. and Fletcher, J.*) BALARAM GURIYA v. SHYAMA CHARAN MANDAL. 24 C. W. N. 1057.

Question of law—Misconstruction of document when a ground of second appeal.

The law is that unless there is a question of legal effect of a deed, which may be treated as a document of title, or embodies a contract or is the foundation of a suit a second appeal does not lie (*Das and Adami, JJ.*) KULDIP NARAIN RAI v. BANWARI RAI. 1 Pat. L. T. 126: 5 Pat. L. J. 251: 55 I. C. 179.

SIND FRONTIER REGULATION (1872) AND 1892 Ss. 20 and 27—

Security for good behaviour—Revision by High Court—No power—Cr. P. Code, S. 439.

The powers conferred by S. 439, Criminal Procedure Code to revise "any proceedings" are very wide but they must be confined to proceedings within the code.

There is no jurisdiction in the High Court either by express enactment or by necessary implication to revise orders of security under the Sind Frontier Regulations.

Neither S. 11 of the Regulation of 1872 nor S. 27 of Regulation of 1892 can be construed by implication upon the High Court's powers of Revision contained in S. 439, Criminal Procedure Code. (*Crump and Raymond, A. J.* C. BHAWAL KHAN v. EMPEROR.

13 S. L. R. 215:
56 I. C. 769: 21 Cr. L. J. 513.

SOLICITOR'S LIEN. Enforcement of—Costs—Direct order to pay—Jurisdiction of Court—Proper Case See (1919) *Dig. Col.* 996. HARNANDROY FOOLCHAND v. GOOTIRAM BHUTTAR.

54 I. C. 691.

SONTHAL PARGANAS—Pardhan—Status of.

A pardhan in the Sonthal Parganas although not a tenure-holder, as defined in the B. T. Act combines both the attributes of *jaith raiyat* or head *raiyat* of a village and *ijara-dar* or true tenure holder. (*Couits and Sultan Ahmed, JJ.*) RAM CHARAN SINGH GHATWAL v. L. W. BERRY GHATWAL. 5 Pat. L. J. 656: 58 I. C. 43.

SONTHAL PARGANAS REGULATION (III of 1872) S. 5—Institution of suit in Civil Court—Bar.

S. 5 of the Sonthal Parganas Regn. 1872 as it stood in 1907 was a bar to the institution of any suit in the ordinary civil Courts in regard to any land or any interest in or arising out of land in the Sonthal Parganas so long as the land had not been settled and the settlement

SPECIFIC PERFORMANCE.

declared by a notification in the *Calcutta Gazette* to have been completed and concluded 42 C. 116 (148) P. C. Foll. (*Chapman and Atkinson, JJ.*) SHAHDEO NARAINDEO v. KUSUM KUMARI. 5 Pat. L. J. 164.

SPECIFIC PERFORMANCE—Contract for lease—Necessary part of—Agreement to defer execution of lease until happening of certain event—Effect of.

Specific performance of an agreement to grant a lease cannot be decreed unless the agreement expressly or impliedly to be granted fixes the date from which the term is to run.

A contract that a lessor should not be required to execute a promised lease until he had paid off a debt, attached a condition precedent to the obligation to execute the lease, which condition must be fulfilled before he could be compelled to do so. (*Lord Atkinson*) SRIMATI GIRIBALA DASI v. KALI DAS BHANJA. 39 M. L. J. 329 : (1920) M. W. N. 653 : 22 Bom. L. R 1332 :

29 M. L. T. 1 : 57 I. C. 626, (P.C.)

Contract of sale—Description of property—Vagueness—Effect of.

A suit for the specific performance of a contract of sale cannot fail by reason of the contract not containing a complete description of the properties when there is no doubt that the identity of the properties and the same could be satisfactorily established and the reasons for the incomplete description are also explained. (*Walmsley and Graves, JJ.*) JANAKI NATA SARKAR v. INNATENNESSA BIBI. 57 I. C. 763.

Contract for sale of land—Conveyance not executed—Vendee put in possession—Time for specific performance not expired—Vendor not entitled to eject vendee. See T. P. ACT. S. 54. 31 C. L. J. 57.

Contract for Sale of land—Time for performance—Extention of—Subsequent fixing of time limit—Default—Specific performance.

On the 7th February 1914 an agreement for the sale of certain lands was entered into and the end of April was fixed as the time before which the purchase money was to be paid and the sale completed. The vendee being unable to find the money the time for completing the sale was extended from time to time until on 14th December 1916 the vendor finding that the purchaser was procrastinating gave a notice calling upon the vendee to pay the purchase money within a week. The vendee, failing the vendor cancelled the contract. The vendee brought a suit for specific performance and contended that reasonable time was not given him in making time the essence of the contract and that his previous conduct was not relevant in judging of the reasonableness of the time.

Held, that the previous history and conduct of the parties are relevant in considering the

SPECIFIC RELIEF ACT, S. 27.

reasonableness of the time limited for the completion of the contract. 35 M. 178 Foll. (*Sadasiva Aiyar and Burn, JJ.*) ABDUL RAZAK v. MESSRS EBOWN & CO.

27 M. L. T. 131 : 11 I. W. 473 : (1920) M. W. N. 290 : 57 I. C. 485.

Joint Hindu family—Agreement by father to sell—Son's liability See Sp. REL. ACT S. 27. 22 Bom. L. R. 997.

Suit for — Prayer for delivery of possession—Grant of—C. P. Code O. 2, R. 2,

In a suit for specific performance of a contract for the sale of land it is open to the plaintiff to join with his prayer for specific performance a claim for delivery of possession unless the contract expressly disentitles him to such relief. The cause of action for delivery of possession may arise both upon the contract and the completed conveyance.

37 C. 57 ; 14 C. L. J. 12, re.

If the plff. in such a suit omitted to ask for delivery of possession a subsequent suit to obtain delivery of possession might be barred under O. 2, R. 2 C. P. C.

But the Court will decree a claim for a conveyance only in cases where it embodies the substantial part of the agreement and where the court can direct its execution without regard to the question whether or not its provisions can be specifically enforced. 22 I. C. 1912 doubted. (*Mullick and Sultan Ahmed, JJ.*) DEONANDAN PRASAD SINGH v. JANKI SINGH.

5 Pat. L. J. 314 : 1 Pat. L. T. 325 ; (1920) Pat. 266 : 56 I. C. 322.

SPECIFIC RELIEF ACT, S. 21 (c)—Contract—Vague terms—Unenforceable.

An agreement contained in a lease to pay a particular rate of rent which is so vague as not to make it clear what the intention of the parties was cannot be enforced. (*Ferard, S. M. and Harrison, J. M.*) RAM BARAN SINGH v. PUJA SINGH. 55 I. C. 923 : 21 Cr. L. J. 447.

S. 22—Specific performance—Discretion of Court.

The granting of a decree for specific performance is discretionary and he who asks for it must show that he has acted with diligence and good conscience. If he delays in asking for it till just before his suit would be barred by limitation, he is not entitled to an exercise of the discretion in his favour. (*Halifax, A. J. C.*) MUNIOR MAHOMAD v. RAMA. 58 I. C. 28.

S. 23—Minor—Contract by guardian for purchase of land—Enforceable by Minor on attaining age. See MINOR. 38 M. L. J. 77.

S. 27—Contract for the sale of land—No time fixed for performance—purchaser of property in execution sale with notice of the

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contract—suit for specific performance against—Maintainability of—Limitation starting point. See LIM ACT. ART. 113.

38 M. L. J. 29.

—S. 27—Contract to sell property devised—Devisee liable to execute conveyance of property and receive purchase money—Heir of testator has no such right. See T. P. ACT S. 54. **22 Bom. L. R. 1396.**

—S. 27 Illn (2)—Specific performance—Legal representative of original obligee bound to fulfil Contract—Agreement by father to sell his undivided share in joint family property.

The father in a joint Hindu family agreed to sell his undivided share in the family property and received the earnest money, but he died before he could complete the sale. The purchaser having sued the sons to obtain specific performance of the contract:

Held, following the illustration (2) to clause (c) of S. 27 of the Specific Relief Act, that the sons were bound to perform the contract specifically in favour of the purchaser. (Macleod, C. J. and Heaton, J.) BHAGWAN BIAU INDAP v. KRISHNAJI.

22 Bom. L. R. 997 : 58 I. C. 335

—Ss. 38 and 41—Sale by person purporting to act as guardian but not entitled as such—Rights of vendee.

Although the sale was void *ab initio* it being effected by persons who were not entitled to act on behalf of the vendor, the vendees, having regard to Ss 38 and 41 of the Specific Relief Act, are entitled to claim that the parties should be relegated to the position they were in. (Bevan Petman, J.) FATEH KHAN v. LANGRA. **2 Lah. L. J. 184.**

—S. 41—Minor—Alienation by guardian—Duty to restore benefit on setting aside.

No transaction can be avoided by a minor under the general principles of equity recognised by S. 41 of the Sp. Rel. Act except on the condition that the person benefited by the transaction restores the benefit he has received or makes such compensation as the justice of the case requires. (Kanhaiya Lal and Lyle A. J. C.) LALA-PARSHOTAM DAS v. NAZR HUSAIN. **54 I. C. 843.**

—S. 41—Minor—Sale by—Vendee aware of real facts—Minor not bound to refund consideration on sale being set aside—No equity in favour of debt. See EVIDENCE ACT S. 115. **22. Bom. L. R. 49.**

—S. 42—Consequential relief—What is—Suit for a declaration that decree against plaintiff is void—Prayer for general relief—Effect of—Court Fees Act, S. (IV) C.

The mere prayer for general relief is not necessarily a prayer for consequential relief so as to take the suit out of the class of suits for declaration only.

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Plff. sued for a declaration that a certain decree was fraudulently obtained and should not affect his rights and for any other relief which the court might deem fit to grant.

Held, that the suit for mere declaration was one for a declaration only, and that a suit for mere declaration was not competent in this case unless followed up by a prayer for consequential relief by injunction or otherwise.

The Court ought to have allowed the plff. an opportunity to amend his plaint so as to include the necessary prayer for consequential relief by injunction or otherwise. (Shadi Lal and Dundas, JJ.) BUA DITTA v. LADHA MAL. **54 I. C. 833.**

—S. 42—Declaratory relief—Discretionary—Settlement of long standing disputes.

The discretionary power which courts possess to grant declaratory decrees should be exercised to put an end to disputes which have lasted a considerable time. (M. Amer Ali) RANI INDAR KUAR v. THAKUR BALDEO BAKSH SINGH. **39 M. L. J. 115 : 28 M. L. T. 384 : 57 I. C. 397 (P. C.)**

—S. 42—Declaratory relief—Discretion of Court—Substantial injury—proof of essential.

The relief granted under S. 42 Sp. Rel. Act being discretionary with the Court, the Court will not grant relief unless there is substantial injury. (Coutts and Dass, JJ.) BABU CHHAKWARI v. SECRETARY OF STATE FOR INDIA IN COUNCIL. (1920) Pat 1 : 5 Pat. L. J. 66.

—S. 42—Declaratory Suit—Cause of action for—Denial of title—Adverse entry in revenue register—Refusal of Revenue court to correct entry.

A man is not bound to sue for a declaration of his title merely because some casual denial of his title is made e.g. by the making of an entry unfavourable to him and favourable to the talukdar in the revenue registers a denial which in no way affects him in the enjoyment of his rights of property.

The refusal of the Revenue Courts to disturb the entry in the revenue registers casts a cloud on the plaintiff's title and gives them a cause of action to bring a suit to have the cloud cleared. (Lidday, JJ.) GANGA PRASAD v. SRI RAJ ECN. **23 O. C. 46.**

—S. 42—Declaratory suit—Consequential relief—Procedure—Amendment.

The proviso to S. 42 of the Specific Relief Act does not empower the Court to dismiss a suit for declaration because it omits to ask for consequential relief. The Court can only refuse to make the declaration until the defect is remedied and ought to allow the plaintiff to amend the plaint. When an objection to a declaratory suit on the ground that it does not ask for consequential relief is taken for the first time in appeal, and allowed, the proper

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procedure for the court is to remand the suit to the lower court, to enable the plaintiff to amend his plaint.

S. 42 of the Specific Relief Act requires a plaintiff to include in his prayer, any further relief he may have a right against the same defendant, but it does not require him to include as defendants the persons against whom he may have a right to consequential relief.

Where a plaintiff has a right to a declaration against one person, and a right to consequential relief against another person, he is not bound to join the latter as defendant in the declaratory suit, but can sue for a declaration without asking for further relief. (*Robinson, J.*) *S. T. K. CHETTY v. BALASUNDARAM.*

13 Bur. L. T. 100.

S. 42—Declaratory Suit—Decree fraudulent, null and void.

Where a plaintiff brought a suit for declaration to the effect that the decree of the Subordinate Judge was ultra vires and therefore void and futile under the law, held, that no suit for such a declaration was maintainable. (*Lindsay, J. C. and Wazir Hasan, A. J. C.*) *KISHAN DAYAL v. DEPUTY COMMISSIONER, PARTABGARH.*

23 O. C. 342.

S. 42—Declaratory suit—Persons denying title—Concerted action—Title—Possession.

In a suit for a declaration that defendants were plaintiff's roys and for an injunction against some of them restraining them from interfering with any rights of the plaintiff it was found that although some of the defts. had not made an overt denial of the plif's rights, yet they were acting in concert and sympathy with those who had and all the defts. were acting in collusion :

Held, that the whole body of defts. were persons interested to deny the plif's title within S. 42 of the Specific Relief Act.

Where in a suit relating to land the pliffs' title and possession within limitation is challenged and he establishes his title by purchase, the presumption, in the absence of evidence to the contrary is that he was in possession up to the time of the suit. (*Lindsay, J. C.*) *JANKI SARAN v. WIDOW OF MAHOMED SADIO*

56 I. C. 720.

S. 42—Declaratory suit—Possession partly with plif. and partly with deft.

Plif. sued for a declaration to the effect that he was the owner of a certain share of the entire holding of one N. It was found that the possession of the land in dispute had been for some time in a state of flux and that deft and plif. were in possession of certain portions and co-sharers with N. in those portions which were in the actual possession of N. Held, that the suit was maintainable. (*Broadway and Martineau, J.J.*) *LABHU RAM v. NATHU.*

55 I. C. 32.

S. 42.—Declaratory Suit —Rever-sionary rights—Safeguarding of.

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A brother may sue for a declaration that his brother (a lunatic) is entitled to a share in a mortgage acquired by the two defendants in their own names (one of them being the manager of the lunatic) where the plaintiff is entitled to succeed on the death of the lunatic as one of his heirs. (*Bevan-Petman, J.*) *VIR SINGH v. HARNAM SINGH.*

1 Lah. 137:
56 I. C. 191.

Ss 42 and 54—Legal status—Right to receive alms—Right of property.

The pliffs. were Mahomedans, and the defts. were Gangaputras. The dispute related to certain gifts, which are made by pious Hindus who came to bathe at a spot called the kubrighat. The pliffs. alleging that the defts. interfered with their right to receive the alms which they and their ancestors had received for 150 years sought for a declaration of their right and also for an injunction restraining the defts. from interfering with that right. Held, that the pliffs. had no legal status within the meaning of S. 42 of the Specific Relief Act, being in fact mere beggars who filled no legal character entitling them to the declaration sought for, and that their claim to receive alms was not a right to property such as would entitle them to an injunction in respect thereof. (*Tudball and Sulaiman, J.J.*) *BANSI v. KANHAI-YA.*

18 A. L. J. 983.

S. 42—Not exhaustive—Declaratory relief.

S. 42 of the Sp. Rel. Act is not exhaustive of cases in which declaratory decrees can be made. A suit by the worshippers of a temple for a declaration that an alienation by the trustee is invalid is maintainable (*Abdur Rahim and Ayling, J.J.*) *VEERAMACHANENI RAMASWAMI v. SOMA PITCHAYYA.*

(1920) M. W. N. 393:
58 I. C. 585.

S. 42—Proviso — Declaratory relief—Pre-emption.

Scimble: A claim for bare declaration of a right to pre-empt is not the right way of asserting a right of pre-emption. A mere claim to such a right is not a claim to any right to property within the meaning of S. 42 of the Specific Relief Act and the right of pre-emption cannot be enforced by a mere declaratory decree. The claim for a declaration would necessarily require to be followed by further relief if the order were to be effectual. (*Lord Buckmaster*) *CHARANDAS v. AMIR KHAN,*

39 M. L. J. 195 : 28 M. L. T. 149 :
18 A. L. J. 1095 :
22 Bom. L. R. 1370 : 57 I. C. 606 :
47 I. A. 255 (P. C.)

S. 42—Suit for declaration—Property partly in possession of the court and of tenants—Consequential relief.

The widow of a Mahesri of Delhi adopted her minor brother. After her death the present plaintiff respondent a cousin of the last male-owner brought the present suit for a declara-

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tion against the minor and his father that he is the owner of a certain house and for an injunction. It appeared that 3 rooms in the house were in the possession of the Court and the remaining portions were occupied by tenants who had not attorned to either party.

Held, that under the circumstances the suit for a declaration without consequential relief was maintainable. 15 Mad. 307. 100 P. R. 1913 Ref. (*Shadi Lal and Bevan-Petman, JJ.*) KALU RAM v. PIARI LAL. 1 Lah. 92 : 55 I. C. 953.

S. 42—Suit for mere declaration—Hindu reversioner.

A suit for a mere declaration that a person is entitled to succeed as the nearest reversioner on the death of a widow is not maintainable. 39 Mad. 634 foll. (*Wallis. C. J. and Krishnan, J.*) GURUSWAMI PANDIYAN v. SENDATTI KALAI PANDIA CHINNATHAMBIAR 39 M. L. J. 529 : (1920) M. W. N. 660 : 28 M. L. T. 365.

S. 42—Suit by worshippers for a declaration that alienation of temple properties is invalid—Maintainability of—C. P. Code. O. I. R. 8.

It is competent to the worshippers of a Hindu temple to sue under O. I. R. 8 of the C. P. Code for a declaration that a permanent lease of the temple properties in favour of the defendants is invalid and not binding on the trust. (*Abdur Rahim and Ayling, JJ.*) AGNI HOTRAM NARSIMACHARLU v. SOMA PIT. CHAYYA. 43 Mad. 410 : 38 M. L. J. 226.

S. 52—Discretionary relief—Injunction—Trial Courts' Discretion—Power of Appellate Court—Landlord and tenant.

Under S. 52 of the Specific Relief Act the grant of relief by injunction is a matter in the discretion of Court and if the Court below has exercised its discretion in a judicial manner and not arbitrarily it is the duty of the Court of Appeal to refuse to interfere.

If land is let to a tenant for purposes of agriculture and he begins putting up a building in the nature of a mosque or other permanent structure there is at once a case for relief by injunction. Damage in a case like this will be inferred at once.

There is no reason why a landlord in such cases should be obliged to take steps in a Rent Court for the ejection of the tenant from the entire holding. If his desire is to prevent a particular portion of the land so let being devoted to some purpose for which the land was not let there is no obstacle in the way of his coming to the Civil Court and asking for relief. (*Lindsay, J.*) KHUDA BAKHSH v. GAURI SHANKAR. 23 O. C. 163 : 57 I. C. 476.

Ss. 53, 54 and 56. (1)—Perpetual injunction—Right to considerations affecting grant of.**SPECIFIC RELIEF ACT, S. 55.**

The right to an injunction depends, in India upon statute and is governed by the provisions of the Sp. Rel. Act 33. Cal. 203, foll.

S. 53 of the Sp. Rel. Act defines the mode in which a perpetual injunction can be granted and its restraining effect on the deft. when it has been granted.

In order to entitle a litigant to a perpetual injunction, he must establish that the injunction is required to prevent a breach of an obligation. The term 'obligation' according to S. 3 of the Sp. Rel. Act, includes every duty enforceable by law, so that when a legal duty is imposed in one person in respect to another, that other is invested with the corresponding legal right.

The first para. of S. 54 of the Sp. Rel. Act establishes the broad and general rule that given the breach of an existing legal right which is vested in the applicant, the breach thereof may be restrained by injunction.

When a plaintiff applied for an injunction to restrain a violation of an alleged right, if the existence of the right be disputed, he must establish that right before he gets the injunction to prevent the recurrence of its violation : *Imperial Gas Light Co. v. Broadcast* 7 H. L. C. 600 (612) referred to.

Ss. 54 and 56 of the Sp. Rel. Act are to be read together as supplementing each other. The former defines the circumstances under which perpetual injunctions may be granted the latter enumerates the cases where an injunction must not be granted. The right to an injunction cannot be determined independently of the provisions of Ss. 54 and 56 by reference to the terms of S. 53.

An injunction cannot be granted when equally efficacious relief can certainly be obtained by any other usual mode of proceeding (except in case of breach of trust.) *Mookerjee and Fletcher, JJ.* RAM KISSEN JOYDOYAL v. POORAN MULL. 47 Cal 733 : 31 C. L. J. 259 : 56 I. C. 571.

S. 55—Injunction—Nuisance—Disturbance by assembly of Hindus.

The Muhammadans have an inherent right to call out the azan from the mosque.

Held, that the noises made by the defendants (Hindus) collectively and continuously at the time of calling out the azan for the sole purpose of frustrating the object of the call constituted a nuisance and it was no answer to the suit that the little noise made by each of the defendants personally did not amount to a nuisance. (1894) 3 Ch. 162 Ref.

The plaintiffs (Mahomedans) were entitled to the injunction prayed for because the nuisance caused by the defendants was not a reasonable exercise of their rights and was an infringement of the rule of "give and take, live and let live" (1876) 2 Ch. D. 692. (1893) L. R. 1 Ch. 316, ref. (*Bevan Petman, J.*) JA-WAND SINGH v. MUHAMMAD, DIN.

1 Lah. 140.

STAMP ACT, S. 2.

STAMP ACT (II of 1899) S. 2 (5)—Bond—Definition of, not exhaustive—Obligation to pay money—Person becoming liable for another's act.

On the question whether the document whereby the defendant appellant took upon himself the liability of another person in respect of a debt of Rs. 1000 and agreed to get certain land mortgaged to the creditors in lieu of that sum and that if he failed to do so he would pay the said sum of Rs. 1,000 together with interest was a bond.

Held, that the document did not come exactly within the definition of a bond under S. 2 (5) of the Stamp Act but the definition was not exhaustive,

The instrument in question was clearly a bond with a condition inasmuch as it was attested by a witness and by it the defendant appellant obliged himself to pay certain sum of money to another, if he did not perform a specified act which he had undertaken. *Scott-Smith, J.* NAND LAL v. THE JOINT HINDU FAMILY OF KARM CHAND SHAMIR MAL.

2 Lah. L. J. 224.

S. 2 (5) and Art. 15 and 40—Receiver—Security bond to Court—Stamp—Pledge of land—Court Fess Act, Sch. II. Art. 6.

Where a Receiver appointed by a Court and directed by it to furnish security for the proper discharge of his duties as Receiver executed a security bond in its favour binding himself and his heirs in the sum of Rs. 150 and as security thereof pledging immoveable property worth Rs. 200 held that the bond must be stamped both under the Court Fees Act and under Art. 40 of Schedule I of the Stamp Act as it came within the definition of a mortgage in S. 2 (5) of the Stamp Act. (*Wallis, C. J. Oldfield and Seshagiri Aiyar, JJ.*) AMIRTHAMMAL v. RAMALINGA GOUDAN. 43 Mad. 363 :

38 M. L. J. 503 : 12 L. W. 537
57 I. C. 184.

S. 2 (15) and Art. 45—Sch. I.A. Art. 5 (6) Applicability—Partition instrument—What is—Stamp duty on.

Whereby a document termed a yadast or agreement executed at Trivandrum in Andu 1090 corresponding to the Year 1915 by one Krishnaiyar and his brother and bearing a Travancore adhesive stamp of one anna, the brothers divided their properties situated both in British and Travancore territories, and the deed provided that the partition was to take effect from the date of execution of the document and the properties were to be enjoyed separately with effect from the 1st Thai of Andu 1090 corresponding to 14th January 1915 and that separate partition deeds should be executed for the properties in Travancore and British India and the document should remain in force till then held that under the definition in S. 2 (15) of the Indian Stamp Act 1899, the

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deed was chargeable as a contract of partition under Art. 45. (*Wallis, C. J. and Krishnan, J.*) RAJANGAM AIYAR v. RAJANGAM IYER.

38 M. L. J. 330 : 11 L. W. 556 :
55 I. C. 965.

S. 5—Single Instrument relating to distinct matters—Sale-deed—Mortgage of other lands as security for covenants—Stamp.

Where in a sale-deed the vendor mortgaged lands not included in the sale as security for the due performance of his covenants held that the deed was not an instrument comprising or relating to distinct matters within the meaning of S. 5 of the Stamp Act and was not liable to be stamped both as a sale and as mortgage. (*Wallis, C. J. Oldfield and Seshagiri Aiyar, JJ.*) SECRETARY TO THE COMMISSIONER OF SALT AND ABKARI AND SEPARATE REVENUE. 43 Mad. 365 : 38 M. L. J. 506 :
56 I. C. 154.

S. 12—Cancellation of—Stamp, what Constitutes. See (1919) Dig. Col. 1010. MELA RAM v. BRIJ LAL. 54 I. C. 976.

Ss. 26 and 35—Mining lease—Royalty in excess of amount covered by stamp.

S. 26 of the Stamp Act, 1899, are governed by S. 35 and, therefore, a lessee under a mining lease is entitled upon payment of the penalty under the latter section to recover the royalty provided for in the lease even though the amount claimed in excess of the amount covered by the stamp used in the lease. 17 W. R. 131; 3 M. 342; 10 Bom. 239, 9 Bom. L. R. 122; 12 W. R. 1 Ref. (*Dawson Miller, C. J. and Mullick, J.*) KUMAR BRAJ MOHAN SINGH v. LACHMI NARAIN AGARWALA.

5 Pat. L. J. 660 : (1920) Pat. 289 :
1 Pat. L. T. 719 : 58 I. C. 99.

Ss. 26 and 35—Optional leases—Lease of coal mine—Maximum Stamp—Royalty exceeding amount—Penalty.

Where by a lease about 32 bighas of coal land where demised for a term of 999 years in consideration for a sum of Rs. 1,920 salami and the lessee agreed to pay commission at the rate of five annas per ton on all sorts of coal raised from the mine and despatched by rail or sold or otherwise disposed of at the pit's mouth and the document was stamped with a revenue stamp of Rs. 40 of which Rs. 20 was for the salami and the balance of the estimated amount of the average yearly commission which on a stamp of that value would be Rs. 2,000 subsequently when the lessor instituted a suit for the recovery of Rs. 39,000 as royalty due for six years, the deft. lessee contended that as the stamp on the lease was Rs. 20 only in respect of the commission the plff. was precluded by S. 26 of the Stamp Act from claiming any commission beyond that which was proportionate to the amount of the stamp and the defect could not be cured by payment of a penalty under S. 35 of the Act.

STAMP ACT, S. 26.

Held, that there is nothing in the words of S. 35 which necessarily excludes its operation from cases covered by S. 26. It would be a strange result, which the legislature could hardly have intended, it an instrument bearing no stamp and therefore no admissable in evidence under S. 35 could be validated by payment of penalty under the proviso of that section whereas a similar instrument bearing a stamp and therefore admissible and enforceable to a limited extent could in no case be fully enforced even by paying the penalty, or admitted in evidence, for purpose of proving the full extent of the contract entered into between the parties.

The object of the Stamp Act is not to alter the terms of the bargain between the parties but to protect the revenue by excluding proof of the bargain by an instrument unduly stamped. By denying the benefit of S. 35 in the case of mining leases requiring an *ad valorem* stamp when the value can only be estimated the state would gain nothing. In fact it would suffer loss. The only person benefitted would be the lessee who would escape a part of the obligation which by the contract he undertook to bear. S. 35 provides the means by which in the case of the estimate proving deficient the revenue can be amply protected and the terms of the bargain can be proved and given effect to. 17 W. R. 131; 3 Mad. 342; 9 Bom L. R. 122; 12 W. R. 1 and (1893) 2 Ch. 555 ref. (*Miller, C. J., and Mullick, J.*) KUMAR BRAJA MOHAN SINGH v. LACHMI NARAIN AGARWALLA. 5 Pat. L. J. 660: (1920) Pat. 289: 1 Pat. L. T. 719: 58 I. C. 99.

S. 35—Promissory note inadmissible for want of stamp—Suit on original consideration—Admissions and pleadings—Decree on when can be given.

If a pro-note is inadmissible in evidence defendant's admission of the pro-note is of no avail but if the debt is admitted the pro-note need not be proved.

If a contract of loan is complete before the pro-note is passed, the plaintiff may sue on the completed contract without the pro-note but if the pro-note contains the contract the suit must be on the pro-note and if that is insufficiently stamped the suit must be dismissed.

In every case it is a question of fact whether the contract was completed before the pro-note was passed or not. (*Pratt, J. C. and Kemp, A. J. C.*) LOKUMAL v. THE SIND BANK, LIMITED 13 S. L. R. 169: 57 I. C. 386.

S. 35—Unstamped document—Admissibility of, in, evidence—Power of appellate court.

Where a document is inadmissible in evidence owing to defective stamp it is open to an Appellate Court to receive the document on payment of the stamp duty and penalty. (*Ferard S. M. and Harrison, J.*) RAM BARAN SINGH v. PUJA SINGH. 55 I. C. 923: 21 Cr. L. J. 447.

SUCCESSION ACT, S. 50.

S. 35—Unstamped original instrument lost—Whether a copy of it can be validated by payment of penalty—Oral evidence of contents—Admissibility.

Under the Stamp Act, 1899, only the original unstamped instrument can be validated by payment of the deficit stamp duty and penalty and then received in evidence. Therefore if the original is lost, and was, when lost, improperly stamped, it cannot be subsequently validated by payment of the penalty; and since the original in its improperly stamped condition is inadmissible in evidence no secondary evidence of its contents can be received 2 Mad 208; 3 M. H. C. R. 158 fol. (*Mittra A. J. C.*) PENTAYYA v. KESHO RAO. 16 N. L. R. 68; 56 I. C. 249.

S. 36—Documents executed in 1862—Insufficient stamp—Admissibility of.

S. 36 of the Stamp Act is applicable to documents of the years when Act XXXVI of 1860 was in force as it is to insufficiently stamped documents under the present Act. (*Tecum and Newbould, J. J.*) NILRATAN MITTER v. ABDUL GAFFUR GAZI. 32 C. L. J. 75

S. 62—Offence—Intention—Proof of

For a conviction under S. 62 of the Stamp Act proof of a dishonest intention even to the payment of stamp duty, is essential. (*Piggot, J.*) KANHAIYALAL v. EMPEROR, 54 I. C. 406: 21 Cr. L. J. 54.

SUCCESSION ACT, S. 2—Will—Construction of deed—Present devise in executant's lifetime with clause as to management after his death.

A dedication by which the grantor appointed himself as the manager and upon his death his disciple was to become the manager, is not a 'will' as the disposition does not take effect after his death but it becomes operative during his lifetime (*Coutts Das and J. J.*) MAHANTH SUKHDEO DAS v. KESHWAR SINGH. 1 Pat. L. T. 457.

S. 50—Will—Attestation—Meaning of—Initial—Affixing,

Under S. 50 of the Succession Act it is sufficient for a valid attestation of a Will that the witnesses had a clear view of the testator when he was in the act of signing: it is not necessary for a witness to actually see the fingers of the testator move as the signature is made. Initials operate as a signature and the mere fact that a testator affixes only his initials to a will would not render the Will invalid if there is proper attestation of the initials. (*Stuart A. J. C.*) NAWAB SHER MAHOMED KHAN v. THE DEPUTY COMMISSIONER OF BAHRACH. 58 I. C. 134.

S. 50—Will—Attestation — Proper mode of.

Under the provisions of S. 50 of the Succession Act it is not necessary for attesting witnesses to actually see the testator's fingers move as his signature is made. It is only necessary that

SUCCESSION ACT, S. 106.

the witnesses have a clear view of the testator when he is in the act of signing. (*Stuart and Kanhaiya Lal, A. J. C.*) MUSSAMMAT KETKIV. MANAGER NANPARA ESTATE. 58 I. C. 945.

—S. 106—Will—Widow's share—Provision for equally dividing it among sons—Compromise.

A Hindu testator provided that his widow would remain in possession of certain property during her life and that on her death his sons would get the property in equal shares. Held, that under S. 106 of the Succession Act, the sons obtained a vested interest in the property, and, therefore, in the event of one of the sons predeceasing the widow, his interest would pass to his heirs.

Under a razinamah between two full brothers and a step brother it was agreed that after the termination of their mother's life interest in a certain property they would get it in equal shares. Held, that under the razinamah the brothers did not take a contingent interest and that on the death of one of the full brothers before the mother, his share would pass to his full brother by inheritance. (*Newbold, J.*) MATHURA NATH BISWAS v. MONMOHINI DASYA.

58 I. C. 747.

—S. 111—Applicability of—Hindu Will.

S. 111 of the Succession Act depends on a natural meaning as opposed to a forced, interpretation of the words used in a Will. (*Walmsey and Huda, JJ.*) SRIMATI GUNAMANI DASSI v. DEVI PROSANNA ROY.

54 I. C. 897.

—Ss. 111 and 118—Will—Gift to daughter for life—Remainder to her children—Gift over to charity on daughter dying issueless—Validity. See WILL, CONSTRUCTION.

22 Bom. L. R. 1005.

—S. 118—Will—Gift with power of disposition during life time—Subsequent gift over of property if undisposed of. See WILL, CONSTRUCTION.

22 Bom. L. R. 1005.

—S. 160—Applicability of—Contract to the contrary.

The principle enunciated in S. 160 of the Succession Act cannot apply when a contrary intention appears in the document. (*N. R. Chatterjee and Panton, JJ.*) RAJLAKHII DEBYA v. SAROLA SUNDARI DEBYA.

58 I. C. 803.

—Ss. 239 and 264 b—Letters of administration—Grant of—Jurisdiction of Dist. Judge to give directions as to property.

A person having a mortgage on moveable property is not debarred by any rule of law from following that property into the hands of purchasers with notice of the mortgage (*Chevis C. J. and Dundas, J.*) THE ORIENT BANK OF INDIA LTD., v. GHULAM FATIMA.

1 Lah. 422 : 2 Lah. L. J. 590 : 57 I. C. 117.

SUCCN. CERTIFICATE ACT, S. 1.

—Ss. 264 B and 239—Administrator—Direction to—Power to give—High Court.

When letters of administration to the estate of the deceased have been granted, it is not competent to a District Court to give directions to the administrator duly constituted. Such a power to give directions vests only in the High Court under S. 264 B. of the Succession Act. (*Shah and Crump, JJ.*) MINA WINSOR v. E. WINSOR.

44 Bom. 682:

22 Bom. L. R. 396 : 57 I. C. 116.

—S. 269—Executor—Power of to mortgage assets—Will restricting Power—Effect of—Renewal of mortgage.

An executor who has obtained probate has absolute authority under S. 269 of the Succession Act to mortgage the testator's assets, and an authority is in no way fettered by reason of the stipulation in the will that he is not to sell or mortgage the property. The executor would be acting within that authority if he renewed a mortgage effected by the testator to satisfy the debt created by that mortgage. (*Stuart, J. C.*) KUL HUSAIN v. AJODHYA BANK, LTD.

54 I. C. 321.

SUCCESSION CERTIFICATE — Death of decree-holder—Substitution of representative.

Where a decree-holder dies during the pendency of the execution proceedings, it is not necessary in order to enable his heirs to be substituted in his place to take out a Succession Certificate. (*Newbold, J.*) KSHETRA MOHAN PADDAR v. AZIZULLA MEA.

57 I. C. 902.

—Grant of—Partial revocation—Validity of. See SUCCESSION CERTIFICATE ACT, S. 18.

18 A. L. J. 314.

SUCCESSION CERTIFICATE ACT (VII of 1889) Ss. 1 (4), 7 and 25—Will—Application for certificate—Probate—Nature of proceedings under the Act—Decision on question of right.

The words "such a will" in the concluding clause of S. 1 sub. S. (4) of the Succession Certificate Act refer to a Will to which either the Succession Act or the Hindu Wills Act applies. 18 Bom. 608 and 2 A. L. J. 126 foll.

S. 1 (4) of the Succession Certificate Act does not preclude a person under a Will to which neither the Succession Act nor the Hindu Wills Act applies. The mere fact that he might have applied for a probate is not an adequate ground for refusing to entertain his application for a succession certificate. 16 Bom. 712 foll.

A Subordinate Judge of the second class invested with the functions of a District Court under S. 26 of the Succession Certificate Act is competent to entertain an application for a succession certificate in respect of debts exceeding Rs. 5,000.

SUCCN. CERTIFICATE ACT, S. 4.

Proceedings under the Succession Certificate Act are of a summary nature, and the only thing which the court is required to decide is whether the applicant has a *prima facie* right to collect the debts, and the decision of the Court under the Act, upon a question of right does not bar the trial of the same question in any suit or in any other proceeding between the same parties. (*Shadi Lal, C. J.*)

RATTAN SINGH v. CHAUDHURI RAJ SINGH.
2 Lah. L. J. 578.

Ss 4 and 6—Assignment by heir of creditor—Suit by assignee—Succession Certificate.

Where the heir of a deceased creditor has not obtained a succession certificate in respect of the debt and assigns the debt to another the assignee is entitled to obtain a succession certificate and cannot be granted a decree until he has done so.

It is a fallacy to assume that once a debt has been assigned by an heir it ceases to be part of the deceased's effects, S. 4 of the succession certificate Act is comprehensive enough to include a person whose claim to a part of the effects is based on a deed of assignment from the heirs of the deceased. S. 6 of the Act also is wide enough to cover an application by a person, who bases "the right in which he claims" the debt on an assignment from the heirs of the deceased person.

14 A. L. J. R. 677 not appr. 35 All. 74; 36 All. 21; 14 A. L. J. R. 650 ref. 15 Mad. 419; 18 Bom. 316 appr.

There is no provision of law which requires that a succession certificate must be filed along with the plaint and an opportunity should be given to the plaintiff of obtaining and producing one, (*Tudball and Sulaiman JJ.*)

GULSHAN ALI v. ZAKIR ALI.
42 All. 549 : 18 A. L. J. 666 :
57 I. C. 55.

S. 4—Judgment—Preparation of decree postponed pending production of succession certificate—Legality of.

Plaintiff sued without the production of a succession certificate, to recover a debt due to the estate of her late husband. The Court passed a judgment in her favour, but postponed the issue of a decree till a certificate was produced. *Held*, the course adopted by the Court was neither desirable nor convenient but it was, nevertheless, legal.

S. 33 of the C. P. Code must be qualified by the terms of S. 4 of the Succession Certificate Act and a decree cannot be passed till a certificate is produced. (*Mittra, A. J. C.*)

RAJARAM v. MALAN. 57 I.C. 650.

S. 4 (a)—Dismissal of suit for want of certificate—Opportunity to produce not given—Revision—Interference—Prov. Sm. C. C. Act, S. 25

SUCCN. CERTIFICATE ACT, S. 18

Where on an objection being taken by debtors, that no Succession Certificate had been filed by plff. the Court forthwith dismissed the suit on that ground, without giving an opportunity to the plaintiff obtaining and producing the necessary certificate it was held in revision that the Court should have given such an opportunity and the dismissal was set aside (*Tudball, J.J.*)

JAWAD ALI SHAH v. KAMLA-PAT RAM. 18 A. L. J. 514 :
56 I. C. 641.

S. 9 (1)—Object of enactment—Application for succession certificate—Scope of inquiry—Widow—Grant of certificate to.

The object of the Succession Certificate Act is to obtain the appointment of some one to give a legal discharge to debtors to an estate for debts due. The fact that in a proceeding under the Act the Court cannot decide intricate questions of law or fact as to the rights of the parties, is no bar to granting a certificate to an applicant, if *prima facie* he is considered to have the best title thereto.

A Hindu widow applied for a succession certificate in respect of debts due to her deceased husband. The application was opposed by the brother of the deceased. The brothers were separate in mess and residence and the deceased alone ran a shop to which the debts were due. *Held*, those would be sufficient to establish the widow's right to a succession certificate, but in order to ensure her rendering an account of the debts and securities received by her and for the indemnity of persons who may be entitled to the whole or any part of those debts and securities, she should be required to furnish a bond under S. 9 (1) of the Succession Certificate Act with one or more sureties. (*Prideaux, A. J. C.*)

CHAMPALAL v. MUSSAMMAT LAHERIBAI

57 I. C. 641.

S. 18 (a) (d) and (e)—Grant of certificate—Minor—Representation by person having adverse interest—Revocation—Certificate granted to a sharer for full debt—Revocation and grant of partial certificates to co-heirs.

The brother of a deceased Mahomedan lady applied for a Succession Certificate in respect of the dower debt which had been owing to her. A minor daughter of the deceased lady, being one of the heirs, was made a party to the proceedings. The father of the minor daughter (and the husband of the deceased lady) was allowed to accept service of notice on behalf of the minor, although the interest of the father was, in this matter, obviously opposed to that of the daughter. The certificate prayed for was granted. *Held*, that the proceedings were seriously defective in substance within S. 18 (a) of the Succession Certificate Act, and the Certificate could be revoked. If a certificate has once been granted in respect of the entire debt and circumstances change so as to bring into operation S. 18 (d) or (e) of Act VII of 1889 it is open to the court to partially revoke

SUCCN. CERTIFICATE ACT. S. 19.

the certificate originally granted or to modify the terms of the grant. The High Court revoked the original certificate to the extent of one half of the amount of the dower and granted a certificate for half the amount to the present applicant whose share of the inheritance was half. (*Piggott and Walsh, JJ.*) SHARIF-UN-NISSA BIBI v. MASOON ALI.

**42 A.I.L. 347 : 18 A.L.J. 314 :
56 I.C. 380**

S. 19—Order granting certificate—Applicability of.

Under S. 19 of the Succession Certificate Act, an appeal lies from an order granting a certificate and it is not incumbent on the appellant to move the Court granting the certificates to revoke it. (*Piggott and Walmsley, JJ.*) RADHE LAL v. MUSSAMMAT BINDO.

42 A.I.L. 512 :

18 A.L.J. 609 : 56 I.C. 181.

Ss. 19 (1) and 26 (2)—Succession Certificate—Appeal—Forum.

An appeal from an order of a Subordinate Judge passed under the Succession Certificate Act, lies to the District Judge and not to the High Court. (*Chevis, C.J.*) MAHABIR v. JAI RAM DAS.

2 Lah. L.J. 312.

SUITS VALUATION ACT VII of 1887 S. 4—Suit—Valuation for purposes of jurisdiction—Suit for declaration that mortgage is unaffected by attachment in execution of decree against mortgagor—Mortgagor and decree holder parties to the suit—No dispute as to mortgage—Effect. See (1919) Dig. Col. 1015, MADDUKURI AUKAMMA v. SUBBAYYA.

54 I.C. 543.

S. 8—Suit for injunction—Valuation—Court fees—Valuation for purposes of Jurisdiction unnecessary—Plff. not to be pinned down to such valuation. See COURT FEES ACT, S. 7, (IV) (d). **22 Bom. L.R. 1450.**

S. 8—Suit for redemption and account—Jurisdiction.

In a suit for redemption of a mortgage and surplus the value of the subject-matter for the purposes of jurisdiction is the aggregate value of the two heads of relief.

In questions of jurisdiction the presumption is in favour of giving jurisdiction to the highest Court. (*Batten, A.J.C.*) CHIMNA v. MOTILAL.

55 I.C. 75

S. 11—Applicability of—Injunction—Undervaluation—Value fixed by rules.

S. 11, of the Suits Valuation Act applies only where the valuation of the suit depends on the discretion of the parties or the Court and is not applicable when the valuation is fixed by rules having the force of law. 132 P.R. 1894: 35 P.R. 1902. Plaintiff sued for possession of a site and an injunction restraining defendants from building a house thereon. He valued his relief for possession at Rs. 50 and for injunction at Rs. 10. The Munsif 2nd Class decreed the claim in part and both parties applied to

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the senior Subordinate Judge, who modified the decree without any objection being raised as to jurisdiction. Defendants filed a second appeal to the High Court on the ground of undervaluation of the relief as to injunction and of the want of jurisdiction of the Senior Subordinate Judge.

Held, that S. 11, of the Suits Valuation Act did not cure the defect as the valuation of the suit did not depend entirely on the discretion of the defendants but was fixed by the rules of the Court:

The order of the lower Appellate Court was defective having been passed without jurisdiction. (*Scott Smith, J.*) MAHOMAD SHAH v. ABDULLAH SHAH.

56 I.C. 918.

S. 11—Valuation in plaint—Court to decide—Suit for declaration.

If the Valuation of a suit put in the plaint for the purpose of jurisdiction is contested it is the duty of the Court to decide what the correct valuation is.

31 B. 73 approved.

In a suit for a declaration the value of the suit for the purpose of jurisdiction must be the value of the property in respect of which the declaration is sought. 12 M. 223 foll.

Plff. valued his suit for a declaration at Rs. 1,400. In the written statement the defendants pleaded that the suit was under-valued. No issue was framed on this and on appeal to the District Judge the defendants again raised the question of valuation but the plaintiff's valuation was upheld without enquiry. The same question was again raised in second appeal and the High Court remitted an issue on the point to the lower Court which then found that the proper valuation was Rs. 16,275. Held that the case was not covered by S. 11 of the Suits Valuation Act, 1887 and that the appeal to the District Judge, was incompetent and his order without jurisdiction. (*Coutts and Adami, JJ.*) MOHINI MOHAN MISER v. GOUR CHANDRA RAI.

**5 Pat. L.J. 397 : 1 Pat. L.T. 390 :
56 I.C. 762.**

SURETY—Liability of. See C. P. CODE, Ss. 55 AND 145.

1 Pat. L.T. 604.

TORT — Illegal attachment — Property attached as belonging to debtors—Detention of property — Responsibility for — Burden of proof—Reasonable and probable cause. See (1919) Dig. Col. 1018. ABDUR RAHIM v. SITAL PRASAD.

54 I.C. 792.

TRADE MARK—Infringement of—Defendant using his own name in business—Injunction.

No one may use a name in a way calculated to lead the public to believe that the business carried on by him is the bus'ness of some other person with whom the name has come to be associated.

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The Court ought not to restrain a man from carrying on business in his own name simply because there are other people who are doing the same and who will be injured by what he is doing. It must appear that the person who is carrying on the business in his own name is doing it in such a way as to pass off his goods as the goods of somebody else. Where a defendant was carrying on business in his own name which also happened to be the name of the plaintiff the defendant could not be restrained from using his own name. (*Shudi Lal and Martincau, JJ*) UBEROI, LIMITED v. KIRPAL SINGH.

56 I.C. 709.

Passing off Warrior Cycle—Transfer of devise—Right as sole importer and seller—Misrepresentation, effect of—cycles sold as being made by a company not in existence, whether amounts to misrepresentation—Injunction whether could be granted when there was misrepresentation. See (1919) *Dig Col.* 1019. SEN AND PANDIT v. OAKES.

55 I.C. 560.

TRADING WITH ENEMY—Pre-war Cotton Contracts—Pleader's security before and after war—By agreement with liquidator of hostile firm security realised and payment made—Right of liquidator to recover such payment—Mistake of law—Money paid under valid agreement—Right to recover. See (1919) *Dig. Col.* 1029. WOLF & SONS v. DADIBA KHIMJI & CO.

44 Bom 631 :
58 I.C. 465.**TRANSFER OF PROPERTY**—Rights of transferee of—Execution of decree.

Per *Sadasiva Aiyar, J.*—Where property of whatever kind is transferred, the assignee or transferee obtains not merely the particular property described in the transfer deed as transferred but he obtains in law all the rights which the transferor had, to protect the title to the property transferred and obtains also all appurtenant and subsidiary rights and titles flowing from his position as holder of the property transferred. (*Sadasiva Aiyar and Napier, JJ*) MUTHU REDDI v. CHINNASWAMI REDDI. 39 M.L.J. 486 : 28 M.L.T. 308 : (1920) M.W.N. 613 : 12 L.W. 403.

What amounts to—Execution of Razinama and Kabuliyat whether.

The execution of a Razinama and Kabuliyat do not necessarily by themselves amount to a transfer of the property. Each case must necessarily depend upon its own facts. Such a transaction can be rebutted by evidence regarding the manner in which the parties concerned dealt with the property. (*Macleod, C.J. and Heaton, J.*) CHANDANMAL v. BHASKAR WAMAN.

22 Bom. L.R. 1079.

T.P. Act S. 6.

TRANSFER OF PROPERTY ACT, (IV of 1882) Ss. 3-59—Notice—Registration—Notice to the public—Omission to search register constructive notice. See REGISTRATION ACT, Ss. 17 AND 49 ETC.

39 M.L.J. 243 (P.C.)

—Ss 5 and 53—Fraudulent transfer—Intention to defeat creditors—Sham sale—*No animus transferandi*—Creditors not bound to set aside. See T.P. ACT, S. 53.

11 L.W. 106.

—Ss. 5 and 14—Mining lease—covenant for renewal—Rule against perpetuities.

Where in a deed of mining lease for five years the lessor covenanted "I bind myself to give you such leases as you may require from time to time, after the expiration of this agreement, on the same condition. Should I fail to do so I bind myself to pay you all your expenses that you may incur" Held that the clause for renewal did not offend the rule against perpetuities and was not rendered inoperative by S. 14 of the Transfer of Property Act. (*Abdur Rahim and Oldfield JJ*) PICHI NAIDU v. JEFFERSON.

12 L.W. 670.

—S. 6—*Spes Successionis*—Transfer of property by expectant heir—Validity of.

An expectant heir, who transfers a portion of the property included in the succession which he expects, does transfer his chance of succession so far as that portion of the property is concerned. S. 6 of the T.P. Act does not prohibit the transfer of a *spes successionis*. All that it provides is that such a transfer cannot be made for the reason that a *spes successionis* is not property and, therefore the execution of a document purporting to transfer the *spes successionis* purports to transfer property which does not exist. (*Le Rossignol and Broadway JJ*) MUSSAMMAT BHAGWATI v. CHAOLI

2 Lah. L.J. 689 :

55 I.C. 698.

—S. 6 (h)—Transfer of property—Immoral object or consideration—Right to recover property.

Where a deed of settlement was made with the object and in consideration of the donee cohabiting with the settlor and the immoral purpose of the donor was achieved by the donee in fact remaining in his keeping and living with him as contemplated by the settlement deed the settlor cannot recover back the property transferred for an immoral consideration which has already been achieved.

S. 6, cl. (h) of the T.P. Act does not modify the well established rules of equity that when a transaction is entered into for unlawful or immoral purpose and that purpose has been achieved, the Court would not interfere at the instance of a *pariceps criminis* to relieve him from the legal effect of the transaction; it only lays down that the Court will not enforce

T. P. ACT, S. 8.

a transfer which would have the effect of carrying out its unlawful object. *Abdur Rahim and Oldfield, JJ.*) DAIVANAYAGA PADAYACHI v. MUTHU REDDI. 28 M. L. T 255 : (1920) M. W. N. 547. 12 L. W. 291.

S 8—Transfer of land—Past Profits—Right to.

A transfer of immoveable property does not pass to the transferee the income which accrued before the date of transfer. (*Oldfield and Seshagiri Aiyar, JJ.*) MUTHU HENGU V. NETRAVATHI NAIKSAVI. 12 L. W. 44: 58 I. C. 383.

Ss 10 and 12—Covenant against alienation—No provision for re-entry on breach—Covenant void. See T. P. Act, Ss. 111, 13 and 12.

12 L. W. 45.

S 10—Transfer of property reserving life-interest—Attachment—Sale.

The father of a Hindu joint family transferred to his sons his full proprietary ownership in certain property which had been allotted to him on a partition of the family property reserving to himself only a life interest therein. A creditor attached the property in execution of a decree against the father.

Held that S. 10 of the Transfer of Property Act had no application to the transfer; that as by the transfer the father was entitled to only a life interest in the property, this was all the creditor could attach and bring to sale in execution of his decree. (*Walsh and Ryves, JJ.*) KUNDAN SINGH v. JADON PRASAD. 58 I. C. 552.

S. 11—Gift—Agrahar gift—Absolute estate—Condition as to residence in the locality—Restraint on alienation—Not enforceable. See GIFT, CONSTRUCTION

22 Bom. L. R. 254

S. 14—Mining lease—Covenant for renewal—Rule against perpetuities not applicable. See T. P. Act, Ss. 5 AND 14.

12 L. W. 670.

S. 39—Hindu widow—Maintenance—Right to—Charge on property—*Bona fide* purchaser for value—Not bound by the charge. See HINDU LAW, MAINTENANCE.

55 I. C. 28

S 40—Property burdened with debt—Rights of transferee.

A transferee who purchases property knowing that it is encumbered with a debt is liable under S. 40 of the T. P. Act, to discharge the debt. (*Stuart and Kanhaiya Lal, A. J. C.*) MAHADEO BAKSH SINGH v. SANT BAKSH SINGH. 23 O. C. 118: 7 O. L. J. 356: 57 I. C. 513.

S. 41—Scope of—Exception to general rule that transferor cannot convey better title than he has—Mortgage by manager

T. P. ACT, S. 51.

of joint Hindu family describing property as self-acquired property—Entry as in record of rights—Knowledge — Duty to enquire. See HINDU LAW JOINT FAMILY MANAGER.

1 Pat. L. T. 546.

S 43—Applicability of—Erroneous representation essential.

To bring a transaction within the scope of S. 43 of the T. P. Act it is not necessary that the representation made by the transferor should be false; it is sufficient that his representation should be erroneous. (*Le Rossignal Broadway JJ.*) MUSSAMMAT BHAGWATI v. CHAOLI. 2 Lah. L. J. 689: 55 I. C. 698.

S 43—Applicability of—Estoppel—Subsequent acquisition of title.

When a person with a defective title purports and intends to mortgage property, any interest subsequently acquired by him in that property is available in equity to make the mortgage effectual, even though the defect in the title is apparent on the face of the document. (1876) 1 Ch D. 256; 45 L. J. Bk. 109; 34 L. T. 466, 24 W. R. 559, followed. (*Le Rossignol and Broadway, JJ.*) MUSSAMMAT BHAGWATI v. CHAOLI. 2 Lah. L. J. 689: 55 I. C. 698.

S. 43—Scope of—Transference must have been misled by erroneous representation.

S. 43 of the transfer of Property Act does not apply to a transferee who is not proved to have been misled by erroneous representations of the transferor as to his power to transfer. (*Sadasiva Aiyar and Spencer, JJ.*) KRISHNA-MACHARIAR v. TIRUVENKATACHARIAR. 12 L. W. 149.

S 51—Improvements—Compensation for.

Held, that in a suit by collaterals for possession of lands, defendants, collaterals of the donees, were not entitled to claim compensation for trees planted on the land by the donees and the ordinary principle *quid plantatur solo solo credit* must prevail. (*Rattigan, C. J.*) HARNAMAN v. DASONDHI. 1 Lah. 210: 56 I. C. 733.

S. 51—Improvement—Compensation—Building with knowledge of defective title.

Where a person with full knowledge of the limited interest which he possesses in land constructs permanent structures upon the same, he is not entitled upon eviction to any compensation. (*Sultan Ahmed, J.*) ONKA MAL MARWARI v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL. 56 I. C. 813.

S. 51—Improvements—Right to compensation—Purchaser from limited owner—Estoppel.

T. P. ACT, S. 52.

A purchaser from a Muhammadan Zemindar who but for the operation of S. 28 of the Sind Encumbered Estates Act, would have been the absolute owner of the property, is not put on notice of the limited title of his transfer.

There is no estoppel against a person challenging a sale merely because he took an active part in bringing about the sale.

Where a purchaser of immoveable property under the honest belief that he is the absolute owner thereof makes permanent improvements on the property he is in equity entitled to compensation for the improvements made by him, on the sale being annulled on the ground that the vendor had only a limited interest in the property and could not convey an absolute title. He is however liable for mesne profits from the date his possession became wrongful, i.e., from the date of the death of the vendor.

What constitutes "good faith" within S. 51 of the Transfer of Property Act is a question of fact. A person may act in good faith even if he acts under a mistake of law or is negligent in investigating title. (*Fawcett and Crump, A. J. C.*) SHAHAB UD-DIN v. VOHIDBUX.

56 I. C. 492

S. 52—Contentious suit—Ex parte decree—Suit not fraudulent or collusive contentious within S. 52—Immaterial whether or not suit well founded.

A suit in which an ex parte decree was passed, but which is not fraudulent or collusive, is a contentious suit from the date of its institution, within S. 52 of the Transfer of Property Act and there is no onus on the plaintiffs to prove against the transferee *pendente lite* any title independently of the *ex parte* decree. (*Tudball and refiq, JJ.*) RAM BHAROSE v. MANPAL SINGH.

42 All. 319 :
18 A. L. J. 303 : 58 I. C. 484.

S. 52—Mortgage decree—Property omitted from decree attached and sold in execution of another decree—Suit for declaration by mortgagee.

Plff. got a decree for foreclosure on 10-8-1912 but by mistake a particular piece of property was not included in the decree. In 1912 the predecessor in interest of the deft. attached that share and brought it to sale. In 1914 plff. obtained amendment of the decree by the inclusion of the share omitted therefrom but did not make the auction purchaser a party to the proceedings. Plff. then brought a suit for a declaration that the share was not liable to be attached or sold in execution of the decree obtained by the predecessor of the deft.

Held, that the plaintiff was not entitled to the declaration he was seeking and the doctrine of *lis pendens* was inapplicable, as at the time of the auction purchase no suit was being actively prosecuted in respect of this share. (*Macnair, A. J. C.*) RAMACHANDRA v. BHAGWAN.

57 I. C. 652.

T. P. ACT, S. 53.

Ss 52 and 91—Suit on mortgage—Attaching decree-holder in execution of prior money decree—Omission to implead—Right to redeem.

The appellant was the purchaser at a Court sale held in execution of a money decree. After his attachment but before the sale a suit was instituted on a mortgage of the properties attached to which the attaching creditor was not made a party. Later on a mortgage decree for sale was passed and the respondent bought the properties. On his claiming delivery he found the appellants already in possession. The Lower Court ordered that as the appellants were there in virtue of a purchase *pendente lite* the respondent was entitled to oust them.

Held, that S. 91 of the T. P. Act, and O. 34, R. 1 are merely statutory provisions for the attaching creditor's right to redeem and to be impleaded in proceedings on the mortgage and do not confer on the attaching creditor any interest in the mortgage property. The doctrine of *lis pendens* applied to him and the Lower Court's order was right. (*Oldfield and Seshagiri Aiyar, JJ.*) VEYINDRA MUTHU PILLAI v. MAYANADAN.

43 Mad. 696 :

39 M. L. J. 456 : 28 M. L. T. 312 :
(1920) M. W. N. 299 : 58 I. C. 501.

S. 53—Fraudulent transfer—Consideration—Natural love and affection—Effect of.

Transfers founded on what is designated good or meritorious consideration, such as natural love and affection, while creating as they do a moral as distinguished from a legal obligation, do not count as transfers for consideration but are looked upon as merely voluntary. Such voluntary transfers are not transfers in good faith and for value, to which the law extends protection, if fraud is meditated or if the necessary effects of those transfers is to perpetrate a fraud on third parties. (*Kanhaiya Lal, A.J.C.*) MUSAMMET SUKHPAL KUAR v. DASU.

58 I. C. 165,

S. 53—Fraudulent transfer by debtor—Avoidance by creditor—Intention to avoid—Open and unequivocal declaration of intention—Fraudulent transference—Rights of.

Under S. 53 of the Transfer of Property Act, 1882, the avoidance by a creditor of a fraudulent transfer by the debtor need not be by a suit, brought on behalf of all the creditors or even by that one creditor, and an open and unequivocal declaration of the intention to avoid it expressed by a creditor is sufficient in law to enable him to treat it as void and to take steps on that footing to enforce his rights as a creditor for obtaining satisfaction of his debt.

43 Mad. 760 ; foll.

Where a creditor notwithstanding his knowledge of a prior fraudulent transfer by the debtor makes a subsequent purchase of one of the lands included in the prior transfer ignoring the prior transfer and treating it as if it

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conveyed no title, so far as the land he himself purchases is concerned, that would amount to sufficiently unequivocal expression of an intention by the creditor to avoid the prior transfer, to the extent to which it is necessary, in order to give effect to his own purchase.

(1) I. L. R. 43 Mad. 760; S. 12 L. W. 475 (F. B.) Distinguished.

A creditor's right to avoid a fraudulent transfer by the debtor is based upon his right to get satisfaction of the debt and he should therefore exercise his option to avoid, in a reasonable and *bona fide* manner. But this does not involve that the fraudulent transferee is entitled to the greatest consideration and the creditor should take the utmost trouble and exercise the utmost ingenuity to see that the transfer is avoided to as small an extent as possible. In considering whether a creditor has exercised his right to avoid, in a reasonable and *bona fide* manner, the facts of such transaction in each particular case should be taken as a whole and weighed with a mind inclined indulgently towards the creditor rather than towards the fraudulent transferee. (*Sadasiva Aiyar and Napier, JJ.*) AIYAMPERUMAL ASARI v. ADINAM AZHAGIYA PILLAI.

12 L. W. 718.

—S. 53—Fraudulent transfer—Plea of, available as a defence to a suit by transferee under O. 21, R. 63, C.P. Code. See C P. CODE, O. 21, R. 63.

16 N. L. R. 3

—S. 53—Fraudulent transfer—Plea in defence to a suit under O. 21, R. 63 C. P. Code.

It is open to an attaching decree-holder to plead in defence to a suit by the alienee whose claim has been rejected that the alienation is a fraudulent one intended to defeat or delay the alienor's creditors, 30 M. L. J. 505 and 41 Mad. 12 overruled.

The effect of a judgment in a suit under O. 21, R. 63 of the C. P. Code is to settle, as between the attaching decree-holder and the claimant, the question of title arising in execution. 35 Mad. 35 doubted. 15 Cal. 521 foll. 35 Cal. 202 expl. (*Wallis, C. J. Oldfield, Sadasiva Aiyar, Spencer and Seshagiri Aiyar, JJ.*) RAMASWAMI CHETTIAR v. MALLAPPA REDDARI.

43 Mad. 760:

39 M. L. J. 350 : 28 M. L. T. 170 :
12 L. W. 475 : (1920) M. W. N. 572.

—S. 53—Sham sale—Setting aside at the instance of creditors—Not necessary.

S. 53 of the T. P. Act has no application to a sham sale-deed not intended to pass title though intended to defeat creditors. Such a deed does not require to be set aside.

The opinion of *Abdur Rahim, J.* in 50 I. C. 959 not followed. (*Sadasiva Aiyar and Spencer, JJ.*) SWAMINATHA AIYAR v. RUKMANI AMMAL.

11 L. W. 106 :
55 I. C. 766,

T. P. ACT, S. 54.

—S. 53—Transfer in fraud of creditors—Release by member of joint family for consideration—Partition of co-parcenary property if within the section. See (1919) Dig. Col. 1036. *INDOJI JITHAJI v. KOTHAPALLI RAMACHURLA.*

27 M. L. T. 245 :
54 I. C. 148.

—S. 54—Contract of sale—Death of vendor—Property devised—Liability of vendor's heir and devisee Specific performance—Sp. Rel. Act, S 27.

Where a testator agrees to sell a house which he has already specifically devised but dies before he completes the sale, it is the devisee and not the heir who can be asked by the purchaser to complete the sale by passing a conveyance on receipt of the purchase money. 1842 5 Beavl. Ref. (*Macleod, C. J. and Fawcett, J. J. GANGARAMA v. SAKHARAM.*

22 Bom. L. R. 1396.

—S. 54—Contract of sale—Legal conveyance not executed—Transferee in possession—Agreement to sell admitted—Specific performance.

When in pursuance of an agreement to transfer property the intended transferee has taken possession though the requisite legal documents had not been executed provided specific performance can be obtained between the parties to the agreement in the same Court and at the same time as the subsequent legal question falls to be determined. (*Mookerjee and Panton, JJ.*) SYAMKISORE DE v. DINESH CHANDRA BHATTACHARYA. 31 C. L. J. 75 : 55 I. C. 154.

—Ss. 54 and 55—Execution of registered sale-deed—Non-payment of price—Suit by vendee for possession—Form of decree.

Defendant sold immoveable property to plaintiff by a conveyance which was duly registered. The plaintiff did not pay the purchase money but sued for recovery of possession of the property from the vendor. The Court below passed a decree for possession conditional on plaintiff's paying the purchase money. Plaintiff appealed. Held, that the plaintiff was entitled to an unconditional decree for possession of the properties sold to him, 27 I. C. 336 ; M. 543 ; 36 M. L. J. 313 Ref (*Ayling and Coutts Trotter, JJ.*) YALLA KRISHNAMMA v. KOTIPALLI MALI.

43 Mad. 712 : 38 M. L. J. 487 :
11 L. W. 563 : (1920) M. W. N. 380 :
28 M. L. T. 88 : 56 I. C. 530.

—S. 54—Oral sale—Immoveable property of Rs. 100 in value—Transfer of possession—Payment of consideration—Subsequent registered sale with notice of prior sale—Effect of

The plaintiff purchased a piece of land upwards of Rs. 100 in value from its owner under an oral sale, paid the price and went into possession. Subsequently the owner sold the same property under a registered sale-deed

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to the defendant who had notice of the first sale before the deed was registered. The plaintiff having sued :—

Held, that the plaintiff was entitled to get a registered sale-deed from the owner on the basis of the oral sale. (*Macleod, C. J. and Heaton, J.*) *DESAIBHAI v. ISHWAR JESHING.*

44 Bom. 586 : 22 Bom. L. R. 764 : 57 I. C. 447.

—**S. 54—Sale-deed—Unregistered—Property worth Rs. 20—Delivery of possession—Admissibility of document.**

There was an unregistered sale deed of a site for Rs. 20 and oral evidence of delivery of possession of the site. *Held*, that the sale-deed created no title to the site by virtue of S. 54 of the Act but although inoperative as a conveyance the sale deed was admissible as evidence of the agreement in pursuance of which delivery of possession took place. (*Mitra, A. J., C.*) *HARSALSA v. BAPU.* 56 I. C. 382.

—**Ss 54 and 55—Sale—Execution of conveyance—Non-payment of price—Effect of—Condition that title should pass only on payment of price**

Where a sale-deed expressly stipulates that if the vendee omits to pay the balance of the purchase money within a particular time, the deed would be treated as null and void, the vendor is entitled to avoid the deed on the vendee failing to make the payment agreed upon.

The mere execution of a sale-deed after the parties had agreed about the price has not necessarily the effect of at once passing ownership in the property sold. It is open to the parties to contract that ownership shall not pass until the fulfilment of certain conditions. (*Lindsay, J. C.*) *BAKHTAWAR RAM v. NAUSHAD ALI.* 55 I. C. 659.

—**Ss. 54 and 55 (4) (b)—Sale of land—Non payment of price—Rights of vendor.**

The mere fact of non-payment of the purchase money does not render a sale of immoveable property invalid, or prevent the passing of the ownership to the purchaser.

The purchaser can notwithstanding non-payment of the purchase money maintain a suit for possession and the only remedy of the unpaid vendor under S. 55 (4) (b) of the T. P. Act is a suit for unpaid purchaser money. (*Maung-Kin, J.*) *SOMASUNDARAM CHETTY v. SHWE BWA.* 13 Bur. L. T. 26 : 57 I. C. 948.

—**S. 55—Sale—Execution of deed—Non-registration owing to default of vendee—Right to demand subsequent conveyance.**

Where a sale-deed is executed and delivered to the vendee but is not registered owing to his default in the payment of the purchase money. *Held*, that as the vendee failed to take advantage of the provisions of Ss 32 and 36 of the Registration Act to enforce compulsory registration, it was not open to him to ignore the

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plain terms of the document and read into it an enforceable agreement to sell which was superseded by the conveyance itself. 16 Mad. 341 foll. 12 C. L. J. 464 Not foll. (*Oldfield and Seshagiri Iyer, JJ.*) *THAYARAMMAL v. LAKSHMI AMMAL.* 43 Mad. 822 :

39 M. L. J. 181 : 12 L. W. 161 : (1920) M. W. N. 457.

—**S. 55—Vendor and purchaser—Covenant of indemnity—Cost of suit—Liability of vendors.**

Where a vendor agreed to indemnify the vendee from the costs in suits in which he will be obliged to defend his title to the property conveyed and where a suit was filed and the vendee incurred costs therefore in defending his title to the property: *Held*, the vendee is entitled to recover not only the taxed costs but the actual costs which he had to pay to his own legal adviser. (*Wallis, C. J. and Seshagiri Aiyar, J.*) *SRI RAJAH VENKATA RANGAYYA APPA RAO v. SATYANRAYANA.*

39 M. L. J. 316 : 28 M. L. T. 188.

—**S. 55 (1)—Vendor and purchaser—Defect in title not disclosed—Refund of purchaser.**

A material defect, within S. 55 (1) of the Transfer of Property Act, includes defect of title and when such a defect is not disclosed to the buyer and it is such that he could not with ordinary care discover it, the vendor will be deemed to be guilty of fraud and the vendee would be entitled to damages in the shape of refund of the purchase money. (*Jwala Prasad, J.*) *SHEO RAM MAHTON v. THAKUR MAHTO.* 58 I. C. 529.

—**S. 55 (1) (d)—Vendor and purchaser—Duty of purchaser to tender conveyance before obtaining the title-deeds.**

It is the duty of the purchaser to tender a conveyance to the vendor for execution as required by S. 55 (1) (d) of the T. P. Act, and until such tender is made or waived the purchaser has no right to obtain the title-deeds. (*Viscount Hallane*) *MA HNIT v. MAUNG POPU.* 31 C. L. J. 87 : 11 L. W. 253 : (1920) M. W. N. 176 :

27 M. L. T. 139 : 55 I. C. 791. (P. C.)

—**S. 55 (1) (g)—Covenant for quiet enjoyment—Principle of applicable to—Cases not governed by T. P. Act.**

In a conveyance by sale of land a covenant for quiet enjoyment and freedom from encumbrances should, in the absence of any express covenant on the point and independently of the T. P. Act be held to be implied as being in accordance with justice, equity and good conscience. (*Kotval, A. J. C.*) *KESHIRIMAL v. KADHAI.* 55 I. C. 152.

—**S. 55 (2) — Covenant for title—Contract to the contrary to be clear and express—Formal recitals—Sale by widow.**

The covenant for title which is implied under S. 55 Cl. (2) of the T. P. Act is not got rid of except by the use of clear and unambiguous

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expressions showing that the vendor did not mean to guarantee that he had a good title to the property conveyed. 1 L. W. 8; 15 C. W. N. 658; 649 Ref.

The recital in a sale deed of the previous transactions forming the links in the vendor's chain of title disclosing a defect in title to the property conveyed has not the effect of a contract displacing the ordinary covenant for title. Neither does the knowledge of the vendor about the existence of a defect in his vendor's title defeat the vendee's right on the basis of the covenants implied by law 1914 M. W. N. 376; 2 L. W. 453; 29 I. C. 747 Ref.

A deed of sale recited "you (the vendee) shall hence forward be enjoying the same hereditarily and with right of alienation by gift sale or otherwise as you please removing the hindrances to this arising from my agnates or king or neighbour. I shall see that the sale is given effect to in your favour without any obstruction." The usual covenant for title was "free of obstruction arising from agnates, kings, or others."

Held, that there was an express covenant for title in the deed. And that there was also a covenant for quiet enjoyment. (*Abdur Rahim and Phillips, JJ.*) MAHOMED ALI SHERIFF v. VENKATAPATHI RAJU. 39 M. L. J. 449; 27 M. L. T. 305: 11 L. W. 537.

S. 55, Cl. (4)—Sale of land—Direction by vendor to purchaser to pay creditor—Purchaser paying off only a portion—Suit by vendor for the balance—Lien if exists. See (1919) *Dig. Col. 1049*. THYAGARAJA MUDALIAR v. SESIAPPIER. 27 M. L. T. 94: 54 I. C. 458.

S. 55, Cl. (4)—Vendor's lien—Unregistered mortgage, execution of, if extinguishes the lien. See (1919) *Dig. Col. 1041*. RANGANAYAKI ANMAL v. PARTHASARATHI AYYANGAR. 54 I. C. 503.

Ss. 56 and 82—*Marshalling—Contribution as between purchasers of different property subject to same mortgage.*

The rule of equity embodied in S. 56 of the Transfer of Property Act is limited in its operation to the case in which the party claiming marshalling is a purchaser and the party against whom it is claimed in the original mortgage, and has no application as between purchasers of several properties which are subject to the same mortgage. As between such purchasers the several properties are liable to contribute to the mortgage debt in proportion to their values. 31 Cal. 95 followed. (*Tuabill and Rafiq, JJ.*) DIN DAYAL v. GURSARAN LAL. 42 All. 336: 18 A. L. J. 237.

Ss. 58 and 100—*Mortgage—Charge—Covenant to pay—Properties to be sold on default—Charge for future debt—Suit by first mortgagee for sale—Second mortgagee not impleaded—Effect of.*

Where a document of indemnity bore a specific date, contained a covenant to pay and

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also specified the property which was to be sold, in case the debt was not paid.

Held, that it created a mortgage and not merely a charge.

23 M. L. J. 131; 29 I. C. 605. *Foll.*

Quaer:—Whether a charge could be created in respect of a future debt?

6 L. W. 115; 21 M. L. J. 562. *Ref.*

Under S. 58 of the Transfer of property Act 1882, a mortgage takes effect on the date of its execution, unless the parties contemplated the bringing into existence of the mortgage on a future date, even though the debt in respect of which the mortgage was executed is a future debt, so that the mortgage will have priority over any intermediate mortgage subsequently created though at a time when the future debt had not come into existence.

Where a first mortgagee brought the properties to sale impleading in the suit for sale the third mortgagee and not impleading the second and shared the sale proceeds with the third mortgagee.

Held, that the second mortgagee's right to sue for the sale of the properties was not lost as he has not been impleaded, in the first mortgagee's suit. 21 M. L. J. 562. *Foll.* and that the equities in the second mortgagee's suit for sale cannot be satisfactorily worked out without impleading the first mortgagee and directing him to return the money taken by him and ordering a fresh sale. (*Spencer and Seshaigiri Aiyar, JJ.*) NARAYANASAMY RAO v. RAMASAMY NAICKER.

12 L. W. 674.

S. 58—*Mortgage by conditional sale—Two deeds executed on same day evidencing sale and agreement to reconvey—Accounting for profits-sale or mortgage.*

Two deeds were executed on the same day, one of them purporting to be an absolute sale of certain property and the other an agreement by the vendees reciting that the property had been purchased by them on the condition that whenever within five years the vendors should pay to them the amount of the consideration money, together with interest thereon at the rate of ten annas per cent per month, but deducting there from the actual profits realised by the vendees from the property, the vendors would be entitled to have the property reconveyed by the vendees. Held, that the provisions as to accounting at the time of the demand for reconveyance, showed clearly that the relation of creditor and debtor existed between the parties and that the two documents taken together indicated that the transaction which the parties entered into was *bai bil wafa* or mortgage by conditional sale. 2 De-Gex and J. 97, 12 All 287 P. C. 38 All. 337 (P. C.) referred to and distinguished. (*Mears, C.R.J. and Rafiq, A.J.*) MUNIBI MULAMMUD HAMID-UD-DIN v. LALA FAKIR CHAND. 18 A. L. J. 478: 58 I. C. 717.

Ss. 58 and 60—*Mortgage—Interest—Redemption.*

T. P. ACT, S. 58.

Under S. 58 of the T. P. Act the mortgaged properties stand hypothecated for the principal money only unless it is expressly made liable for the interest which when secured becomes included under the term 'mortgage-money'.

As a general rule there can be no partial redemption unless the mortgagee become interested in the equity of redemption and a mortgagee purchaser who has been impleaded as a defendant in a suit brought by the subsequent mortgagee can claim the right to redeem the latter. (1919) 52 I. C. 512 referred to. (*Das and Adami, JJ.*) PAWAN KUMAR CHAND v DULARI KUAR. 5 Pat. L. J 544:

1 Pat. L. T. 544: 58 I. C. 216

Ss. 58 (c) and 60—Sale—Agreement to reconvey on payment of amount—Redemption.

P. executed a deed of sale in favour of M At the same time *kabuliyat* was executed under which P. accepted a sub-tenancy of the land under M. and M. executed an *ekrarnama* agreeing to return the land to P. on receiving the amount mentioned in the sale-deed and the arrears, if any, due under the *kabuliyat*. On P's death her son A executed a conveyance of the equity of redemption in favour of N.

Twenty-six years after the sale N. claimed the right to redeem on the footing, the transaction was a mortgage. All these days N. had stood by and allowed the heirs of M. to remain in possession and assert their absolute right to the property.

There was also evidence of specific conduct on the part of N. to show that the transaction was a sale:

Held, that the claim to redeem was not maintainable. (*Richarison and Sir Syed Shamsul Huda, JJ.*) NAZIR ALI v. THE COLLECTOR OF CHITTAGONG. 57 I. C. 681.

S. 58 (c)—Sale—Mortgage by conditional sale—Agreement to reconvey—Effect of. See DEED CONSTRUCTION.

22 Bom. L. R. 979.

S. 59—Attestation—Scribe as an attesting witness—Evidence Act. S. 68—Attesting witness, who is.

A deed of mortgage was signed in the presence of the writer or the deed and of the attesting witnesses. The other attesting witness put his attestation on the deed later on:—

Held, that the deed was not validly executed under S. 59 of the T. P. Act. 41 Bom. 384 Ref. Per Macleod, C. J.:—A court will be loath to hold that in any case a scribe wherever he wrote his name, could be considered to sign the document as an attesting witness unless he actually said so in the document. There is a very great difference between an attesting witness and a scribe and it would seem to me that it would lead to attempts to evade the plain words of S. 59, and would also lead to constant difficulties thereafter if the law was not strictly observed since parties might think that they were executing a valid mortgage if only one

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outside person was brought in to witness the document and evidence would have to be called to show that the scribe as a matter of fact did sign as an attesting witness. (Macleod, C. J. and Heaton, J.) DALICHAND SHIVRAM MARWADI v. LOTU SAKHARAM.

44 Bom. 405:

22 Bom. L. R. 136: 55 I. C. 616.

S. 59—Attestation—What constitutes—Scribe signing document if an attestator.

A person who sees a document being executed is in fact a witness to it, but he is not an attesting witness unless he subscribes as a witness.

The writer of a document who signs it as scribe does not by so signing it become an attesting witness. 35 M. 607 foll. (*Twomey, C. J. and Robinson, JJ.*) S V. S T. CHETTY v. PO MYA. 12 Bur. L. T. 261:

56 I. C. 945.

Ss. 59 and 123—Gift—Attestation—Meaning of.

The word "attested" in S. 123 of the T. P. Act means the witnessing of the actual execution of the document by the person purporting to execute it. 14 Bom. L. R. 1084, P. C. Ref. (Macleod, C. J. and Heaton, J.) AMARAPPA SANABASAPPA v. RACHAV SUGAPPA.

44 Bom. 231: 22 Bom. L. R. 86: 55 I. C. 355.

S. 59—Mortgage—Attestation—Proof of—Examination of one of the attestors as witness—Sufficiency of. See EVIDENCE ACT, S. 68.

(1920) M. W. N. 512.

S. 59—Mortgage—Attestation—Purdanashin lady.

In the case of a pardanashin lady executing a mortgage-deed it is not essential that the attesting witnesses should actually see the executant sign or make a mark. If there is evidence that a pardanashin lady admitted that she was the executant and the deed was taken behind the *parilah* for her signature and after it was signed by her, the signatures of attesting witnesses who were present there were then made. *Held*, that there was sufficient proof of attestation. (*Kotval, A. J. C.*) KASIDANSI v GANGU LAL. 56 I. C. 247.

S. 59—Mortgage by deposit of title deeds in places to which T. P. Act, does not extend.

In places to which the T. P. Act has not been extended a valid mortgage can be effected by a deposit of title deeds with a creditor with intent to secure a debt. (*Ormond and Pralt, JJ.*) SHU KYI v. HAJEE BEE BEE.

12 Bur. L. T. 217: 55 I. C. 248.

S. 59—Mortgage by deposit of title deeds—Memorandum when must be registered.

Deft. (who had already mortgaged a house to the plff. to secure two previous loans and had delivered to him the title deeds thereof for the purpose of those mortgages on 25th

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February, 1914 executed a promissory note for Rs. 1,500 in respect of a fresh advance in pltf's favour and on the same date gave Pltf a letter in these terms : " For payment of the sum of Rs. 1,500 with interest I have borrowed from you on a promissory note of date, I hereby put on record that the title deeds *re* my premises already deposited with you shall be held as a collateral security." The amount (Rs. 1,500) was paid to deft. after the execution of the promissory note and the passing of the letter :

Held, that there was no completed contract of mortgage before the letter passed, which in the circumstances of the case constituted the mortgage contract and was inadmissible for want of registration. (*Chatterjea and Panton, JJ.*) **BHAIRAB CHANDRA BOSE v. ANANTH NATH DE.** 24 Cal. W. N. 599:

31 C. L. J. 375 : 57 I. C. 686.

S. 59—Mortgage—Execution in presence of attesting Witnesses—Sufficiency of.

... When a mortgage deed is executed in the presence of attesting witnesses it is a sufficient compliance with the provisions of S. 59 of the T. P. ACT. (*Mears, C. J. and Bannerjea J.*) **KIFAYATULAH KHAN v. SRI RAGHUNATHJI.**

18 A. L. J. 105 : 55 I. C. 230.

S. 60—Equity of redemption—Clog on—Mohurrari: lease to mortgagee.

Once a mortgage transaction has been entered into it is not within the competency of the parties to clog the equity of redemption whereby, even after redemption, the mortgagee would retain an interest in the property as lessee upon payment of a comparative trifling rent. Such a transaction is invalid both as against the mortgagor and as against a purchaser from the mortgagor of his interest.

Per Das J.

Quære. Whether a lease intended to operate in future is an invalid lease.

Quære. Whether a lease by a mortgagor to the mortgagee subsequent to the mortgage transaction may correctly be called a clog on the equity of redemption (*Dawson Miller, C. J., and Das, J.*) **RAM NARAIN PATTACK v. SURATHNATH PANDAPADHYA,**

5 Pat. L. J. 423 : 1 Pat. L. T. 575 : (1920) Pat. 351 : 57 I. C. 337.

S. 60—Mortgage—Acquisition of part of equity of redemption by mortgagee—Holder—Effect.

The principle that when a mortgagee acquires a part of the mortgaged property, the integrity of his mortgage is broken up and the mortgage is extinguished *pro tanto* the balance only being recoverable from the residue, applies equally where it is after the decree for sale and not before it that the mortgagee (decree holder) acquires a part of the mortgaged property. (*Tudball and Sulaiman JJ.*) **SARJU KUMAR MUKERJI v. THAKUR PRASAD**

42 All. 544. 18 A. L. J. 690 :

58 I. C. 748.

T. P. ACT, S. 60.**S. 60—Mortgage—Clog on—Redemption postponed for two years**

Where a mortgage-deed precluded the mortgagor from redeeming for a term of 70 years and the mortgage is possessory and the principal sum secured by it is Rs. 99 and it is admitted in Court that the property yields a profit of Rs. 90 per year, the condition debarring the mortgagor from redeeming the property for 70 years is a clog on the equity o. c. r. p. o. and is manifestly oppressive and unreasonable. 17 O. C. p 313 foll (*Kanhaiya Lal, JJ.*) **RAM DAS v. SWAMI DAYAL.** 23 O. C. 108: 57 I. C. 553.

Ss. 60 and 61—Mortgages—consolidation—Redemption—Clog

In 1862 S gave 26 bighas of lands in usufructuary mortgage to A for Rs. 200 with right of redemption after nine years, and upon the death of S. the property was partitioned among her five successors, each getting 1/5th share and two of them brought in 1876 a suit for recovery of 11 bighas out of the 26 bighas i.e, their 2/5th share against the mortgagee, the three other successors of S. having been joined as pro forma defendants to which a compromise was effected between the plaintiffs and the mortgagee defendant only, by which the mortgagee continued to be in possession of the 26 bighas, the money secured being now held to be Rs. 500 with interest, and the present suit was brought for redemption of the original mortgage of 1862 by the plaintiffs who were representatives of all the five successors of S. and the mortgagee's representatives raised the plea of substitution of the mortgage and consolidation.

Held, (1) that the second mortgage of 1876 was not in substitution for the earlier mortgage of 1862 nor was the principle of consolidation applicable, as the mortgagors were not identical, and the second mortgage was in respect of only two fifths of the property of the two heirs of S. out of five;

(2) that a mortgage being one and indivisible there could not be a piecemeal redemption and two mortgagors out of five could not by the compromise of 1876 fetter the right of redemption of the other three mortgagors in respect of the original mortgage or less;

(3) that there could not be two different usufructuary mortgages on the same lands at the same time;

(1) that the compromise of 1876 being in the nature of a clog on the equity of redemption, two mortgagors binding three others to pay a higher amount for redemption, it was invalid under S. 60 of the T. P. Act. 31 All. 482 and 32 All. 651 dist. and

(2) that no question of estoppel arose, simply because the plaintiffs are now successors of all the five successors of S. two of whom compromised in 1876, the validity of the second mortgage was to be considered w.h regard to the circumstances existing at the time when it was

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entered into when there were five mortgagees alive. (*Coutts and Adami, J.J.*) LALA RAM NARAIN v. LALA MURLIDHAR.

5 Pat. L. J. 644 : 1 Pat. L. T. 616 : 58 I. C. 129.

—S. 60 and 95—*Mortgage—Joint mortgagors—Relinquishment by one in favour of mortgagee—Redemption by others.*

One out of four brothers mortgagors, who was the registered occupant of the mortgaged land, passed a Rajinama of the land in favour of the mortgagee, who executed a Kabuliyat for the same. The remaining three mortgagors sued to redeem the mortgage alleging that the Rajinama passed by their brother conveyed only his interest and nothing more.—*Held*, that though the conveying brother was a co-mortgagor with the plaintiffs he had no right to sell their interest in the equity of redemption, and that so far as they were concerned he was in the same position as an outsider; and that the plaintiffs were entitled to redeem their share in the mortgage. (*Macleod, C. J. and Fawcett, J.*) LALCHAND SAKHARAM MARWADI v. KHANDU.

22 Bom. L. R. 1431.

—Ss. 60 and 82—*Mortgage—Purchase by mortgagee of equity of redemption in part of the mortgaged property—value of the property mortgaged equal to amount due on mortgage—Effect of—Discharge of mortgage.*

When a mortgagee buys at auction the equity of redemption in part of the mortgaged property, such purchase has in the absence of fraud the effect of discharging and extinguishing only that portion of the mortgage debt which was chargeable on the property purchased by him i.e., a portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the entire property comprised in the mortgage even though the value of the property purchased be equal to the amount due on the mortgage. (*Wallis, C. J., Oldfield and Seshagiri Aiyar, JJ.*) PONNAMBALA PILLAI v. ANNAMALAI CHETTIAR. 43 Mad. 372 : 33 M. L. J. 239 : (1920) M. W. N. 235 : 11 L. W. 429 : 55 I. C. 666.

—S. 60—*Mortgage—Redemption—Clog on equity of redemption—Deed of mortgage restricting redemption if mortgagee planted fruit trees on mortgaged lands—Suit for account—Dekhan Agriculturists' Relief Act, S. 13.*

The plaintiff mortgaged his land with possession to the defendant in 1867. It was provided by the mortgage deed that redemption should not take place until after twenty-one years, and that if the mortgage was not redeemed then the mortgagee was to continue to enjoy the land and take the profits in lieu of interest. It was further provided that if the mortgagee should at some future time, after the expiration of the twenty-one years

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when the mortgagor sought to redeem, have planted trees which were bearing fruit, the mortgagee should not be required to give up possession until the *Udin* had come to an end. At the end of the stipulated period of twenty-one years nothing was done. The mortgagee who remained in possession planted a number of orange trees on the land. In 1913, the mortgagor sued to redeem the mortgage under the provisions of the Dekhan Agriculturists' Relief Act:—

Held, (1) that the provisions in the deed postponing the mortgagor's taking possession, so long as there were fruit bearing trees on the land, was not a clog on the equity of redemption as understood in English Law;

(2) that treating the case as governed by S. 70 of the Transfer of Property Act 1882, the mortgagor was entitled to redeem the mortgage at any time after the principal money had become payable; and,

(3) that the mortgagor was in any event entitled, under S. 13 of the Dekhan Agriculturists' Relief Act, 1879, to an account from the beginning of the mortgage up to the date of the suit (*Heaton, A. C. J. and Crump, J. J.* GENU TUKARAM v. NARAYAN).

22 Bom. L. R. 1147.

—S. 60—*Mortgage—Redemption—Portion of equity of redemption vested in mortgagee—Partial redemption.*

Where the equity of redemption in certain property vests in several persons one of whom is the mortgagee, one of those persons cannot, under S. 60 of the Transfer of Property Act, compel the mortgagee to allow him to redeem the entire property; he can only redeem his own share in the property. (*Stuart and Kanhaiya Lal, A. J. C.*) MAHOMED ZAKI ALI KHAN v. AHMAD SHAH.

58 I. C. 983.

—S. 60—*Mortgage—Redemption—Suit for—Cause of action—Tender before suit if essential.*

S. 60 of the T. P. Act does not necessarily mean that before a suit for redemption can be instituted the mortgage money must be paid or tendered. The mortgagor's right to claim redemption on payment of the mortgage money exists notwithstanding that he may not have made any tender thereof, when the mortgage money has become payable.

Where the mortgage money is alleged to have been satisfied out of the usufruct, a tender would obviously be out of the question. 11 A. L. J. 1004 ; 14 A. L. J. 55 ; 17 A. L. J. 910 and 18 A. L. J. 440 ref. (*Sulaiman and Kanhaiya Lal, JJ.*) HAIT SINGH v. BEHARI LAL.

18 A. L. J. 947.

—S. 60—*Redemption of mortgage—Arrears of interest.*

The law of limitation does not apply so as to fix the period for which interest on the mortgage debt is payable by a mortgagor to a mortgagee in a redemption suit in which the mort-

T. P. ACT, S. 60.

geree is a deft. The deft. makes no claim in such a suit on which the law of limitation can take effect. The question is what sum is due and payable by the mortgagor to the mortgagee and the mere fact that if the position of the parties were reversed and the mortgagee were plff. he could only recover interest for a period fixed by the law of limitation, is irrelevant.

In a suit for redemption, therefore, the mortgagee is entitled to receive interest for the whole of the period of the mortgage. (*Shadi Lal and Broadway, JJ*) AKBAR HUSSAIN v RAGNANDAN DAS.

57 I. C. 348

S. 60—Redemption—Purchaser of portion of property.

It is open to a transferee of a part of the mortgaged property to redeem the entire mortgage on the properties. But he cannot compel the mortgagee to allow him to redeem his part by itself unless something had happened which extinguished the mortgage in whole or in part such as an exercise of a power of sale originally conferred upon the mortgagee by his security or such conduct on the part of the transferees as would estop them from ascertaining what normally would have been their right, (*Viscount Haldane*.) MIRZA YADALLI BEG v. TUKARAM.

39 M. L. J. 147:

28 M. L. T. 95 : 1920. M. W. N. 369 :
12 L. W. 503 : 22 Bom. L. R. 1315 :
16 N. L. R. 154 : 57 I. C. 535 :
47 I. A. 207.

S. 61—Mortgage—Redemption—Consolidation of mortgages—No right to.

A mortgagor seeking to redeem any one mortgage, shall in the absence of a contract to the contrary, be entitled to do so without paying any money due under any separate mortgage on property other than that comprised in the mortgage which he seeks to redeem; and the onus of establishing such a contract lies upon the mortgagee.

As consolidation has the effect of interfering with the right of a mortgagor to redeem a mortgage on one property without being required to redeem another mortgage relating to a different property a court of justice will always struggle against an interference with the mortgagor's right unless the covenant is shown to be express and unequivocal,

33 All. 393 ; 22 Ind. Cas 132 ; 26 All 559 ; Ref. 2 P. R. 1890 dist. 4 All. 85 diss. (*Shadi Lal and Dundas, JJ*) JIWAN DAS v. THARAJ.

1 Lah. 105 : 14 P. L. R. 1920 :
55 I. C. 509.**Ss. 61 and 62—Usufructuary mortgage—Simple mortgage—Transfer of equity of redemption—Redemption of usufructuary mortgage—Consolidation of mortgages—Rule against**

Where a person executed a usufructuary mortgage over certain properties which were immediately let on lease by the usufructuary mortgagee to the mortgagor under a lease deed

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which created a charge on the properties usufructarily mortgaged for the rents and profits in favour of the mortgagee (lessor) and subsequently both the equity of redemption and the mortgage and charge passed by assignment to two different individuals and the assignee of the equity of redemption sued the assignee of the usufructuary mortgage and the charge for redemption on payment of the principal alone due under the usufructuary mortgage which the assignee of the mortgage resisted on the ground that the amount of the charge should also be paid before redemption could be had:—

Hold, (1) that the assignee of the equity of redemption could recover possession of the properties usufructarily mortgaged by payment of the principal alone due under the usufructuary mortgage.

Wallis, C.J. The fact that the property usufructarily mortgaged is also the subject of a simple mortgage, does not entitle the mortgagee to retain possession, if the mortgagor is in a position to discharge the usufructuary mortgage only. 17 All. 295 ; 27 All. 313. followed.

Per Seshagiri Iyer, J.—Whatever may be the rights of the mortgagee to compel the mortgagor to consolidate mortgages upon the same property before redemption, the rule is not applicable against persons who are the purchasers of the equity of redemption.

Wallis, C.J.—Any right of the kind which the mortgagee may have against the mortgagor are *prima facie* enforceable on general equitable principles against the assignee of the equity of redemption.

(1881) 6 A. C. 698, foll. 32 All. 612 ref :

Per Seshagiri Iyer, J.—In this country it would be a denial of an undoubted right to compel the mortgagor to redeem the other mortgages

Wallis, C.J.—Though all the incidents of mortgages in England and India are not the same, there is some difficulty in holding that the Indian Legislature when re-producing S. 17 of the English Conveyancing Act 1881 in S. 61 of the Transfer of Property Act, 1882 intended it to have a different operation in India.

Per Curiam J. That even if the usufructuary mortgage and lease were treated as one transaction of an anomalous mortgage it was a transaction by which the properties were usufructarily mortgaged for the principal debt and were further made the subject of a simple mortgage and the mortgagee's enjoyment of the usufruct was in lieu of part of the interest on the principal due and had no reference to the simple mortgage created for arrears so that the possession could be recovered on payment of the principal debt.

33 All. 393 ; (1903) 1. K. B. 147. considered.

Per Seshagiri Iyer J. Notwithstanding that a mortgagor is himself the lessee of the properties usufructarily mortgaged there is no

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necessary presumption that the lease is part of the mortgage transaction.

Also per *Seshagiri Iyer, J.*—A Vaddibhogam deed is a usufructuary mortgage though it may contain the statement that the mortgagor stands liable along with the security of the mortgaged and other properties.

Per *Seshagiri Iyer, J.*—Where a mortgagee is damaged by the wrong description of one of the villages mortgaged, the claim arising therefrom is not recoverable as against the purchaser of the equity of redemption (*Wallis C. J.* and *Seshagiri Aiyar J.*) *PANAGANTI RAMARAYANIGAR v. MAHARAJAH OF VENKATAGIRI.*

12 L. W. 685 : 28 M. L T. 234.

S. 63—Mortgagee—Acquisition of subsisting tenancy—Payment on redemption,

Where one of several mortgagees acquires tenancies while in possession and claims the cost of such acquisitions upon redemption, it is unnecessary, under S. 63 of the T. P. Act, to invoke the doctrine of merger. The section does not require the accession to have been made by the mortgagee by availing himself of his position as such, nor can it be urged that the acquisitions might have been made even if the mortgage had not been taken. (*Drake Brockman, J.*) *PYARELAL v. PANNALAL.*

56 I. C. 193.

Ss. 65 and 68—Mortgagee deprived of part of the security—Right to sue for mortgage money.

Where a mortgagee is deprived of a part of the mortgaged property by the act of the mortgagor he is entitled to recover the mortgage money from the mortgagor. (*Fletcher and Cuming, JJ.*) *HARIS CHANDRA NANDITV. KESHAB CHANDRA.*

54 I. C. 785.

Ss. 65 (c) and 68—Personal decree—Refusal of application under O. 34 R. 6 C. P. C—Suit for personal decree if lies.

A separate suit to enforce the personal remedy provided by S. 68 of the Transfer of Property Act is not maintainable after an application for a personal decree has been disallowed under O. 34, R. 6, of the Code of Civil Procedure. 28 All 19; 9 I.C.P. 403; 14 O. C. P. 62; 29 All P. 396 Ref. (*Stuart and Kanhaiya Lal, JJ.*) *BRIJ BEHARI LAL v. INDARPAL SINGH.*

23 O. C. 145 : 57 I. C. 967.

Ss. 70 and 72—Usufructuary mortgage of house—Repairs—Right to enhanced rent.

Where a usufructuary mortgagee of a house carries out repairs and improvements with the object of realising enhanced rent, he ought to have the benefit of the enhancement w.r.t. the money spent by him brings about. (*Kanhaiya Lal, J. C.*) *NAWAB SAYYAD WILAYAT HUSAIN v. ZAMANI BEGAM.*

54 I. C. 112.

S. 72—Mortgagee paying off arrears of Govt. revenue to prevent sale—Charge—T. P. Act, S. 100.

T. P. ACT, S. 76.

Where a mortgagee pays off arrears of Govt. revenue to prevent the sale of the property, he can add on the amount to the mortgage debt under S. 9 of the Bengal Revenue Sales Act, 1859.

The amount will at least be a charge upon immoveable property within S. 100 of the T. P. Act, 1882, and could only be enforced by a suit under O. 34, C. P. C. (*Jwala Prasut, J.*) *RAJKUMAR LAL v. JAIKARAN DAS.*

5 Pat. L. J. 243 : 1 Pat. L. T. 225 : 57 I. C. 653.

Ss. 72 (b) and (c)—Usufructuary mortgage—Revenue—Liability to pay—Enhancement of revenue—Payment of—Right to tack on to the mortgage money.

S. 76 (c) of the T. P. Act only imposes on a mortgagee an obligation to pay the revenue and Govt. charges when they can be paid out of the income. If they can be so paid, he cannot recover them under S. 72 (b), since the permission given by S. 72 (b) must be read subject to the obligation imposed by S. 76 (c). If they cannot be so paid, then in the absence of a contract to the contrary, a mortgagee who has paid them out of his own pocket can recover them under S. 72, (b), (*Lyle and Ashworth, A. J. C.*) *FARZAND ALI v. KANIZ FATIMA.*

22 O. C. 270 : 54 I. C. 264.

S. 73—Mortgagor in possession—Acquisition of land—Application for purchase money by mortgagor—Injunction.

During the pendency of a suit by a mortgagee in which he obtained a preliminary decree, a part of the mortgaged property was compulsorily acquired under the Land Acquisition Act 1894. Held, the mortgagee was entitled to an injunction, restraining the mortgagor from taking purchase money out of the hands of the Land Acquisition Deputy Collector. 16 A. 78 diss. 6 M. 344; 6 C. L. J. 745; 10 C. L. J. 150 foll. (*Coutts and Sultan Ahmed, JJ.*) *ASHOTOSH RAI v. BABU LAL JHUNGAR.*

5 Pat. L. J. 650.

Ss. 74 75 and 98—Anomalous mortgage—Right of puise incumbrancer to redeem prior mortgage. See (1919) Dig. Col 1051 *MADIO RAO v. GULAM MOHIUDDIN.*

56 I. C. 717.

S. 74.—Subrogation—Redemption of prior by puise mortgagee—Lease—Interest of lessor in lessee—Effect of.

Where a prior mortgage is redeemed by a subsequent mortgagee the latter acquires all the rights and powers of the prior mortgagee and the provisions of S. 74 of the Transfer of Property Act apply to the case.

Where a lessee acquires all the rights and interests of his lessor, his lease could not have effect. (*Stuart, J. C.*) *JAGMOHAN SINGH v. RAGHO RAM.*

55 I. C. 638.

S. 76—Mortgagee in possession as lessee—Obligations of—Puisne mortgagees—Obligations of.

T. P. ACT, S. 76.

The case of a mortgagee who enters into possession of the mortgaged property by virtue of a lease under which a rent is payable to the lessor and the case of a mortgagee who enters into possession of the mortgaged property by virtue of a lease under which the rent is appropriated by the lessee towards the reduction of the mortgage debt are different. In the former case he is not chargeable as a lessee in possession under S. 76 of the T. P. Act and in the latter case he is so chargeable.

A *thika patta* was granted by the mortgagor to the prior mortgagees by virtue of which the latter obtained possession of the mortgaged property and under which the rent was to be appropriated by the lessees towards the reduction of the debt due. Held, that the substance of the transaction was that the prior mortgagees had taken possession in their own interest in order to secure payments of the amount due to them, and they were therefore bound to pay the Government revenue payable in respect of the property. There being no contract by which the mortgagor had agreed to pay the Government revenue the purchase of the mortgaged property by the prior mortgagees at a revenue sale was subject to the mortgages of the puisne mortgagees.

A prior mortgagee who takes a lease of the mortgaged property subsequently to the execution of a puisne mortgage is chargeable as a mortgagee in possession. (*Das and Adami, JJ.*) *KISHUNDAYAL BHAGAT v. MAHABIR BHAGAT.*

5 Pat L.J. 492 : (1920) Pat 277;
1 Pat L.T. 711 : 58 I.C. 291.

Ss. 76 and 80—Scope of—Priority

The general rule as contained in S. 80 of the Transfer of Property Act is that a mortgagee making a subsequent advance to the mortgagor does not acquire any priority in respect of his security for such subsequent advance as against an intermediate mortgagee. S. 79 engrafts an exception on that general rule and provides that the intermediate mortgagee who has notice of the prior mortgagee is postponed in respect of all advances subsequently made on the security of that mortgage, provided it expresses the maximum to be secured thereby and that the maximum is not exceeded. (*Coutts and Das, JJ.*) *BAIJ NATH GOENKA v. DALEEP NARAIN SINGH.* (1920) Pat. 261: 1 Pat. L.T. 582: 58 I.C. 489.

S. 76 (4)—Mortgagee in possession—Surplus profits—Interest.

A mortgagee in possession, who is, in receiving the profits after his debt has been fully paid up-availing himself of another man's money for his own use and benefit ought to be charged with interest from the time at which the mortgage debt was satisfied (*Drake Brockman, J.C.*) *BHAYALAL v. MAHOMED HAKIM MIRZA.* 57 I.C. 294.

S. 82.—Equity of redemption—Splitting up of after date of mortgage—Suit**T. P. ACT, S. 90.**

against part owner of equity of redemption—Suit against others barred—Proportionate liability—Limitation.

A mortgage was executed in 1870. The equity of redemption was in 1883 sold to deft. No. 5 and another who later separated and divided it half and half.

The plff. mortgagee brought a suit to recover the full amount of mortgage money with interest by sale of the mortgaged property in the hands of defendant No. 5. The owner of the remaining moiety of the mortgaged property was not made a party to the suit and the claim against him became barred by limitation.

Held, that it was contrary to the principles of equity that the plff. who by his own negligence had lost his remedy against the owner of half the equity of redemption should seek to throw the whole burden of the mortgage on the owner of the other half. 33 C. 613, 621 foll. (*Macleod, C. J. and Heaton, J.*) *BUDHMAL KEVALCHAND v. RAMA YESU.*

44 Bom. 223 : 22 Bom. L.R. 68 :
55 I.C. 327.

—**Ss. 82 and 56—Marshalling—Contribution as between purchasers of different properties, subject to same mortgage. See.**
18 A.L.J. 287.

—**S. 82—Mortgage—Acquisition of share of equity of redemption by mortgagee—Value of purchased property equal to mortgage amount—Mortgage debt if extinguished.**

When a mortgagee buys at an auction the equity of redemption in a part of the mortgaged property, such purchase, in the absence of fraud, has not the effect of discharging or extinguishing the mortgage debt even if the value of the property purchased be equal to the amount due on the mortgage. (*Waltis, C. J. Oldfield and Seshagiri Aiyar, JJ.*) *PONNAMBALA PILLAI v. ANNAMALAI CHETTIAR.*

43 Mad. 372 : 38 M.L.J. 239 : (1920) M.W.N. 235 : 11 L.W. 429 : 55 I.C. 666.

—**S. 84—Tender—Mere offer by notice not sufficient.**

An offer by notice of the amount due under a mortgage without production of the money is not a good tender within S. 84 of the T.P. Act. (*Mears, C.J. and Rafique, J.*) *MUHAMMAD MUSHTAQ ALI v. BANKEY LAL.*

42 All. 420 : 18 A.L.J. 440 : 55 I.C. 991.

—**S. 89—Mortgage—Decree on—Effect of—Rights of parties merged in decree. See C.P. CODE, O. 3, R. 3 AND S.**

47 I.A. 71.

—**S. 90—Mortgage decree—Recovery of balance over and above net proceeds at sale of mortgaged property—Personal decree for balance—whether sale must take place**

T. P. ACT, S. 91.

before passing such decree. See (1919) *Dig. Col.* 1053. JEUNA BAHA v. PARMESHWAR NARAYAN MAHTHA. 47 Cal. 370.

—S. 91—Mortgage—Redemption—Malabar tarwad—Karnavan—Junior members not entitled to sue for redemption. See MALABAR LAW, TARWAD. 38 M. L. J. 207.

—S. 95 Co.—mortgagors—Decree for sale—Payment by one mortgagor before confirmation of sale—Charge.

One D mortgaged his property to J. On his death D was succeeded by three nephews. J or his representatives brought a suit for the recovery of the amount due on the mortgage and obtained a decree for sale of the mortgaged property. The property was brought to sale and purchased by a stranger. Before the sale could be confirmed, the representatives of one of the nephews of D, who had deposited the money, took possession of the mortgaged property. The question arose, whether the representatives of the nephew of D who had deposited the money and redeemed the property, had a charge on the property that was the subject of the mortgage, under S. 95 of the Transfer of Property Act.

Held, that there having been an auction-sale of the property it must be presumed that there was an order absolute for sale under S. 89 of the Transfer of Property Act before it was amended by the present Civil Procedure Code and that on the making of an order absolute, under the above section, the security as well as the defendants' right to redeem are both extinguished. For the right of the mortgagee, under his security, is substituted a right of sale conferred by the decree, and any payment made after this cannot be taken to be a payment by way of redemption, because there can be redemption only when the mortgage subsists and consequently no charge can be created in favour of the person who makes such payment.

Held, further, that under S. 95 Transfer of Property Act a charge can only arise in favour of one of the several mortgagors who 'redeem', the mortgaged property. 40 All 407 foll 9 C. W. N. 865 Ref. (Lindsay, J. C.) RABNATH BAKHSH v. GANSEH PRASAD. 23 O. C. 334.

—Ss. 95 and 100—Co-mortgagors—Redemption by one—Right's as against others.

One of several mortgagors redeeming a mortgage can, where the question of contribution by another co-mortgagor arises, take advantage of a decree in favour of the mortgagee affirming the validity and scope of the mortgage notwithstanding that he admits facts inconsistent with the correctness of that decree. A redeeming mortgagor is the representative in interest of the mortgagee in respect of the share for which contribution is claimed to be due. (Ashworth, A. J. C.) LAC IMI NARAYAN v. RAJ NARAYAN. 22 O. C. 278 : 54 I. C. 269.

—S. 98—Anomalous mortgage—Redemption—Restraint on—Enforceability of.

T. P. ACT, S. 99.

A mortgage deed recited "Possessory mortgage deed of immoveable property for Rs. 50 on 23rd August 1900 in favour of..... This sum with interest thereon at R. 1 per cent. per month. I shall pay you on 23rd August 1911 and have it endorsed by you... If I fail to pay on the due date aforesaid, I shall give up the said land as sold to you for the amount then outstanding due to you and execute a sale-deed. This property has been delivered possession to you on this very date. You shall henceforth enjoy the property as you please and yourselves pay Rs. 6-3-0 due to Government every year without giving any consideration whatever every year."

Held, on a construction of the deed that it amounted to a combination of a simple mortgage and a usufructuary within the meaning of S. 98, Transfer of Property Act. So the stipulation for sale, fettering the equity of redemption is invalid as opposed to S. 60. Transfer of Property Act.

The Court should satisfy itself that the particular mortgage cannot fairly be brought within any of the six specified classes of mortgages before holding it to come within the rule of exception created in favour of anomalous mortgages.

Seshagiri Aiyar, J.:—The mortgagor is not entitled to claim redemption in cases of anomalous mortgages, 39 Mad. 1010 Approved. (Wallis, C. J. Oldfield and Seshagiri Aiyar, JJ.) KANDLA VENKIAH v. DONGA PALLAYIL.

43 Mad. 589 : 28 M. L. T. 56 : 1920 M. W. N. 349 : 57 I. C. 724

—S. 99—Applicability of—Mortgage not intended to be operative.

The provisions of S. 99 of the T. P. Act cannot be applied to the case of a mortgage which was never brought into operation or which according to its terms could not come into operation until a condition was fulfilled and that condition was not fulfilled. (Abdur Rahim and Spencer, JJ.) ARUMUGA THEVAN v. MEERA IBRAHIM RAVUTHAR.

55 I. C. 417.

—S. 99—Sale in contravention of, void or voidable.

A right to make an application to set aside a sale held in contravention of S. 99 of the Transfer of Property Act continues up till the time of the confirmation of the sale. 35 Cal. 61 foll.

After confirmation of the sale that right no longer exists. If the right ceases on confirmation of the sale, it ceases altogether and cannot be revived or continue to exist if the person who might have taken advantage of S. 99 of the Transfer of Property Act before the confirmation of the sale was a minor at the time. (Coutts and Sultan Ahmed, JJ.) PRASAD DAS GOSSAIN v. JITU SAHU.

(1920) Pat. 259.

T. P. ACT, S. 100.

S. 100—Hypothecation of future crops—Transferee without notice—Liability of—Revision—Material irregularity

A hypothecation of future crop becomes complete when the crop is grown and the produce realized, and is enforceable against a transferee of such produce with notice of the obligee's equitable interest but not against a transferee without notice. 10 A 133 foll.

The Lower Appellate Court's misapprehension of the nature of the contract entered into by the pif. was a material irregularity justifying interference in revision. (Martineau, J.) SAWAYA RAM v. FATTU RAM.

56 I. C. 489

S. 106—Lease—Agreement to vacate within one month of receipt of notice—Notice to quit not expiring with end of month—Validity of,

Where there is a clear contract in the lease to vacate at one month's notice, S. 106 of the T. P. Act does not apply and a notice to quit is perfectly valid, even though it was not received on the 2nd day of the Hindu month

7 A. 899; A. W. N. (896) 51; 2 C. W. N. 583 dist. (Chavis, A. C. J.) RADHA KISHEN v. RATTAN LAL.

56 I. C. 7.

S. 106—Lease—Annual tenancy—Proof of—Rent paid annually—Not conclusive. See LANDLORD AND TENANT, NOTICE TO QUIT.

32 C. L. J. 6.

S. 106—Lease of house—Monthly tenancy—Notice to quit not expiring at the end of a month of the tenancy—Validity of.

A house was let on a monthly tenancy terminating on the 26th of each month according to the Hindu calendar. Notice to quit was issued on 28th December 1915 and served on or before the 31st December 1915. The notice required the tenant to vacate on or before the 31st January 1916. The 25th of the Hindu month falling next after the date of the notice was the 15th of January 1916 and the next succeeding was the 14th of February, 1916.

Held, that the notice was invalid as it did not fix a period which expired with the end of a month of the tenancy. (Tuaball una Sulaiman, JJ.) SEOTI BIBI v. JAGANNATH PRASAD.

18 A. L. J. 854;

57 I. C. 593.

Ss. 106 and 117—Non-agricultural tenancy—creation of b for: T. P. Act—Heritable and transferable.

When the terms of the dowl kabuliyaats expired the tenants holding over became yearly tenants on the terms of the dowl kabuliyaat so far as applicable to yearly tenancy and when on the death of the last survivor of them their heirs were recognized as tenants, they became yearly tenants under the terms of the dowl kabuliyaat so far as applicable to a yearly tenancy.

The Transfer of Property Act having come into operation before the tenancy came into the

T. P. ACT, S. 108.

possession of the tenants' heirs, they had a yearly tenancy in the land which was capable of transfer, and notice was necessary to terminate the tenancy, the tenancies not being agricultural within the meaning of S. 117 of the T. P. Act and Chap V of the Act consequently applying to them. (Greaves and Newbould, JJ.; MAHOMED AVEJUDDIN MEA v. PRODAM KUMAR. 25 C. W. M. 13.

Ss. 107 and 4—Unregistered lease for less than one year—Admissible in evidence to prove character of possession.

An unregistered lease for less than a year is admissible in evidence to prove that the occupation of the leased premises was as tenants and not independently

S. 4 of the T. P. Act cannot be taken to have inserted in S. 17 of the Registration Act the provisions of S. 107 of the T. P. Act as to the necessity of the registration for leases for less than a year and consequently S. 49 of the Registration Act has no application to such a case (Wallis, C. J. dying am. Krishnan, JJ.) RAMA SAHU v. GOWRO RATHO.

39 M. L. J. 639 : 12 L. W. 649 : (1920) M. W. H. 711 : 29 M. L. T. 10.

S. 108—Landlord and Tenant—Delivery of possession necessary before suit for rent can be maintained.

It is a well recognised principle that governs the relationship between landlord and tenants that the delivery of possession by the lessor is a condition necessary for the maintenance of an action for rent. That principle applies to all kinds of leases agricultural and non-agricultural. (Jwala Prasad and Adami, JJ.) UDHAB CHANDRA SINGH v. NARAYAN MANJU. 58. I. C. 186.

S. 108 (c) and (m)—Lessor and lessee—Negligence—Fire in premises—Repair to building—Notice.

The lessee of certain premises stored cotton bales therein and left them in charge of a watchman. The watchman left a lighted kerosene oil lamp in close proximity to the bales, locked the place and went to have his meals. The lamp burst, the cotton bales caught fire and considerable damage was caused to the leased premises by the fire. In reply to a notice by the lessor the lessee disclaimed all liability for the fire and also determined the tenancy under S. 108 (c) of the Transfer of Property Act. In an action for damages by the lessor

Held, that leaving a lighted kerosene lamp unattended and open to the draft in close proximity to bales of cotton was an act of negligence; (2) that the lessor was liable for the damage caused; and (3) that the action of the lessee in disclaiming all liability and determining the tenancy amounted to a waiver of notice under S. 108 cl. (m) of the Transfer of Property Act. (Sir John Wallis, C. J. and Krishnan, JJ.) GIARDIDESS v. PONNA PILLAI. 39 M. L. J. 233 : 12 L. W. 19.

T. P. ACT, S 109.

S. 109—Assignee of reversion from lessor—Right of, to give notice to quit—“Transferee of any interest” meaning of See (1919) Dig. Col. 1956. PARBHU RAM v. TEK CHAND. **I Lah 241.**

Ss. 111, 10 and 12—Covenant against alienation—Breach—No provision for re-entry—Effect of.

In the case of a mulgani lease granted prior to the Transfer of Property Act a bare covenant in the lease against alienation by the lessee unaccompanied by any provision for re-entry by the landlord does not render an assignment of the terms invalid.

Per Seshagiri Aiyar, J.—A mere prohibition against an alienation is not a benefit to the landlord and is void under Ss. 10 and 12 of the Transfer of Property Act.

Under the Transfer of Property Act a covenant against alienation will be valid only when the lease provides that on breach of the covenant the landlords may re-enter into possession or put an end to the lease. 26 Mad 157 cons. (Wallis, C. J. and Oldfield and Seshagiri Aiyar, JJ.) UDIFI SESAGIRI v. SESHAMMA SHETTATHI. **43 Mad. 503:**

39 M. L. J. 128: (1920) **M. W. N. 408: 12 L W 45.**

S. 111 (g)—Lease—Breach of covenant—Forfeiture—Overt act—Suit for possession.

Under cl. (g) of S. 111 of the T. P. Act it was necessary for the plaintiff to establish that the lessor had, prior to the institution of the suit, done some act showing an intention to determine the lease.

Where the rights and obligations of the parties are regulated by Cl. (g) of S. 111 of the T. P. Act, there is no determination of a lease by forfeiture immediately on breach of covenant but such breach must be followed by an overt act on the part of the lessor before the institution of the suit for ejectment. The institution of the suit cannot be rightly regarded as the requisite act because the forfeiture must be completed and the lease determined before the commencement of the action. 45 Cal. 469 approved.

A suit for ejectment does not lie in respect of a portion of the lands of a tenancy which has been forfeited or a condition whereof has been broken. (Mookerjee, C. J. and Fletcher, J.) MOTILAL PAL CHOWDHURY v. CHANDRA KUMAR SEN. **24 C. W. N. 1064**

S. 111 (g)—Permanent tenancy—Claim of by annual tenant—Denial of title—Notice to quit.

An assertion by an annual tenant that he is a permanent tenant is not tantamount to a denial of the landlord's title. Such a tenant is entitled to notice before he can be evicted (Heaton, J.) GOL DAJI HATHAI v. DOD LAXMAN KURSAN. **22 Bom. L. R. 648:**

58 I. C. 226

T. P. ACT, S. 130.

S. 114—Forfeiture—Non-payment of rent—Period of grace allowed by lease—Power of court to relieve against forfeiture.

The defendants rented certain lands from the plaintiff in 1870 under a rent-note which provided that every year rent should be paid by the end of the month of Falgun, and if the rent was not paid within a further period of grace of three months, the lease was to stand forfeited. There having been default in payment of rent for two years, the plaintiff forfeited the lease and sued to recover possession of the lands.—

Held, dismissing the suit, that under the circumstances the Court should relieve the defendants against forfeiture, though the rent was not paid within the period of grace allowed. 28 M. 389 dissented from. The Court will ordinarily relieve a tenant against a forfeiture clause in a lease unless the tenant has done something to forfeit his right to bring himself within the principles of equity. (Macleod, C. J. and Fawcett, J.) KRISHNAJI GOVIND JOSHI v. SITARAM HANMANT RAMDASJI. **22 Bom. L. R. 1439.**

S. 123—Attestation—Meaning of—Witnessing of actual execution requisite See T. P. Act, S. 123. **22 Bom. L. R. 86.**

S. 123—Gift—Buddhist law—Burmese.

Burmese Buddhist religious gifts are not exempted from the operation of S. 123 of the T. P. Act. (Heald, A. J. C.) UNE MEIN v. MA HNIN ON. **57 I. C. 809.**

S. 123—Oral gift—Absence of registered deed—Invalid gift—Actings of parties—Estoppel.

In June, 1903, the defendant Municipality took possession of plaintiff's land and used it for making a new road. The plaintiff's father protested against this unauthorized occupation and, subsequently gave the land in gift to the Municipality. No deed of gift was, however, passed. The plaintiff's father died in 1906. The plaintiff sued in 1914 to recover possession of the land from the defendant:

Held, decreeing the suit, that as there was no registered deed of gift, as required by S. 123 of the T. P. Act, the gift was not complete in law and that the title to the land was still vested in the plaintiff; that the mere consent of the plaintiff's father to make a gift of the land was not sufficient to vest the land in the Municipality, and that inasmuch as the defendant had occupied the land and constructed a part at any rate of the road before the plaintiff's father was induced to make an oral gift of the land, the plaintiff was not estopped, under S. 115 of the Evidence Act, from denying the validity of the gift. (Shah and Hayward, J.J.) KUVERJI KAVASJI v. THE MUNICIPALITY OF LONAVALA. **22 Bom. L. R. 654:**

58 I. C. 403.

S. 130—Assignment of chose in action—Mere acknowledgment of payment of

T. P. ACT, S. 131.

money due and signature—Not operative. *See* NEG. INS. ACT Ss 4 and 16.

(1920) M. W. N. 600

Ss. 131 and 137—Chose in action—Mortgagee of—Right of mortgagee to sue on the debt. *See* CHOSE—IN—ACTION.

11 L. W. 238.

S. 134—Chose in action—Mortgagee of—Right to sue for debt—Limitation—Starting point. *See* Chose, in action.

11 L. W. 238.

TRANSFER OF PROPERTY (VALIDATING) ACT (XXVI OF 1917) S. 3—Proviso 3—'Former Court'—Restoration of appeal once dismissed—Finding of trial court not binding on.

Where an Appellate Court acting in accordance with the provisions of S. 3 of Act XXVI of 1917 restores an appeal which has been dismissed, the appeal becomes once more a pending appeal on the file of the court and in such a case it is the Appellate Court which is "the former court" within the meaning of proviso (3) to Section 3 and in deciding the appeal that court is not bound by the finding of fact of the original trial court. (Piggot and Walsh, JJ.) KAMPA DEVI v. KISHORI LAL.

42 All. 430:

18 A. L. J. 447 : 55 I. C. 981.

TRUST—Acts of trustee—Right to impecunia—Locus standi.

The acts of a trustee of a private trust cannot be impeached in a suit by a person who has no interest relating to the property of the trust. (Lindsay, J. C.) SAIVAD TAWAHEE HUSAIN v. LAL LACHHMAN DAS.

56 I. C. 707.

Management—Co-trustees—Allotment of properties among Trustees—Compromise, effect of—Trespasser, Ejclement, Notice to quit—Decree, form of.

The plaintiffs father and the father of defendants 5 and 6 were trustees of a charity which owned, inter alia a dozen shops. Under an arrangement among the Co-trustees plaintiff's father was in management of six of the shops and getting the rents therefrom while the father of the defendants 5 and 6 was managing the rest. As a result of litigation between the plaintiff and defendants 5 and 6 it was agreed by a compromise sanctioned by the court on behalf of the parties who were minors, that the plaintiff on the one hand and defendants 5 and 6 on the other, through their respective guardians, should be in sole possession and management of a half a dozen shops each, on behalf of the trust. The first defendant who was a lessee of two of the shops allotted to the plaintiff and had been paying rental along to the plaintiff and his co-trustee subsequently took an usufructuary mortgage of the shops in question from the father of the defendants 5 and 6 and assigned his right to the second defendant. It was found that the usufructuary mortgage

TRUST ACT, S. 82.

was not for any necessary purpose and therefore not binding on the trust. In a suit by the plaintiff to eject the second defendant after notice to quit.

Held, that it was competent to the plaintiff acting alone to determine the tenancy of the second defendant by a notice to quit but that the decree for possession should be given in favour of the plaintiff and defendants 5 and 6 as representing the charity.

Spencer, J. (*Sadasiva Aiyar, J. dubitante*) The decision in Raja Ram v. Ram Roy (1912) 24 M. L. J. 75, is good law even after the P.C. decision in Sethuramaswamiar v. Meruswamir (1917) I L. R. 41 Mad. 296. (*Sadasiva Aiyar and Spencer, JJ.*) ANGAMUTHU v. RAMALINGA PILLAI. 39 M. L. J. 685.

—Trustee's powers—Permanent lease—Right of lessee to eject trespasser.

A permanent lease of trust property in excess of the trustee's powers is not void but only voidable and it is competent to the lessee to sue for the ejectment of the trespasser from the demised land. 40 Mad 212, 36 Cal. 1003 and 40 Cal. 709 ref. (*Spencer and Seshagiri Aiyar, JJ.*) KADHIR MASTHAN ROWTHEER v. SEGAMMAL. 43 Mad. 433:

38 M. L. J. 198 ; (1920) M. W. N. 185:

27 M. L. T. 286:

11 L. W. 197 : 55 I. C. 655.

TRUSTS ACT Ss. 3 and 6—Mortgagor appointing mortgagee as agent for management of estate w/ liability to account—Mortgagee not a trustee. *Sec* BURDEN OF PROOF.

24 C. W. N. 769.

—S. 82—Mortgage-sale of equity of redemption by mortgagor—Payment of part of consideration—Suit for redemption by purchaser—Consent to, obtained by fraud and undue influence—Right to redeem.

One A mortgaged the land in suit to D. for Rs. 100 and subsequently sold the equity of redemption in this land as well as the proprietary rights in other lands to H. and J. for the nominal sum of Rs. 4,503. H. and J. instituted the present suit to redeem the mortgage and impleaded A as a defendant. A resisted the suit alleging that his consent to the sale to plaintiff's was obtained by undue influence and fraud that the transfer was void in consequence, that there was no consideration and that the plaintiffs had no right to bring any suit to redeem the mortgage. It appeared however A had actually been paid Rs. 700 out of the alleged consideration.

Held, that the plaintiffs even assuming the fact of fraud or undue influence are in the legal position of holding the property as trustees and as such have an interest entitling them to redeem the mortgage. (*Chevis and Dundas, JJ.*) MOKANDI v. HARNAM DAS.

2 Lah. L. J. 446.

—Ss. 82 and 83—Resulting trust—Indian and English law—Presumption of advancement—British parents domiciled in India—Burma Laws Act S 12 (2).

TRUST ACT, S. 82.

The general rule and principle of the Indian Law as to resulting trusts differs but little, if at all, from the general rule of English Law upon the same subject.

It has been established by decisions that owing to the widespread and persistent practice which prevails among the Natives of India, whether Muhammadan or Hindu, for owners of property to make grants and transfers of it *benamis* for no obvious reason or apparent purpose, without the slightest intention of vesting in the donee any beneficial interest in the property granted or transferred, as well as the usages which these natives have adopted and which have been protected by statute, no exception has ever been engrafted on the general law of India negativing the presumption of the resulting trust in favour of the person providing the purchase money, such as has, by the Courts of Chancery in the exercise of their equitable jurisdiction been engrafted on the corresponding law in England in those cases where a husband or father pays the money and the purchase is taken in the name of the wife or child. In such a case there is, under the general law in India, no presumption of an intended advancement as there is in England.

Where the transaction takes place between two persons, born in India of British parents and who have resided practically all their lives in India, the principles and rules of law which would be applicable if the case were tried in one of the Courts of Chancery in England are applicable to it when tried in India.

The determining of which rule of law is in any given case to apply in India does not entirely depend on race, place of birth, domicile or residence; the widespread and persistent usages and practices of the native inhabitants are more important.

The mere fact that a husband or a father who has made an apparent advancement in favour of a wife or child that he did not intend it to confer any beneficial interest in the thing given or transferred to the donee or transferee is of little avail unless he establishes at the same time with reasonable clearness that he had other and different motives for the action he took. *Held*, on the question of fact that the evidence rebutted the *prima facie* presumption that the advancement to the wife was intended. (*Lord Atkinson*) KERWICK v. KERWICK.

39 M. L. J. 396 : 28 M. L. T. 194 : (1920) M. W. N. 738 : 32 C. L. J. 490 : 57 I. C. 834 : 47 I. A. 275. (P. C.)

Ss. 88—*Resulting trust—Purchase by one—Constitution proceeding from all.*

A resulting trust takes place where several persons jointly furnish the purchase money and the purchase is made in the name of one of them. (*Mitra, A. J. C.*) NARHAR v. NARAIN.

56 I. C. 386.

TRUSTEE—Of debutter property, removal or when justified. Ss. HINDULAW, DEBUTTER PROPERTY. 24 C. W. N. 478.

U. P. EXCISE ACT, S. 60.

TRUSTEES ACT (XXVII OF 1868)
Ss. 3 and 35—Trustee—Appointment of new trustee—Power of court—Hindu charity property—Application to be in chambers and to specify provision of law under which it is made. See (1919) Dig. Col 1064. BASIL LANG v. MOOLJI KARSONJI.

54 I. C. 455.

U. P. COURT OF WARDS ACT (IV OF 1912) S. 2. (2)—Act III of 1899 Ss. 2 and 3—Proprietor declared “disqualified on his own application—Power to make a will.

In 1897 a proprietor was, on his own application declared to be a “disqualified proprietor” as defined in S. 191, cl. (g) of the N. W. P. Land Revenue (Act XIX of 1873) and his estate was taken under the management of the Court of Wards. He executed a will in 1917 making dispositions of his property still under the said management. *Held*, that on the passing of the N. W. P. Court of Wards Act (Act III of 1899) he ceased to belong to the category of “disqualified proprietors” and was to be deemed a proprietor who had applied under S. 9 of that Act, and that he was therefore fully competent to make a will. (*Mars, C. J. and Bauerji, J.*) MUHAMMAD ISMAIL KHAN v. HAMIDAH KHATOON.

42 All 509 : 18 A. L. J. 581.

—Ss 17 and 18—*Claim prepared after considerable delay—Duty of Collector.*

The provisions of S. 17 and 18 of the U. P. Court of Wards Act protect the Court of Wards against having claims which may be dishonest claims rushed upon them at a late period. But the provisions of these sections are not intended to bar persons who have made an honest mistake and have preferred their claims late.—The interpretation of S. 18 of the U. P. Court of Wards Act is that when a claimant puts in a claim late the Collector should write to him and ask why he did not put in his claim within the right time and what was the cause of his failure. If the claimant is unable to satisfy the Collector by showing sufficient cause for his failure to put in his claim within the right time then and then only is the claim held to be extinguished. (*Stuart, and Pandit Kanhaiya Lal, A. J. C.*) MUSAMMAT KETKI v. MANAGER, NANPARA ESTATE.

58 I. C. 945.

U. P. EXCISE ACT (IV OF 1910) S. 60 A—*‘Uses’ if means habitually uses.*

Under S. 60 (a) of the U. P. Excise Act 1910 the owner or occupier of a house who knowingly keeps an illicit supply of cocaine on the premises renders himself liable to punishment under this section and no burden is laid on the prosecution of proving that the said illicit supply had been kept there for any length of time or that the premises had been used for the purposes on previous occasions. (*Piggott, J.*) DURGA v. EMPEROR. 18 A. L. J. 348 :

58 I. C. 246 : 21 Cr. L. J. 742.

U. P. LAND REV. ACT, S 1.

U P LAND REV. ACT, (III of 1901)
Ss. 1 (1) and 4 (12)—Sir land—Status of
—Subsequent passing of Agra Ten. Act (II of
1901)—Effect of S. 2 (4).

Land which has once acquired the status of "Sir" before the Agra Tenancy Act came into force might lose its status if he does not satisfy the requirements of the new definition in the Tenancy Act.

A land is not "sir" within S. 4 (12) (b) of the U. P. Land Revenue Act if it was not in a proprietor's personal cultivation immediately before the commencement of that Act (*Ferari, S. M. and Harrison, J. M.*) **SHEOGHULAM KOERI v. PERMESHWRI LAL.** 56 I. C. 649

S 4—Mahal—Waste land included in—Jurisdiction of Revenue Court to participation.

Within the boundaries of a mahal there may be many plots of land such as roadways waste lands, and even *abadi* sites which speaking colloquially are "not assessed to revenue" in the sense that there is no income derived from them which may be taken into account at the time of assessment of revenue on the mahal. But the fact remains that all areas within the mahal are primarily responsible for the revenue of the mahal, and are part and parcel of it. That is equally so in the case of a *khata* which is a sub-division of a mahal.

Held, that the side of a *parao* (camping ground) situated in qasba Meerut and included in a particular *khata* of a mahal and bearing a particular khasra number formed part and parcel of the mahal and its partition could only be affected by the Revenue Court. (*Tudball and Kanhaiya Lal, JJ*) **MAHOMED JAHAN BEGAM v. GOVIND RAM.** 18 A. I. J. 783

S. 24. (2)—Custom—Patwari—Successor—Appointment of—validity of.

Where there is a local custom under which the successor of a *patwari* who dies or is missed must be chosen from his family, if there is no such person or, if there is, he is unfitted, then an outsider may be appointed. If, however, a relation of the ex *patwari* qualifies within a year, he is entitled to be appointed *patwari*, and a permanent appointment in contravention of the custom is liable to be set aside. (*Hopkins S. M. and Porter, J. M.*) **CHIMMAN LAL v. KULAP NARAIN LAL.** 57 I. C. 588

Ss. 33 and 35—Order under—Effect of—Mutation—Application under S. 33.
 An order passed under S. 35 of the U. P. Land Revenue Act is a legal and a proper order finally disposing of the proceedings to which it relates, although it may not be binding upon Revenue Courts under S. 44 in their and subsequent proceedings. Where mutation proceedings have recently been concluded and the effect of instituting an enquiry would be to re-open a proceeding already legally completed, an application to the Collector under S. 33 of the U. P. Land Revenue Act ought not to be entertained.

U P LAND REV. ACT, S. 110.

(*Hopkins, S. M.*) **CHAUDHURI NAUBAHAR SINGH v. MUSSAMMAT KRISHNA KUNWAR.** 57 I. C. 432.

S 36—Content of order.

An order under S. 36 of the U. P. Land Revenue Act is not to specify the land of the expropriator in which occupancy rights have not been created. (*Hopkins, S. M. and Porter, J. M.*) **MAULA BUX v. RAM PRASAD.** 57 I. C. 431.

Ss. 36—Suit for rent—Defendant accepting agreed rent—Order passed "fixing" rent—Effect of.

The defendant mortgaged his zemindari to the plaintiff who, under an agreement leased to him the lands for cultivation at a certain rent. On a suit for recovery of rent being brought, the defendant expressed his willingness to pay the said rent; the Court however passed an order "fixing the rent, under S. 36 of the Tenancy Act. There was no appeal against this order. *Held*, that the tenant could not challenge the correctness of the order in a subsequent suit for rent, unless he could challenge it on the ground of jurisdiction or fraud. (*Tudball and Kanhaiya Lal, JJ*) **HAR PRASAD v. KHAZAN.** 18 A. I. J. 684. 18 I. C. 441.

S 40—Mutation of names—Right to Possession.

Where the present possession of a person is perfectly legal though the title is a bad title, he cannot be regarded as a trespasser and mutation Court finds that he is not entitled until possession. (*Ferari, S. M. and Harrison, J. M.*) **CHAIT SINGH v. BADRI SINGH.** 57 I. C. 290.

S. 110—Partition proceedings—Date of "issue of proclamation"—Objection filed beyond time—Discretion of Court to entertain objection.

Where there is a direction to fix the date as a matter of procedure, a Court is still at liberty, after expiration of that date, to entertain an objection and do justice between the parties if sufficient reason is shown for delay.

The date of "issue" of a proclamation under S. 110 of the U. P. Land Revenue Act is the day on which it is published in such a manner that the persons likely to be affected thereby can, with the exercise of reasonable prudence, obtain knowledge of its contents.

Where such a proclamation assumes the shape of a notice to be served personally on the co-sharer, the date on which personal service is effected is the date of "issue" of the proclamation. It is from this day that the period of thirty days for preferring objections must be reckoned. (*Sanders and Greaves, A. J. C.*) **SHEO RATAM SINGH v. ROHAN SINGH.** 54 I. C. 258.